COMMON SENSE: IMPLICIT CONSTITUTIONAL LIMITATIONS ON CONGRESSIONAL PREEMPTIONS OF STATE TAX

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Perhaps the sentiments contained in the following pages, are not yet sufficiently fashionable to procure them general favor; a long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides.¹

INTRODUCTION

There is a conundrum that faces persons that seek to evaluate Congress’s authority to preempt a state tax. It cannot be the case that the U.S. Congress has unfettered authority to preempt state taxes pursuant to the U.S. Constitution’s Commerce Clause. This is because the federal government and the state governments are separate sovereigns under the U.S. Constitution,² and the power to tax is a fundamental aspect of governmental sovereignty.³ Further, such unlimited authority is inconsistent with the purpose and meaning of the Commerce Clause as it has been construed by the U.S. Supreme Court starting with its earliest cases and running through its more recent federalism cases.⁴ Yet, such preemptions, which began slightly more than a half-century ago,⁵ have become more frequent in recent years,⁶ and

1. THOMAS PAINE, COMMON SENSE ix (Peter Eckler Publishing Co. 1918).
3. See, e.g., Arkansas v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821, 826 (1997) (stating “[t]he power to tax is basic to the power of the State to exist”; and the “[t]he States’ interest in the integrity of their own processes is of particular moment respecting questions of state taxation”); Dep’t of Revenue of Or. v. ACF Indus., 510 U.S. 332, 345 (1994) (the power to tax is “central to state sovereignty”); Bode v. Barrett, 344 U.S. 583, 585 (1953) (“The power of a state to tax [is] basic to its sovereignty.”); Curry v. McCanless, 307 U.S. 357, 366 (1939) (the state power to tax is “incident of” and “coextensive with” sovereignty); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199 (1824) (“The power of taxation is indispensible to [the states’] existence.”). In the recent “dormant” Commerce Clause case, Department of Revenue of Kentucky v. Davis, 533 U.S. 328, 341-42 (2008), the Supreme Court singled out state bond issuances as something beyond a mere “traditional government function,” terming such issuances as a “quintessentially public function” that serves to “shoulder the cardinal civic responsibilities . . . protecting the health, safety and welfare of citizens.” The imposition of state taxes shoulders similar responsibilities and is at least as vital. See Dows v. Chicago, 78 U.S. (11 Wall.) 108, 110 (1870) (“It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments.”).
4. See infra Parts I, II.
5. See 15 U.S.C. § 381 (1959). The Act’s primary application is to preempt the imposition of a state’s net income tax as applied to a corporation engaged in the sale of tangible personal property when that corporation limits its in-state connection to the solicitation of such sales and the delivery of the property from a point located outside the state. See id.; see also H.R. REP. NO. 88-1480, at 8 (1964) (stating that with the Act, “Congress had for the first time exercised its power over interstate commerce to enact a general statute dealing with
the volume of federal bills proposing such preemptions have recently multiplied, fostered by the fact that there are no established applicable judicial limitations. Indeed, each year the prospect for Congressional preemption of state taxes seems to become greater; in 2011, at least eight such bills, which would broadly preempt various state income and sales taxes, were introduced in Congress. Moreover, two of those bills were quickly voted on favorably by the relevant Congressional committee, and one of those two bills was subsequently passed by the House of Representatives.
The Framers of the Constitution who established our nation’s system of dual sovereignty would no doubt be surprised by the Congressional activity preempting state taxes. The Framers considered the imposition of a state tax to be perhaps the most vital of the states’ sovereign functions. Indeed, even Alexander Hamilton, a staunch supporter of federal power, and of commerce generally, explicitly suggested that there are limitations on Congress’s power to preempt a state tax when he stated in the Federalist Papers that “the individual states would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may need, by every kind of taxation, except duties on imports and exports.” Hamilton also stated that:

Though, a law, therefore, for laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of a tax laid by the authority of the States (unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power not granted by the Constitution.

The U.S. Supreme Court has in recent years emphasized our nation’s dual sovereignty structure and the Framers’ intentions as embodied in the Constitution in crafting rules to protect the states from federal overreaching in various contexts under the Constitution, including with respect to the Commerce Clause. Some of those latter Commerce Clause limitations are


10. Id.; see also THE FEDERALIST NO. 32, supra note 9, at 165-66 (Alexander Hamilton) (acknowledging “the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their wants”).

11. THE FEDERALIST NO. 33, supra note 9, at 173 (Alexander Hamilton).

12. See, e.g., Bond v. United States, 131 S. Ct. 2355 (2011) (concluding that an individual has standing under the Tenth Amendment to argue that a federal law improperly intruded upon an area of “police power” reserved to the states); United States v. Morrison, 529 U.S. 598 (2000) (striking down a federal law enacted pursuant to the Commerce Clause that would have provided a federal civil remedy for victims of gender-based violence); Alden v. Maine, 527 U.S. 706 (1999) (striking down under the Tenth Amendment a federal law that authorized a private suit against a non-consenting state for money damages in state court); Printz v. United States, 521 U.S. 898 (1997) (striking down a federal law enacted pursuant to the Commerce Clause that required state police to perform background checks and other activities in connection with gun purchases); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down a federal law enacted under Article 5 of the Fourteenth Amendment on the grounds that the law was disproportionate in its effects compared to its objective); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (striking down under the Eleventh Amendment a federal law that authorized a private suit against a state in federal court); United States v. Lopez, 514 U.S. 549 (1995) (striking down a federal law enacted under the Commerce Clause that sought to make it a federal offense for an individual to knowingly possess a firearm at a place that the individual knows or has reasonable cause to know is a school zone).
now the subject of a national debate among persons considering the constitutionality of the recently-enacted federal health care bill. However, the Court has not yet posited any rules to protect the states from federal preemptions in the state tax area. The lack of any stated judicial standards emboldens supporters of state tax preemptions who conclude that the current absence of stated limitations indicates that there are no such limitations. Consequently, the lack of judicial standards acts to the detriment of the states, which are unable to point to such limits when seeking to fend off Congressional action.

This Article advances from the common sense notion that, given the nation's dual sovereignty structure and the intended meaning of the Commerce Clause, there must be meaningful limitations on Congress's ability to preempt a state tax. The Article concludes that in general the Commerce Clause confers upon Congress two basic powers: (1) the power to prevent states from engaging in discrimination that would inure to the benefit of local commercial interests and other forms of state-based economic protectionism, which is a power consistent with the clear intention made express by the Constitutional Framers at the time of the drafting of the Constitution, and (2) a general power to regulate private commercial activity as literally referenced in the Commerce Clause by the statement that "Congress shall have the power ... to regulate commerce ... among the several states." 


14. See Henchman, supra note 6, at 72-8 (stating at a 2011 Congressional hearing that the "Constitution ... empowers you, the Congress, to restrain states from enacting laws that harm the national economy by discriminating against interstate commerce," noting that "[t]his is a power that you have exercised in past situations where preempting state taxation furthered that national economic interest," and then citing twenty instances where Congress preempted a state tax); Amy Hamilton, Governors Urge Congress to Oppose BAT Nexus Legislation, ST. TAX TODAY, Aug. 5, 2011, at 151-1 ("[S]ince 1789, the regulation—including the taxation—of interstate commerce 'has clearly been the responsibility of Congress, and Congress has exercised that authority more than a dozen times ... in the context of interstate commerce.'") (quoting comments of Arthur Rosen).

15. U.S. CONST. art. I, § 8, cl. 3. A similar two-part method of inquiry applied to Constitutional interpretation, focused on "text and principle," i.e., the meaning of the text and the underlying purposes for the text, has been suggested by Professor Balkin. See Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 1 (2010); see also Robert H. Bork & Daniel E. Troy, Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce, 25 Harv. J.L. & Pub. Pol'y 849, 852 (2002) (stating that the text of the Commerce Clause "was designed to empower Congress to regulate trade between and among the States" and that "[[given the text and purpose behind the Clause, Congress certainly has the power, at a minimum, to displace state laws that discriminate against interstate commerce, either explicitly or implicitly"); Brannon P. Denning, Is the Dormant Commerce Clause Expendable? A Response to Edward Zelinsky, 77 Miss. L.J. 623, 634 (2007) (stating that a "core purpose" of the Commerce Clause along with the "explicit textual provisions" was to "inhibit that sort of commercial predation, which invited, and often resulted in, recrimination and retaliation among neighboring states").
As to the former power to limit economic protectionism, this Article concludes that Congress has broad power, but that it acts outside the scope of this power when it preempts a state tax that does not reflect economic protectionism. Most of the recently proposed Congressional preemptions fall into this latter category, as they purport to preempt state taxes as applied to a specific industry merely on the theory that state taxes apply more heavily to that industry—i.e., a supposed “discrimination” as between types of industries—and not because the state is favoring in-state commercial interests. Indeed, in several of the recently proposed preemption bills, reference is made to a purported “discrimination” as between industries when in fact there is not even “discrimination” of this type.

Apart from the power imparted to Congress to police economic protectionism, the literal language set forth in the Commerce Clause, which empowers Congress “to regulate commerce . . . among the several states,” affords Congress no obvious ability to preempt a state tax at all. The imposition of state taxation is not an act of “commerce.” Persons who support

16. See supra note 7 (generally referencing these recently-proposed Congressional bills). For example, the bill with respect to digital goods is predicated on the claim that the state tax digital goods “differently from their tangible counterparts.” See John Buhl, Congressional Witnesses Debate Value of Framework for State Taxation of Digital Goods, St. Tax Today, May 24, 2011, at 100-2. Also, the wireless bill defines a discriminatory tax as “a tax that is imposed only on mobile services, or is imposed at a higher rate on mobile services than other types of services.” See Simon Brown, House Committee Approves Moratorium on “Discriminatory” Wireless Taxes, St. Tax Today, July 15, 2011, at 136-2. And, the rental car bill is intended to address the fact that there are taxes imposed as to rental cars that are not imposed as to the rental of other types of tangible personal property. See End Discriminatory State Taxes for Automobile Renters Act of 2011, H.R. 2469, 112th Cong. (2011). Another example is the previously enacted, thrice renewed, Internet Tax Freedom Act of 1998, which is directed in part at “discrimination” in state taxes that is, supposedly, unique to that industry. 47 U.S.C. § 151 (1998). Also, the video bill focuses on “discriminatory taxes” imposed on satellite TV providers that are not imposed upon cable TV providers. See State Video Tax Fairness Act of 2011, H.R. 1804, 112th Cong. (2011). The industry pushing the latter bill has also attempted to claim similar discrimination in court proceedings. See DIRECTV v. Levin, 941 N.E.2d 1187, 1194 (Ohio 2010) (finding against the industry because “differential tax treatment of ‘two categories of companies result[ing] solely from differences between the nature of their businesses, [and] not from the location of their activities, does not violate the dormant Commerce Clause.’” (quoting Ameranda Hess Corp. v. Director, Div. of Taxation, N.J. Dep’t of Treasury, 490 U.S. 66, 78 (1989))); see also DIRECTV v. North Carolina, 632 S.E.2d 543, 545 (N.C. 2006) (similar); DIRECTV v. Treesh, 487 F.3d 471, 481 (6th Cir. 2007) (similar).

17. See, e.g., Russ Brubaker, Federation of Tax Administrators Rep Testifies Against Digital Goods Tax Bill, St. Tax Today, May 24, 2011, at 100-5 (comments of Russ Brubaker, Tax Policy Adviser with the Washington Department of Revenue) (noting that there is no evidence that the States tax digital goods less favorably than the sale of other goods and that therefore a Congressional preemption as to such taxes on this basis is unwarranted).

18. U.S. Const. art I, § 8, cl. 3.

19. Cf. U.S. Const. art. I, § 8, cl. 3; see generally Balkin, supra note 15, at 15-29 (discussing the intended meaning of the term “commerce” in the Commerce Clause); Bork &
state tax preemption generally assume that the Commerce power broadly allows Congress to preempt state taxes on the theory that state taxation indirectly impacts commerce, but the Commerce Clause literally allows Congress only to regulate commerce itself and the Tenth Amendment makes express what is generally implied in the Constitution, that powers that are not delegated to the Congress are reserved to the states.

In some cases, the states function as commercial actors and thereby compete with commerce. The Congressional ability to regulate the states under the Commerce Clause even in this context has proven controversial through the years, though the cases now generally conclude that Congress can regulate state activity when it is the equivalent of private commercial activity. However, the imposition of a state tax is not the equivalent of a private commercial activity, but rather is a unique attribute of government.


20. See, e.g., Hellerstein, supra note 6 (“There should be no serious controversy over Congress’s broad authority to adopt virtually any rule [preempting state taxes] that it believes is appropriate with respect to matters that substantially affect interstate commerce.”).

21. The Tenth Amendment to the U.S. Constitution provides that “[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. This Amendment “expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.” Fry v. United States, 421 U.S. 542, 547 n.7 (1975); see also Printz v. U.S., 521 U.S. 898, 919 (1997) (stating that the Tenth Amendment makes “express” that there is “[r]esidual state sovereignty”).


23. See New York v. United States, 326 U.S. 572, 582 (1946) (plurality opinion) (Frankfurter, J.) (case allowing Congress to impose tax on state sales of state mineral water, but noting in dicta that the federal government cannot tax state tax revenues because such action would constitute “taxing the State as a State,” and that further the federal government can tax private commercial ventures, but unlike private commercial ventures, “only a State can get income by taxing”); see also id. at 588 (Stone, C.J., concurring) (explaining that,
In most of the decided cases that have evaluated Congress’s ability to regulate commercial activity under the Commerce Clause, beginning with *Gibbons v. Ogden* in 1824, the essential issue has been whether the object of the regulation in question is reserved to the states, reserved to Congress, or to be shared by some combination thereof. That history of cases has through the course of time channeled much of the nation’s regulatory activity into the third classification of federal-state “concurrent jurisdiction,” where, the cases have determined, Congressional power is supreme. But state taxation cannot be evaluated under this analysis because the taxing power of the states is not a concurrent power; only a state can impose a state tax.

Before proceeding to the crux of the argument, there are two threshold points that warrant consideration. First, it is sometimes suggested that arguably-intrusive Congressional activity taken pursuant to the Commerce Clause is subject to the general restrictions protecting the states that arise from the operation of the national political process. The federal health care bill, which has incited strong feelings on the part of the populace for and against federal—as opposed to state—regulation, is an example of this dynamic. However, the national political process does not operate as an effective safeguard in the realm of Congressional attempts to preempt state taxes. Unlike in the instance of the health care bill, which directly affects individuals’ lives, most persons are generally unaware of Congressional

unlike the states, “private citizens do not own State-houses or public school buildings or receive tax revenues . . . .”); United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342-43 (2007) (“Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens . . . . These important responsibilities set state and local government apart from a typical private business.”).

25. *Gibbons* recognized that there would be times when federal or state legislative acts would pose no conflict as to one another but that there would also be times when a state would be “regulating commerce . . . among the several States . . . [and thereby be] exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.” See id. at 199-200; see also infra Section I.B.
26. See infra note 73 and accompanying text.
27. See New York, 326 U.S. at 582.
29. See, e.g., Rebecca E. Zietlow, Democratic Constitutionalism and the Affordable Care Act, 72 OHIO ST. L.J. 1367, 1367-68 (2011) (noting that “[d]uring the congressional debate over the 2010 Patient Protection and Affordable Care Act (ACA), opponents of the Act mounted dramatic demonstrations against it’ and “Tea Party activists attacked the ACA as an unconstitutional infringement on states’ rights and individual liberty”) (citations omitted); Elizabeth Weeks Leonard, Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform, 39 Hofstra L. Rev. 111, 113-14 (2010) (noting numerous efforts in the aftermath of the passage of the Act on the part of the states and their citizens to nullify the application of the law including several ballot initiatives).
activity with respect to state taxes, and the implications thereof. 30 Indeed, to the extent persons are aware of state tax preemptions they generally perceive such actions not as a strike against our nation’s constitutional design, but rather as a measure in which their federal legislators are providing them with a tax break—albeit one as to their state rather than their federal taxes. Federal legislators can placate the business lobby group that requested the preemption 31 and take credit for such tax “cuts,” 32 though they themselves are not responsible for the state budgets that will either need to make corresponding cuts to state services or to replace the taxes preempted with taxes of some other type. 33

30. Professor Jerome R. Hellerstein has noted that proposed legislation concerning state multistate taxation is “too technical and complex to excite public interest,” and that therefore “the issues can be easily obfuscated by the public relations arms of the various interested groups.” Jerome R. Hellerstein, State Taxation Under the Commerce Clause: An Historical Perspective, 29 VAND. L. REV. 335, 351 (1976). The result is that “federal legislation that may emerge may be determined more by the sheer political muscle of the groups with a direct stake in the matter than by a rational resolution of the legitimate positions of the state and local governments, multistate business, and its local competitors.” Id.

31. See Moore, supra note 5, at 204 (noting that “[t]he empirical evidence suggests that Congress may enact legislation regulating discrete instances of state and local taxation of interstate commerce if the legislation [among other things] . . . will benefit a specific, well-defined interest group that orchestrates an extensive campaign with limited opposition.”); Garcia, 469 U.S. at 575 n.18 (Powell, J., dissenting) (“[W]e have witnessed in recent years the rise of numerous special interest groups that engage in sophisticated lobbying, and make substantial campaign contributions to some Members of Congress. . . . groups [that] are thought to have significant influence in the shaping and enactment of certain types of legislation[,] . . . a ‘political process’ that functions in this way is unlikely to safeguard the sovereign interest of States and localities.”); see also supra note 30 (quoting Jerome R. Hellerstein).

32. See Brian Galle, The Politics of Federalism: Self-Interest or Safeguards? Evidence from Congressional Control of State Taxation 7 (Boston College Law Sch. Legal Studies Research, Paper No. 220, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1759510 (noting that “a congressional decision to prohibit certain state taxes would appear to have the exact political structure of any other unfunded mandate: the state loses money, while Congress can take political credit with the affected interest group”); Tracy A. Kaye, Show Me the Money: Constitutional Limitations on State Tax Sovereignty, 35 HARV. J. ON LEGIS. 149, 178 (1998) (noting the incentive for Congress to provide constituents “with tax giveaways in the form of prohibitions on state taxation”).

33. Cf. Printz v. United States, 521 U.S. 898, 932 (1997) (evaluating a federal law requiring state officials to perform background checks on purchasers of handguns; critiquing the law as one that tends to “direct the functioning of the state executive and hence to compromise the structural framework of [our nation’s] dual sovereignty”); Alden v. Maine, 527 U.S. 706, 751 (1999) (evaluating a federal law creating a private right of action against a state in state court) (“When the Federal Government asserts authority over a State’s most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.”); id. at 750-51 (stating the law would be inconsistent with the Constitution because, among other things, of the drain that the law
Second, persons who support the preemption of state tax frequently claim that the amount of preempted state taxes at stake is not large and therefore not worthy of legal concern. However, this argument misses the point that if the nature of the congressional act is unauthorized, its magnitude does not matter. Moreover, the dollar cost of the various state tax preemptions in sum to date is certainly quite large and ever-growing. Indeed, the very nature of a preempted tax is that once the tax is preempted, the potential cost of that preemption grows progressively more difficult to ascertain, in part because the provisions of the law remain static but the transactions that qualify for preemption are potentially in flux. As Professor

could place on the states’ treasuries preventing “the States’ ability to govern in accordance with the will of their citizens”).

34. See, e.g., Amy Hamilton, Governors Urge Congress to Oppose BAT Nexus Legislation, ST. TAX TODAY, Aug. 4, 2011, at 151-1 (noting the comments of a supporter of the 2011 proposed Congressional bill that would expand the application of Public Law 86-272, justifying the bill in part on the theory that the expanded provisions would apply only to de minimis activity).

35. As former Justice Powell has written:

[The harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. Nor is it a matter of the wisdom or folly of certain policy choices. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.]

Garcia, 469 U.S. at 572 (Powell, J., dissenting) (citations omitted).

36. To take just one example, there are no recent estimates as to the cost to the states of Public Law 86-272, which preempts the state taxation of net income of a corporation that limits its in-state activity to the solicitation of the sale of tangible personal property where the delivery of such property is from a point located outside the state. See 15 U.S.C. § 381 (1959). However, a recent study by the Congressional Budget Office suggested the magnitude of the cost of that law when it estimated that the cost of extending the protections of that law to the sale of similar services would cost the states $2 billion annually beginning in the first year of application—five percent of the state collections from corporate income taxes—and “at least that amount in subsequent years.” CBO Estimates Cost of Business Activity Tax Simplification Legislation, ST. TAX TODAY, Sept. 15, 2011, at 179-3; see also Michael T. Fatale, Federalism and State Business Activity Tax Nexus: Revisiting Public Law 86-272, 21 VA. TAX REV. 435, 439 n.15 (2002) (noting that “[a]n affidavit filed by the Massachusetts Department of Revenue in a 1997 case stated that, for the fiscal years 1993 and 1994, the Department assessed taxes or sent notices of intention to assess in 1,580 cases in which taxpayers invoked [the protection of] Public Law 86-272, representing taxes that totaled $29,578,207); see also supra note 37 and accompanying text.

37. See Internet Tax Freedom Act, 47 U.S.C. § 151 (1998). The Internet tax “moratorium,” originally enacted in 1998, but subsequently extended three times and now about to enter its fourteenth year, provides an example of this phenomenon. That law initially applied only to transactions to log on to the Internet but later, by virtue of the statutory language, also applied to charges for “mobile device data plans,” transactions that did not exist at the time the law was enacted. This latter fact, and the fact that the states were slow to amend their practices to apply the federal law to evolving technology, resulted in a successful class action
sor Lawrence Tribe has succinctly stated, the danger "lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." 38

This Article evaluates the Commerce Clause using a historical approach. It proceeds by first evaluating the Commerce Clause generally, including consideration of both the affirmative and "dormant" Commerce Clause. This first Section evaluates the purposes that underlie the Commerce Clause and considers Congress's ability to preempt state taxes that reflect economic protectionism or discrimination in favor of local commercial interests consistent with these purposes. 39 The second Section evaluates Congress's more general textual power to regulate "commerce . . . among the several states" and considers what ability, if any, this section confers upon Congress to preempt a state tax. 40 Lastly, the Article considers some prior Congressional preemptions of state taxes and dicta in some recent U.S. Supreme Court cases and evaluates what if anything those developments portend with respect to future Constitutional doctrine as it relates to state tax preemptions. 41

I. THE ECONOMIC PROTECTIONISM PURPOSE AND PRINCIPLE REFLECTED IN THE COMMERCE CLAUSE

The history of the Commerce Clause reveals an intention that Congress be authorized to police state acts of economic protectionism. Moreover, the history suggests sensitivity to the performance by the states of integral and traditional governmental activities, including specifically what may be the most integral and traditional government act, the imposition of a state tax. 42 This history tracks through the primary purpose for the Commerce Clause, the construction accorded to the Clause in the Supreme Court's earliest cases, and the Court's current understanding of the purposes that underlie the Clause as articulated in the Court's recent "dormant" Commerce Clause cases.

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39. See infra Part I.
40. See infra Part II.
41. See infra Part III.
42. See supra notes 3, 9-11; see also infra note 55 and accompanying text.
A. The Adoption of the Commerce Clause

In part to address concerns about the states’ protectionist activities, the U.S. Constitution was adopted in place of the Articles of Confederation, which was the preliminary document that governed the operations of the United States after its victory in the Revolutionary War. In the absence of British rule, “uncertainty and retaliatory trade barriers began to spread among the States.”43 The political effect of the increasing tension between the various states led some persons, including Alexander Hamilton, to conclude that unregulated trade warfare would turn to interstate war.44 Problematically, Congress “lacked the power to prepare a coherent response to interstate squabbles” and moreover was unable “to frame and implement satisfactory foreign policies.”45

The U.S. Constitution was drafted in 1787 and became effective after it was ratified by a sufficient number of states the following year.46 The Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, addressed a perceived deficiency in the Articles of Confederation, stating simply that Congress shall have power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”47 The Constitution included in Article I, Section 8, Clause 18, an additional provision, the “Necessary and Proper Clause,” which states that “Congress shall have [the] power ... to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”48

Two years after the ratification of the Constitution, in 1791, the Bill of Rights was adopted as a series of amendments to the Constitution.49 These amendments were being contemplated at the time that the Constitution was being ratified, and the prospect of these amendments encouraged some states to ratify the Constitution.50 Included in the Bill of Rights is the Tenth Amendment, which states that “[t]he powers not delegated to the United

44. Id.
45. Id. at 857 (quoting JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 26 (1996)).
47. U.S. CONST. art. I, § 8, cl. 3.
49. See Constitution of the United States, supra note 46.
States by the Constitution, nor prohibited by it to the States, are reserved to
the States respectively, or to the people.” 51

The Tenth Amendment confirms the rights of the states as separate sovereigns, although even apart from that provision, “[d]ual sovereignty is a defining feature of [the] Nation’s constitutional blueprint.” 52 As James Madison wrote in the Federalist Papers, prior to becoming the primary author of the Bill of Rights, states entered the nation with “‘residuary and inviolable sovereignty.” 53 Madison wrote also that:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. 54

The Constitutional Framers—notably Alexander Hamilton, a strong proponent of federal power and of commerce generally—also expressed the particular view that the federal government could not act to abridge the states’ sovereign ability to impose taxes. 55

Although the literal language of the Commerce Clause does not express a specific concern as to protectionist acts by the states, there is no doubt that providing the means to address such acts was the Framers’ primary intention as expressed in that clause. 56 Statements to this effect are made throughout the Federalist Papers, through which Hamilton, Madison, and John Jay sought to muster support and ultimately ratification for the recently authored Constitution. 57 For example, Hamilton in Number 22 stat-

51. U.S. CONST. amend. X.
55. See The Federalist No. 32, supra note 9, at 199-201 (Alexander Hamilton) (stating that the taxing power of the States under the U.S. Constitution, save for imports or duties on imports or exports, “remains undiminished” and that the States “retain [their taxing] authority in the most absolute and unqualified sense”); see also supra notes 9-11 and accompanying text.
56. See Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 MICH. L. REV. 1091, 1124-25 (1986) (noting that there is nothing in the Commerce Clause text that would suggest to a modern reader that the states are forbidden to engage in protectionism against other states but that the text would have been understood to make that point at the time of its drafting).
57. The specific concern was obtaining ratification by the State of New York, which was thought to be an important step in obtaining ratification by the requisite number of
ed concern about "unneighborly regulations" that would result in "injurious impediments to the ... different parts of the confederacy." 58 In Number 7, Hamilton expressed concern with "those regulations of trade, by which particular States might endeavor to secure exclusive benefits to their own citizens." 59

Professor Brannon P. Denning has argued that as between the anti-protectionism component of the Commerce Clause and the aspect of the Commerce Clause that authorizes the regulation of national commerce, the former was more important to the Framers as "[t]he Framers did not necessarily appreciate the economic benefits of a national common market, but they had firsthand experience with the political instability produced by recurring cycles of discrimination and retaliation between and among states." 60 Consequently, the literal language of the Commerce Clause notwithstanding, "the anti-discrimination principle was closer in scope to the evil the Commerce Clause and the related provisions were intended to remedy." 61 Numerous other scholars have made effectively the same point. For example, Professor Laurence Tribe noted that "[t]he function of the clause is to ensure national solidarity, not necessarily economic efficiency." 62 Professor Calvin Johnson has noted that, while "[i]t is now often stated that the major purpose of the ... [Commerce Clause] was to ... establish a common market with free trade across state borders[,] ... [b]arriers on interstate commerce ... were not a notable issue in the original debates." 63 In his
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widely-cited, exhaustive research as to the Constitutional records, Professor Albert S. Abel discovered only nine references to the Commerce Clause, all directed to the dangers of interstate rivalry and retaliation.\(^{64}\)

B. *Gibbons v. Ogden* and the Early Commerce Clause Cases

In the decades that followed the ratification of the Constitution, the Supreme Court’s interpretation of the Commerce Clause determined that the Clause not only has two separate thrusts, but also two distinct modes of application, again only one of which is supported by the text’s literal language. These two modes of application are the exercise of Congressional power under the affirmative Commerce Clause, which is the main focus of this Article, and the exercise of judicial review under the “dormant” Commerce Clause, in the absence of any Congressional legislation.\(^ {65} \) The first mode of application, which is textual, allows Congress to engage in substantive policy-making as to national affairs.\(^{66}\) Because the states also have policy-making powers as to local affairs, there is the prospect for conflict, and in cases where the national interest is supreme, Congressional legislation may result in federal preemption.\(^{67}\) The second mode of application of the Commerce Clause—judicial power that has come to be applied under the so-called “dormant” Commerce Clause—is not the focus of this Article, but is nonetheless relevant to the analysis because the cases decided in this area

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\(^{65}\) See Dep’t of Revenue of Ky. v Davis, 553 U.S. 328, 337-38 (2008) (noting that “[t]he Commerce Clause empowers Congress ‘[t]o regulate Commerce ... among the several States’ . . . [b]ut although its terms do not expressly restrain ‘the several States’ in any way, we have sensed a negative implication in the provision since the early days”—a negative implication that “has come to be called the dormant Commerce Clause”); United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) (stating that although the Commerce Clause “does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute”—the “so-called ‘dormant’ aspect of the Commerce Clause”).

\(^{66}\) For example, Congress utilized the Commerce Clause to enact legislation that effectuated the “New Deal” in the 1930s and ‘40s and also to address racial discrimination in the 1960s. See infra notes 133-44 and accompanying text.

\(^{67}\) Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 770 (1994) (stating that in areas where the states have “preexisting, concurrent lawmaking powers,” state legislation has full effect unless it is in conflict with a “valid federal law”).
explain the meaning of the Commerce Clause authority granted to Congress. 68

The first case to test Congressional power under the Commerce Clause was *Gibbons v. Ogden* in 1824, argued on behalf of the plaintiff by Daniel Webster, the future Massachusetts Senator. 69 There the Court struck down a steamship monopoly conferred upon private persons by the state of New York to operate on the waters between New York and New Jersey because it conflicted with a federal coasting license. 70 *Gibbons* was similar to the Commerce Clause cases that would eventually follow, in that it sought to determine whether the activity regulated, navigation on waters between the states, was ultimately subject to federal or state regulation. 71 In later cases, the Court would at times determine that the subject being regulated was potentially subject to both state and federal regulation, at least when there was no conflict between the laws. 72 As would eventually be true in most of the Court's later cases, *Gibbons* effectively resolved the dispute as to the appropriate legislating body by determining that the subject of Congress's regulation—navigation between the states—was interstate commerce that could not be subject to conflicting state regulation. 73

Despite the holding in *Gibbons* favoring Congress, it is significant that the Court felt it important to clarify—in response to the state's claim that it could both tax and regulate the activity in question—that substantive regulation, "the power to regulate commerce," and "the power to lay and collect taxes" are "not . . . similar in their terms or their nature." 74 "The power of taxation is indispensible to [the States'] existence, and is a power, which, in its own nature, is capable of residing in, and being exercised by, different

68. See infra notes 78-96, and accompanying text; see also Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574 (1997) (noting that the definition of "commerce" is the same whether it is applied under the dormant or the affirmative Commerce Clause).
69. 22 U.S. (9 Wheat.) 1, memo. (1824).
70. See id. at 1.
71. See generally infra Part II
72. See, e.g., Gonzales v. Oregon, 546 U.S. 243 (2006) (the federal Controlled Substances Act does not allow the U.S. Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under state law permitting the procedure); see also Gardbaum, supra note 67, at 770 ("In itself, federal supremacy does not deprive states of their preexisting, concurrent lawmaking powers in a given area; rather, it means that a particular state law in conflict with a particular federal law will be trumped where both apply.").
73. See *Gibbons*, 22 U.S. (9 Wheat.) at 189-222; see also Gardbaum, supra note 67, at 783 (noting that in the early twentieth century, "genuine" concurrent state and federal regulatory power gave way to a regime in which "the power of the states over interstate commerce was subordinate to that of Congress in all cases of Congressional action," followed—beginning in the 1930s—by the current system in which concurrent power exists "until Congress clearly manifests its intent to [override state law]").
authorities[,] [e.g., the state and federal government,] at the same time.” 75 In contrast, the conflict in Gibbons occurred because “when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.” 76 The Court stated that “[t]here is no analogy, then, between the power of taxation and the power of regulating commerce.” 77

Gibbons was an affirmative Commerce Clause case, given that it resolved a direct conflict between state and federal law. 78 However, despite Gibbons, for most of the nation’s first century or so, judicial activity under the dormant Commerce Clause was more prevalent since as a practical matter what little federal economic legislation there was tended not to result in conflicts with state law. 79 The dormant Commerce Clause cases of this time generally determined whether, in the absence of regulation by Congress, the states themselves were entitled to substantively regulate certain areas of commerce. 80 These cases reflected a common theme and dealt “almost entirely with the Commerce Clause as a limit on state legislation that discrim-

75. Id. at 199.
76. Id. at 199-200.
77. Id. at 200. Chief Justice John Marshall wrote similarly in McCulloch v. Maryland, decided five years earlier:

[T]hat the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; [these] are truths which have never been denied.

17 U.S. (4 Wheat.) 316, 425 (1819) (case determining that a state could not impose tax on a U.S-chartered bank). Marshall did later, however, concede in Brown v. Maryland, that state taxation should be subject to some limits, in cases in which the tax was applied to items in commerce passing through the state or destined for another state, implicitly recognizing, it would seem, that such instances are ones that implicate the economic protectionism purpose reflected in the Commerce Clause:

[T]he taxing power of the States must have some limits. . . . It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of re-exportation? . . . Or what should restrain a State from taxing any article passing through it from one State to another for the purpose of traffic or from taxing the transportation of articles passing from the State itself to another State, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce and affect materially the purpose for which that power was given.

25 U.S. (12 Wheat.) 419, 448-49 (1827) (case in which the federal tariff laws were deemed to constitute a license to import, barring Maryland’s imposition of a tax on importers of foreign goods).

78. See Gibbons, 22 U.S. (9 Wheat.) at 1-3.
79. See Wickard v. Filburn, 317 U.S. 111, 121 (1942) (discussing this early history of cases).
inated against interstate commerce."81 In general, the Court concluded that certain categories of activities, such as production, manufacturing, and mining could be regulated by the states in which the activity occurred, and hence this regulation was “beyond the power of Congress under the Commerce Clause.”82

In the late 1800s, the enactment of the Interstate Commerce Act and Sherman Antitrust Act “ushered in a new era of federal regulation under the commerce power.”83 These federal statutes, directed at private commercial activity, required the Supreme Court to adjudicate, at times, actual conflicts between federal and state interests.84 In general, when these cases first reached the Supreme Court, the Court “imported” from the dormant Commerce Clause cases the notion that Congress could not regulate inherently intrastate “activities such as production, manufacturing, and mining.”85 Simultaneously, however, the Court concluded that “where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation.”86 These latter cases led to difficult determinations as to whether the effects of the federal regulation in question “directly” or “indirectly” impacted interstate commerce.87

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81. Lopez, 514 U.S. at 553. An analogous case in the state tax area was Welton v. Missouri, 91 U.S. 275 (1875) (striking down as impermissibly discriminatory a state license tax imposed on persons “who deal in the sale of goods, wares and merchandise which are not the growth, produce or manufacture of the state”).

82. Lopez, 514 U.S. at 554; see Wickard, 317 U.S. at 121. In contrast, state regulation of interstate—as opposed to intrastate—commerce was prohibited under the dormant Commerce Clause. See, e.g., Case of State Freight Tax, 82 U.S. (15 Wall.) 232 (1872) (determining that the state tax imposed on freight transported from state to state was the equivalent of a direct regulation of interstate commerce and therefore impermissible).

83. Lopez, 514 U.S. at 554; see Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887); Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890); see also Herbert Hovenkamp, Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem, 97 YALE L.J. 1017, 1019 (1988) (“The Interstate Commerce Act was the first comprehensive regulatory measure passed by Congress.”). Professor James W. Ely, Jr. has noted that Congressional regulation largely began after the beginning of the Civil War with respect to railroads, and that prior to the enactment of the Interstate Commerce Act in 1887, there was some minor history of Congressional regulation in that context. See James W. Ely, Jr., “The Railroad System has Burst Through State Limits”: Railroads and Interstate Commerce, 1830-1920, 55 ARK. L. REV. 933, 965-66 (2003).

84. Wickard, 317 U.S. at 121.

85. Id.; Lopez, 514 U.S. at 554.

86. Lopez, 514 U.S. at 554.

87. Id. at 554-55.
C. The “New Deal” and the Evolution of the Court’s Modern Dormant Commerce Clause Doctrine

Beginning in the late 1930s, in the course of reviewing the federal “New Deal” legislation, the Supreme Court liberalized its review of federal statutes pursuant to the Commerce Clause. The resulting cases dispensed with the “direct” versus “indirect” approach that the Court had previously applied in favor of an approach that viewed the “interstate commerce” subject to federal regulation more broadly, potentially including purely in-state activity that had a “substantial economic effect” on interstate commerce. These cases “greatly expanded the previously defined authority of Congress under [the Commerce] Clause.”

However, as the Court’s affirmative Commerce Clause doctrine matured in the early to middle part of the twentieth century, its dormant Commerce Clause cases, which initially had informed its affirmative Commerce Clause cases, retained the latter cases’ discarded analytic framework. Hence, for example, in the state tax context, under the dormant Commerce Clause, the notion that the states could only tax in-state activity akin to production, manufacturing, and mining was not finally put to rest until Northwestern States Portland Cement Co. v. Minnesota in 1959. Also, vestiges of the direct-indirect analysis, which generally held that the states could not place direct burdens on interstate commerce, lived on through cases like Freeman v. Hewitt until Complete Auto Transit, Inc. v. Brady in 1977. In Freeman v. Hewitt, the Court struck down a state tax not on the basis of economic protectionism, but rather on the theory—rooted in the direct/indirect burden concept—that the dormant Commerce Clause “created an area of trade free from interference by the states.” However, Complete Auto, which ushered in the Court’s “modern era” of dormant Commerce Clause cases in the state tax context, rejected that line of reasoning, concluding, among other things, that administrative inconvenience is not a basis for relieving multistate taxpayers from their share of the states’ tax burden and that, therefore, “interstate commerce may be made to pay its way.”

88. Id. at 555-56.
89. Id.
90. Id.
95. Freeman, 329 U.S. at 252.
96. Complete Auto, 430 U.S. at 288 n.15; see Tracy A. Kaye, Tax Discrimination: A Comparative Analysis of U.S. and E.U. Approaches, 7 FLA. TAX REV. 47, 88 (2005) (noting that the rule stating that a state may not directly tax interstate commerce—the so-called
As the progression of dormant Commerce Clause cases suggests, the Court has been willing to revisit and restate its interpretative doctrine. Eventually, two sets of judicial tests emerged to evaluate the constitutionality under the dormant Commerce Clause of state taxes, on the one hand, and non-tax state regulations, on the other. The standards to evaluate a state tax are set forth in the four-part test referenced in *Complete Auto Transit v. Brady*, which includes as one of its four “prongs” a test as to whether the state tax is unconstitutionally discriminatory. The standards to evaluate a state non-tax regulation are two-part, consisting of a test as to whether the non-tax regulation is discriminatory and a second test, as referenced in *Pike v. Bruce Church, Inc.*, that weights the respective benefits and burdens of such regulation. But each of these multipart tests are now dated, and the Supreme Court has recently made it clear that it is no longer particularly enamored with either—apart from the discrimination standard included in each—such that it is possible that a restatement of the relevant standards may be forthcoming in each area.

“Formal Rule”—was abandoned in *Complete Auto*; Howard O. Hunter, *Federalism and State Taxation of Multistate Enterprises*, 32 EMORY L.J. 89, 95 (1983) (“The thrust of the Formal Rule was that a state may not impose a tax on any activity or process viewed by the Court as a part of interstate commerce.”); Regan, *supra* note 56, at 1093-94 (noting that the “modern era of dormant commerce clause jurisprudence” began with the “abandonment of the ‘direct/indirect’ burdens test” in non-tax cases in 1945, but that the test “hung on a bit longer” in state tax cases, through *Freeman*).

97. *See* Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959) (describing the Court’s focus as “clearing up the tangled underbrush of past cases” with reference to the taxing power of the States”) (citations omitted); see also *Complete Auto*, 430 U.S. at 287-89; *Quill Corp.*, 504 U.S. at 309-10.


100. *See id.* Under the *Pike* balancing test, “where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Id.* “If a legitimate local purpose is found, then the question becomes one of degree.” *Id.* “[T]he extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Id.*

101. Professors Norman R. Williams and Brannon P. Denning have recently commented on what they call the “twilight of *Pike* balancing.” *See* Norman R. Williams & Brannon P. Denning, *The “New Protectionism” and the American Common Market*, 85 NOTRE DAME L. REV. 247, 304-10 (2009). They note that by their count a majority of the Court has not invalidated a law by applying *Pike* in over twenty years and suggest that the “rather desultory” and “tepid” evaluations of the standard in *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007), and *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008), call into question its future viability. *Id.* at 304. The tests referenced in *Complete Auto*, in the state tax area, have also recently fared poorly. Over the past fifteen years the Court has taken only one case, *MeadWestvaco Co. v. Illinois Department of Revenue*, 553 U.S. 16, 25 (2008), that probed anything other than a discrimination claim—only one of *Complete Auto’s* four prongs—and in *MeadWestvaco*, an
The Court's apparent general difficulty with the dormant Commerce Clause tests that have emerged in the tax and non-tax areas is that the Court now views these tests—apart from the discrimination test that is applied in both contexts—as having a broader focus than the Court's historic and limited purpose under the dormant Commerce Clause to evaluate economic protectionism (as the Court itself is not empowered under that Clause to "regulate Commerce . . . among the several states").102 As the Court recently stated in Department of Revenue of Kentucky v. Davis, "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"103 Justices Scalia and Thomas are repeatedly on the record as stating that they would dispense with all inquiries under the dormant Commerce Clause, though neither would abandon cases that involve a claim of purported state discrimination.104

So-called "Pike balancing" has the particular problem that rather than merely evaluating a state's purported attempt at protectionist behavior in the apportionment case, the Court's primary disposition was to remand the case for further state court proceedings. See id. at 416-17. Further, most of the Court's state tax dormant Commerce Clause cases taken over the past fifteen years—MeadWestvaco included—don't even mention Complete Auto. See infra notes 113-14 and accompanying text; see also Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 201 (1995) (Scalia, J., concurring) ("I would not apply the remainder of the eminently unhelpful, so-called 'four-part test' of Complete Auto Transit, Inc. v. Brady . . . I look forward to the day when Complete Auto will take its rightful place in Part II of the Court's opinion, among the other useless and discarded tools of our negative Commerce Clause jurisprudence.") (citations omitted).105

102. U.S. CONST. art. I, § 8, cl. 3.

103. 553 U.S. at 337-38 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988)). The Court also stated that "[t]he point is to 'effectuat[e] the Framers' purpose to 'prevent a State from retreating into [the] economic isolation' that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" Id. at 338 (quoting Fulton Corp. v. Faulkner, 516 U.S. 325, 330 (1996); Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)) (brackets and secondary quotes omitted).

104. See Edward A. Zelinsky & Brannon P. Denning, Debate, The Future of the Dormant Commerce Clause: Abolishing the Prohibition on Discriminatory Taxation, 155 U. PA. L. REV. 196, 203 (2007) (comments of Professor Denning); see also Davis, 553 U.S. at 359 (Scalia, J., concurring) (stating, "I will apply our negative Commerce Clause doctrine only when stare decisis compels me to do so. In my view it is 'an unjustified judicial intervention, not to be expanded beyond its existing domain.'") (citation omitted); id. at 361 (Thomas, J., concurring) (stating that "I would entirely 'discard the Court's negative Commerce Clause jurisprudence'" because it "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.") (citation omitted) (quotes omitted); see also United Haulers Assn., 550 U.S. at 348 (Scalia, J., concurring) (stating that "[t]he historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce," but that he would be "willing to enforce on stare decisis grounds a 'negative' self-executing Commerce Clause . . . against a state law that facially discriminates against interstate commerce.").
non-tax context, it allows for a balancing of the state benefits and commercial burdens imposed by the state legislation—a determination that is sometimes referred to as an evaluation as to whether the state regulation imposes an “undue burden” on interstate commerce. While balancing tests were in vogue in Supreme Court jurisprudence several decades ago, the Court now views such inquiries as a subjective exercise that, in addition, involve considerations that are inherently legislative rather than judicial in nature.

The four tests of Complete Auto are also problematic in part because one of them, the “fairly related” test, has no apparent stringency, and two of the remaining three tests, the nexus and fair apportionment standards, generally embody Due Process notions. Significantly, the last time the Court took a nexus case—nearly twenty years ago in Quill Corp. v. North Dakota ex rel. Heitkamp in 1992—it suggested it had incorrectly decided Quill’s predecessor case from twenty-five years earlier, National Bellas Hess, Inc. v. Illinois Department of Revenue, which it was then revisiting. Quill retained the holding in Bellas Hess, but restated the logic to


106. See United Haulers Ass’n., 550 U.S. at 347; Davis, 553 U.S. at 353-56; see also Denning, supra note 61, at 453-57 (surveying the rise and fall of the use of the balancing approach in the Court’s dormant Commerce Clause cases); Day, supra note 105, at 50 (noting that a “remarkable feature of the end of the Rehnquist Court was that . . . [the nondiscrimination tier of the two-part test applied to state non-tax regulations] had fallen into rather obvious non-use”).

107. The Court has stated that the “fairly related” standard is related to the nexus standard and can be satisfied by “general services” provided by the state. See Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981); Goldberg v. Sweet, 488 U.S. 252, 267 (1989). Since this standard is so easily satisfied, it is almost never at issue. Cf. Zelinsky & Denning, supra note 104, at 205 (stating that “[c]ourts have heretofore been so reluctant to . . . [apply] the ‘fairly related’ prong of Complete Auto [that it] has become a dead letter”) (comments of Brannon P. Denning); Kathryn L. Moore, State and Local Taxation of Interstate and Foreign Commerce: The Second Best Solution, 42 WAYNE L. REV. 1425, 1459 (1996) (“[I]t is not entirely clear what content, if any, this [fairly related] prong contains, for the Court has yet to strike down a state tax based solely on this prong of the Complete Auto test.”).

108. See Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 305, 318-19 (1992) (stating that the Due Process and Commerce Clause aspects of the nexus analysis are “closely related,” but resting its decision on Commerce Clause grounds so that Congress would be free to reconsider it); see also infra notes 290, 292 and accompanying text. Professors Jesse H. Choper and Tung Yin have argued that the four Complete Auto tests are needlessly complicated because they are “functionally redundant.” See Jesse H. Choper & Tung Yin, State Taxation and the Dormant Commerce Clause: the Object-Measure Approach, 1998 SUP. CT. REV. 193, 193 (1998).


110. The Court stated, for example, that “contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today,” that
make clear that Congress could overrule it. Only three of the eight Justices who decided *Quill* remain on the Court, and each of those Justices filed a single concurrence in that case in which they stated that they were not upholding *Bellas Hess* based upon its logic, but rather on the basis of stare decisis. Almost all of the recent state tax cases that the Court has taken under the dormant Commerce Clause have been discrimination cases—of which there have been several—and often those cases no longer even pay lip service to *Complete Auto*.

D. The Economic Protectionism Principle in the Court’s Contemporary Dormant Commerce Clause Jurisprudence

What seems clear is that the Supreme Court’s current mode of analysis in dormant Commerce Clause cases is to focus on whether the state legislation being reviewed reflects economic protectionism, consistent with the purposes that underlie the Commerce Clause. In non-tax cases, this implies that so-called “*Pike* balancing,”—an evaluation of “undue burdens”—may no longer be relevant. However, in any event, such *Pike*-like “free trade” considerations were eliminated decades ago from the dormant Commerce Clause inquiry as applied to the imposition of a state tax. These

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111. *Quill Corp.*, 504 U.S. at 320 (Scalia, J., concurring) (“I would not revisit the merits of *Bellas Hess*, but would adhere to it on the basis of stare decisis.”). Justice Scalia was joined in his concurrence by Justices Kennedy and Thomas. See id. at 319.

112. Id. at 318-19.


114. The Court’s one fair apportionment case from this period also failed to reference *Complete Auto*. *MeadWestvaco Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 25 (2008); see also supra note 101.

115. See Williams & Denning, *supra* note 101, at 249 (“[A]ntipathy to local protectionism has been a hallmark of the Court’s Commerce Clause jurisprudence.”); Choper & Yin, *supra* note 108, at 199-200 (noting the “Dormant Commerce Clause’s core prohibition of discrimination against interstate commerce”).

116. See *supra* notes 91-96 and accompanying text (discussing the advent of *Complete Auto Transit*, Inc. v. *Brady*, 430 U.S. 274 (1977)). The principle espoused by *Complete Auto* rejecting a free trade rationale has been echoed in subsequent cases. See, e.g., *Barclay’s Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 310 (1994) (“The [Commerce] Clause does not shield interstate (or foreign) commerce from its ‘fair share of the state tax burden.’” (quoting Dep’t of Revenue of Wash. v. Ass’n of Wash. Stevedoring Cos., 435 U.S. 734, 750 (1978))); *Quill Corp.*, 504 U.S. at 310 n.5 (1992) (“It was not the purpose of the commerce
two distinct analytic approaches as applied to tax and non-tax state legislation—which implicitly reflect heightened respect for the states’ taxing power since the “undue burden” test does not apply in that context—are similar to the two-part approach suggested by *Gibbons v. Ogden*.117 Also, to the extent that these two divergent approaches suggest a heightened respect for the states’ taxing power, they are consistent with the Court’s recently expressed concern that the states must be free to engage in sovereign acts,118 as well as the Constitutional Framers’ recognition that the imposition of state taxes is perhaps the most significant such sovereign act.119

The Court’s cases have revealed that the state discrimination to be policed under the Commerce Clause may take many forms and is not always easy to identify in practice, but there is nonetheless a clear definition of the outer parameters of such discrimination.120 For example, as stated by Chief Justice Roberts in the recent decision, *United Haulers Ass’n v. Oneida-

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117. 22 U.S. (9 Wheat.) 1, 199 (1824); see supra notes 74-77 and accompanying text; see also Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959) (corporate net income taxes "are not regulations in any sense of that term"); Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 Mich. L. Rev. 895, 942 (1992) ("The Supreme Court may treat tax cases as meriting greater deference to state and local governments than regulation cases because it regards the power to tax as at the heart of a government’s sovereignty."); Kaye, supra note 96, at 89 (stating, "The [Supreme] Court grants greater deference to state and local taxation autonomy than [it does to state actions at issue in Commerce Clause cases involving regulation.") (citing Laurence H. Tribe, *American Constitutional Law* §6-15, at 442 (2d. ed. 1988)).

118. See United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt, 550 U.S. 330, 343 (2007) ("The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake."); id. (expressing apprehension at potential unprecedented interference by the courts with a traditional government function); Dep’t of Revenue of Ky. v. Davis, 553 U.S. 328, 340 ("State and local governments that provide public goods and services on their own, unlike private businesses, are ‘vested with the responsibility of protecting the health, safety, and welfare of [their] citizens . . . . and laws favoring such States and their subdivisions may ‘be directed toward any number of legitimate goals unrelated to protectionism.’") (quoting United Haulers Ass’n, 550 U.S. at 343)) (also expressing apprehension at potential unprecedented interference by the courts with a traditional government function).

119. See supra notes 9-11, 55 and accompanying text.

120. See Choper & Yin, supra note 108, at 199 ("Although the question of what constitutes discrimination is complex and multifaceted, the evil generally stated, is a state policy whose purpose or effect is to confer advantages on local interests at the expense of out-of-staters.").
Herkimer Solid Waste Management Authority, 121 "any notion of discrimination assumes a comparison of substantially similar entities." 122 Further, in a subsequent case, Department of Revenue of Kentucky v. Davis, 123 the Court stated that "[t]he modern law of what has come to be called the dormant Commerce Clause is driven by concerns about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" 124 Davis stated that "[t]he point is to 'effectuat[e] the Framers' purpose to 'prevent a State from retreating into [the] economic isolation'... 'that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" 125

Because Congress has broader investigative powers than the Supreme Court, it evidently has broader ability to enforce the anti-protectionism principles of the Commerce Clause—effectively the ability to find discrimination in situations where the Supreme Court might not. 126 However, congressional efforts to eliminate discriminatory state legislation under the affirmative Commerce Clause must logically, nonetheless, apply the same standard of discrimination as that applied by the Court under the dormant Commerce Clause, as the standard in each instance has the same constitutional derivation and meaning. 127 Indeed, as has been noted, such parallel interpretations

121. 550 U.S. 330 (2007) (holding that a New York state ordinance forcing private waste management companies to deliver waste to a public facility did not discriminate against interstate commerce).

122. Id. at 342 (quoting General Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997)).

123. 553 U.S. 328 (2008) (holding that the State of Kentucky does not engage in unconstitutional discrimination against interstate commerce by exempting the interest on its bonds from residents' taxable income while taxing the interest earned on the bonds of other states).

124. Id. at 337-38 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988)).


126. See Ruth Colker & James J. Brudney, Dissenting Congress, 100 Mich. L. Rev. 80, 117 (2001) (noting the "rich informality" of Congressional information gathering as compared to the "structured record evidence" that is introduced in a court proceeding); Hanah Metchis Volokh, Congressional Immunity Grants and Separation of Powers: Legislative Vetoes of Federal Prosecutions, 95 Geo. L.J. 2017, 2031-32 (2007) (noting "Congress has an inherent power to conduct investigations in pursuit of its enumerated powers" and exploring the history of the use of such investigative power).

127. See supra notes 56-64 and accompanying text (discussing the Framers' notion of discrimination as reflected within the Commerce Clause); cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574 (1997) (noting that the definition of "commerce" is the same when applied by the Supreme Court in a dormant Commerce Clause case as it is when applied by Congress when acting pursuant to the affirmative Commerce Clause).
of the dormant and affirmative Commerce Clause have long characterized
the history of Commerce Clause jurisprudence. 128

II. PREEMPTION OF A NON-DISCRIMINATORY STATE TAX IS NOT A
"REGULATION OF . . . COMMERCE AMONG THE SEVERAL STATES"

In instances in which a state tax is not discriminatory within the mean­
ing of the Commerce Clause, there is no basis for a congressional preemp­
tion of that tax on the grounds that the state has engaged in economic pro­
tectionism. 129 Instead, the question is whether the state tax can be otherwise
preempted under the Congress’s substantive, textual power to "regulate . . .
commerce among the several states." 130

A. The Commerce Clause Cases, 1937-1995

This Article previously discussed the Supreme Court cases that pre­
ceded the Court’s consideration of the federal “New Deal” legislation. 131
Those early Court cases evaluated the permissibility of substantive Con­
gressional legislation under the Commerce Clause based on whether the
legislation was directed at wholly intrastate activity or, alternatively, “di­
rectly” or “indirectly” impacted interstate—as opposed to intrastate—
commerce. 132 The Court’s more liberal, modern approach to evaluating such
legislation under the Commerce Clause began in 1937 with NLRB v. Jones
& Laughlin Steel Corp. 133 in which the Court upheld the National Labor
Relations Act. 134 The Court’s New Deal cases continued in United States v.
Darby, 135 where the Court upheld the Fair Labor Standards Act (FLSA), 136
including minimum wage and maximum hour requirements as applied to
private employees and employers, and in Wickard v. Filburn, 137 often

128. See supra notes 83-96 and accompanying text.
129. But see the discussion of the issue of “fair apportionment,” infra notes 291-94
and accompanying text.
130. U.S. CONST. art I, § 8, cl. 3.
131. See supra Section I.B.
132. See United States v. Lopez, 514 U.S. 549, 554-55 (1995); see supra notes 83-87
and accompanying text.
133. 301 U.S. 1, 37 (1937).
(2006)).
135. 312 U.S. 100 (1941).
137. 317 U.S. 111 (1942).
thought to be the furthest extension of Congress’s Commerce power.\textsuperscript{138} In \textit{Wickard}, the federal law that was upheld limited the wheat that a farmer grew for his own consumption, despite the fact that the regulated activity was entirely local and arguably not “commerce.”\textsuperscript{139} \textit{Wickard} concluded that this private activity was subject to Commerce Clause regulation because the aggregation of similar such private activities, if left unregulated, could have a “substantial effect” on interstate commerce.\textsuperscript{140}

The Supreme Court’s broad New Deal holdings found later application in two cases upholding the Civil Rights Act of 1964, which prohibited racial discrimination in places of public accommodation. In those cases, \textit{Katzenbach v. McClung}\textsuperscript{141} and \textit{Heart of Atlanta Motel, Inc. v. United States},\textsuperscript{142} the Court concluded that a restaurant and hotel were subject to Commerce Clause regulation under the substantial effects test because, in the case of the restaurant, interstate supplies were consumed,\textsuperscript{143} and in the case of the hotel, persons traveling from other states were frequently offered lodging.\textsuperscript{144}

However, even as the Court was extending its broad Commerce Clause holdings in the Civil Rights cases, it began the process of narrowing these precedents, particularly in the instance of Congressional regulation directed not at private commercial activity, but at activity undertaken by the states “as states.” In 1968, in \textit{Wirtz v. Maryland},\textsuperscript{145} the Court extended FLSA to state and local workers employed at schools, hospitals, and institutions. The Court was sensitive to the Tenth Amendment issue, but stated that “valid general regulations of commerce do not cease to be regulations of commerce because a State is involved” and that “if a state is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.”\textsuperscript{146} Seven years later, in \textit{Fry v. United

\textsuperscript{138} See, e.g., United States v. Lopez, 514 U.S. 549, 560 (1995) (citing \textit{Wickard} as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity”).

\textsuperscript{139} \textit{Wickard}, 317 U.S. at 125.

\textsuperscript{140} \textit{Id.} at 128-30. During the New Deal era, the Court also held that Congress could validate a state tax that would otherwise be impermissibly discriminatory against interstate commerce because the Commerce Clause allows Congress to burden or even “prohibit” interstate commerce “subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states.” Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946).

\textsuperscript{141} 379 U.S. 294 (1964).

\textsuperscript{142} 379 U.S. 241 (1964).

\textsuperscript{143} Katzenbach, 379 U.S. at 299-301.

\textsuperscript{144} Heart of Atlanta Motel, Inc., 379 U.S. at 252-53.


\textsuperscript{146} Wirtz, 392 U.S. at 196-97.
States,"147 the Court applied a similar, careful analysis to uphold the Economic Stabilization Act of 1970,148 which temporarily froze the wages of all workers, including state and local government employees.

Then, one year later, in 1976, in National League of Cities v. Usery,149 the Court struck down FLSA as applied to most state and local employees, and reversed Wirtz.150 The Court rejected the notion that the states could be regulated like private citizens under the Commerce Clause.151 The Court concluded that Congress has broad power to regulate private citizens, but stated that "the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce."152 The Court stated that the law could not stand because it would "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."153

After Usery, federal courts wrestled with the "traditional government functions" test. Questions arose as to whether certain activities were traditional or integral state functions, including those that could be performed by either the states or private citizens, such as, for example, the operation of an airport, performance of solid waste disposal, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility, and provision of in-house domestic services for the aged and handicapped.154 Therefore, in Garcia v. San Antonio Metropolitan Transit Authority,155 the Court overruled Usery, and applied the provisions of FLSA to public workers.156 Garcia rejected as "unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral'
or "traditional." The Court vote in both *Usery* and *Garcia* was five-to-four, with Justice Blackmun changing sides. In his dissent in *Garcia*, Justice Rehnquist, who authored the majority opinion in *Usery*, stated that *Usery* represented "a principle that will, I am confident, in time again command the support of a majority of this Court." The Court also observed that

"[t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be."

As the Court noted, in critique of the stricken judicial rule from *Usery*, "[m]any governmental functions of today have at some time in the past been non-governmental."

### B. The Commerce Clause Cases Subsequent to 1995

In the aftermath of *Usery* and *Garcia*, the Court re-articulated the rule in *Garcia* as being one that allows the states to be made subject to a federal regulation "of general application"—a regulation that applies equally to the states as it would to private actors. In two subsequent cases, *South Carolina v. Baker* and *Reno v. Condon*, the Court, consistent with *Garcia*,

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157. *Id.* at 546-47.

158. Justice Blackmun wrote the decision for the five-to-four majority in *Garcia*. 469 U.S. at 528. Previously, he provided the decisive fifth vote in *Usery*, and explained his vote to join the five-to-four majority in a concurrence. 426 U.S. at 856 (Blackmun, J. concurring).

159. 469 U.S. at 580 (Rehnquist, C.J., dissenting).

160. *Id.* at 543-44.

161. *Id.* at 546.

162. *Id.* (quoting Helvering v. Gerhardt, 340 U.S. 405, 427 (1938) (Black, J., concurring)).

163. See FERC v. Mississippi, 456 U.S. 742, 758-59 (1982) (stating "National League of Cities, like *Fry v. United States*, 421 U.S. 542 (1975), presented a problem the Court often confronts: the extent to which state sovereignty shields the States from generally applicable federal regulations"); see *id.* at 759 (distinguishing such situations from one in which the federal government "attempts to use state regulatory machinery to advance federal goals").

upheld federal laws of "general application" that, respectively, prohibited States from issuing unregistered bonds and regulated the disclosure of driver information. It is to be noted that this post-Garcia judicial approach generally suggests a broad scope for most forms of federal regulation vis-à-vis the states. However, the general application standard is apparently limiting in the instance of a Congressional attempt to preempt a state tax. The imposition of a state tax is not an action private citizens can perform and therefore cannot be impacted by a federal law of general application.

Further, while Garcia was based on the general inability to delineate "integral" and "traditional" government functions in the large majority of cases where the question is difficult, there is no question that the imposition of a state tax is an integral and traditional government function, as Alexander Hamilton himself suggested in the Federalist Papers.

Since Garcia, the Court has decided two sets of cases that revisit the state sovereignty concerns of Usery, both of which announce principles that rein in the federal Commerce power. In the first set of cases, New York v. United States and Printz v. United States, the Court considered federal laws directed at the states that were not laws of general applicability, but rather instances where Congress sought to "commandeer" state employees.

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166. See generally Baker, 485 U.S. at 514-15; Reno, 528 U.S. at 151. Reno noted that Congress may regulate the States by means of "generally applicable" laws, or laws that apply to individuals as well as States, and concluded that the statute in question was generally applicable as it "regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce." Id. Baker concluded that Congress could require the states, like private actors, to issue bonds in registered form. 485 U.S. at 511-15; see id. at 529-30 (Rehnquist, C.J, concurring) (referencing the "well supported conclusion" that the statute in question would have only a de minimis effect on the state's ability to raise debt capital and upon the manner in which the state would raise this capital).
167. Garcia posited that the primary protections to be afforded to the states under the Tenth Amendment in such cases would derive from the operation of the "national political process," a process that might fail in any given instance. 469 U.S. at 554-55. The four-Justice dissent vigorously disagreed with this view. Id. at 564-67 & nn.7-11. In Baker, the state challenging the federal statute asserted that the political process had failed, a claim that the Court rejected. 485 U.S. at 513. But Baker, like Garcia, refused to specify under what circumstances the political process will be deemed to have failed, see id., and this standard was not referenced in the later case, Reno v. Condon, 528 U.S. 141 (2000). Further, unlike in the case where a statute is one of general application that affects the interests of private citizens equally, there is no reason to assume that the political process will adequately protect the states in the instance of a preempted state tax. See supra notes 28-33 and accompanying text.
168. See supra note 23 and accompanying text.
169. See supra notes 3, 9-11, 55 and accompanying text.
into federal service. The law struck down in *New York* required the States' legislatures to develop a plan to dispose of low-level radioactive waste and to take title to and possession of the waste if the state did not develop a plan by a certain date; the law struck down in *Printz* required state police to perform background checks and other activities in connection with gun purchases. In striking down the latter law, *Printz* relied upon the analysis in *New York*, stating that "[t]he Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens." Although the preemption of a state tax does not effect a "commandeering" of state employees within the meaning of *New York* and *Printz*, it is significant that in such tax preemption cases the federal law is not one of general application, similar to the facts in *New York* and *Printz*. Also, the federal displacement of state tax revenues raises accountability concerns similar to those that were deemed significant in *New York* and *Printz*.

In the second set of cases, *United States v. Lopez* and *United States v. Morrison*, the Court revisited its New Deal and Civil Rights cases, in each case striking down a Congressional attempt to regulate private intrastate activity on the theory that the federal regulation invaded the realm of state sovereignty. In *Lopez*, the Court struck down a law that sought to make it a federal offense for an individual to knowingly possess a firearm at a place that the individual knows or has reasonable cause to know is a school zone. In *Morrison*, the Court struck down a law that would have provided a federal civil remedy for victims of gender-based violence. In both cases, the Court concluded that the non-economic intrastate activity regulated was not commerce and did not "substantially affect" commerce, and that, therefore, the activity was not within the scope of the Commerce Clause.

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172. 505 U.S. at 150-54. In ruling as it did, the Court noted that "where the Federal Government directs the states to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169.

173. 521 U.S. at 902-03. In so ruling, the Court stated that: [b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. *Id.* at 930.


175. *See supra* notes 172, 173 and accompanying text.


177. 529 U.S. 598 (2000).

178. 514 U.S. at 567.

179. 529 U.S. at 627.

180. In *Lopez*, the Court concluded that the criminal statute in question "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might
As with New York and Printz, it remains to be considered by analogy what the implications of Lopez and Morrison are with respect to a Congressional preemption of a non-discriminatory state tax since neither Supreme Court case evaluated that specific issue. Significantly, both Lopez and Morrison expressly rejected the idea that Congress has plenary power to decide the subject matter that is within the breadth of its Commerce power and also the manner in which that subject matter is to be regulated—even in the instance of federal regulation of private activity where Congressional authority is at its apex. This is important because, although the U.S. Supreme Court has not previously addressed under what circumstances Congress may preempt a non-discriminatory state tax, state courts have previously opined—in cases that generally pre-date Lopez and Morrison—that the analysis to be applied in such cases is mere deference to Congress’s plenary Commerce Clause power.

Rather than defer to Congress’s plenary authority, both Lopez and Morrison stated that, applying the principles of the Constitution, it was for the Court to inquire whether the intrastate focus of the federal regulation was “activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate com-

define those terms” and was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” 514 U.S. at 561 (emphasis added). In Morrison, the Court stated that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity” and “in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic.” 529 U.S. at 613.


182. See Lopez, 514 U.S. at 617 (“[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so” (quoting Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc., 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)); Morrison, 529 U.S. at 614 (same); see also Morrison, 529 U.S. at 614 (“[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court” (quoting Lopez, 514 U.S. at 557, n.2 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964) (Black, J., concurring))). Compare Wickard, 317 U.S. at 124 (“The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.” (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942))).

merce.” However, the imposition of a state tax is not an act of “commerce,” and it is clear that the term “commerce” as set forth in the Commerce Clause was not intended to include a reference to the imposition of a state tax.

In a later case, Gonzalez v. Raich, the Supreme Court clarified the “substantial effects” test as applied in Lopez and Morrison. Raich held that a federal statute banning the possession, obtaining, and manufacturing of cannabis preempted a state statute that permitted such actions when undertaken for personal medical use. Raich re-visited the Court’s prior holding in Wickard, and distinguished Morrison and Lopez, ruling that even non-commercial activities that are “purely local” can be made subject to Commerce Clause regulation when they “are part of an economic ‘class of activities’” that in the aggregate have a substantial effect on commerce. Raich stated that this broader aggregation of commercial and non-commercial activity permits Congress to determine whether the “‘total incidence’ of a practice poses a threat to a national market.” Further, the Court specified that for purposes of its test, “economic” activities consist of “the production, distribution, and consumption of commodities.” However, unlike in Raich, the imposition of a state tax cannot be aggregated with private commercial activity for purposes of the Court’s substantial effects test, because the imposition of a state tax will never be part of an “economic ‘class of activities’” within the meaning of this test, nor will such taxes ever be part of the “‘total incidence’ of a practice.”

Although Lopez and Morrison specifically evaluated the application of the “substantial effects” test, the two cases also stated that apart from such fact patterns, Congress has the ability to “regulate the use of the channels of interstate commerce” and “to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce.” However, the preemption of a state tax constitutes the regulation of the “states as states” and not the regulation of a “channel” or an “instrumentality” of interstate commerce. Further, the Court’s case citations in support of these

184. Lopez, 514 U.S. at 561; see also Morrison, 529 U.S. at 614.
185. See supra note 19 (referencing law review articles with detailed analysis as to the meaning of the term “commerce” as set forth within the Commerce Clause).
186. 545 U.S. 1 (2005).
187. Id. at 15, 22.
188. Id. at 17 (quotes omitted) (citing Perez v. United States, 402 U.S. 146, 151 (1971) and Wickard, 317 U.S. at 128-29).
189. Id.
190. Id. at 25-26 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).
191. Id. at 17.
193. See supra notes 23 and 145-52 and accompanying text.
tests make clear that the Court’s verbiage was merely referencing its prior Commerce Clause jurisprudence, including cases where Congress sought to regulate private activity and one case, the *Shreveport Rate Cases*, where the Court sanctioned a Congressional statute that preempted a state statute that reflected patent discrimination in favor of in-state commercial interests. It does not make sense to read the *Lopez* and *Morrison* dicta on the regulation of the channels and instrumentalities of interstate commerce any more broadly than a reference to the Court’s prior cases because, among other things, such an interpretation would be at odds with the actual *Morrison* and *Lopez* case holdings. Further, the Court’s prior cases do not authorize the preemption of a non-discriminatory state tax.

In his concurrence in *Raich*, a six-to-three decision, Justice Scalia emphasized that Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. As the imposition of a state tax is not itself part of interstate commerce, a preemption of a non-discriminatory state tax would


196. The *Shreveport Rate Cases* evaluated Congress’s attempt to regulate a state’s intrastate shipping rates as charged to a railroad, an attempt to rectify a situation in which the state was charging more per mile for an interstate shipment of commodities than for intrastate shipments. *Id.*; see infra note 340, and accompanying text.

197. See, e.g., Jesse H. Choper, *Taming Congress’s Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 760 (2003) (noting that were it construed broadly, the “channels” test would counter-intuitively threaten “the very results that *Lopez* and *Morrison* fear”).

198. See generally discussion supra Part II.

199. Gonzalez v. Raich, 545 U.S. 1, 33-34 (Scalia, J., concurring); see id. at 22 (concluding that “[t]hus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce . . . among the several States’” (quoting U.S. Const. art. I, § 8, cl. 3)).
therefore need to be justified under this Clause. However, the preemption of a state tax is not permissible under the substantial effects test because the imposition of a state tax cannot be aggregated with private commercial activity as would be required for purposes of the application of this test. Also, Congress’s general ability to regulate the channels or instrumentalities of interstate commerce—private activity—does not confer the ability to preempt a non-discriminatory state tax.

Indeed, if one were to somehow conclude that the imposition of a state tax were the type of activity or conduct that could be subject to the substantial effects test, then the application of this test would apparently result in the counter-intuitive conclusion that virtually every state tax could be preempted by Congress since taxes are fundamentally economic in their result, and consistent with Wickard and Raich, even small in-state economic impact can have the requisite “substantial effect” on interstate commerce. The Congressional authority to preempt state taxes that merely impact the channels or instrumentalities of interstate commerce—problematically—would be similarly broad.

More fundamentally, the Framers did not intend that the Necessary and Proper Clause would be used in a manner that is “repugnant . . . to the powers . . . assigned to the States,” as such usage would not be “proper.”

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200. See supra notes 184-91 and accompanying text.
201. See supra notes 192-98 and accompanying text.
202. See Michael J. McIntyre, Thoughts on the Future of the State Corporate Income Tax, 25 ST. TAX NOTES 931 (2002) (noting that the states’ personal income taxes and sales taxes could likely be abolished under a test allowing for the preemption of a state tax imposed upon interstate commerce, as these taxes affect interstate commerce, and that the states’ property taxes could possibly be preempted as well). McIntyre was responding to suggestions made by Professor Kirk J. Stark. Id.; cf United States v. Morrison, 529 U.S. 598, 613 (2000) (stating if “Congress could regulate any activity that it found was related to the economic productivity of individual citizens . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.” (quoting United States v. Lopez, 514 U.S. 549, 564 (1995))).
203. See supra notes 202.
204. Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 DUKE L.J. 267, 299-300 (1993) (quoting the comments of Constitutional delegate Fisher Ames shortly after the Constitution’s ratification); see Printz v. United States, 521 U.S. 898, 923-24 (1997) (“When a ‘La[w] . . . for carrying into Execution’ the Commerce Clause violates [other Constitutional principles], it is not a ‘La[w] . . . proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] act[t] of usurpation’ which ‘deserve[s] to be treated as such.’” (emphasis in original) (quoting THE FEDERALIST No. 33, supra note 9, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1999))); United States v. Comstock, 130 S.Ct. 1949, 1967-68 (2010) (“It is of fundamental importance to consider whether essential attributes of federalism embodied in the Constitution are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor
Indeed, in the Federalist Number 33, Hamilton evaluates the breadth of the Necessary and Proper Clause and concludes in his penultimate statement that, despite this Clause, “the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports.”

Focus on Hamilton’s comments in the Federalist logically permits the historical analysis in this Article concerning Congress’s power to engage in substantive regulation under the Commerce Clause to be brought full circle. In general, in the Court’s Commerce Clause cases leading up to and including Lopez and Morrison—beginning with the Court’s seminal Commerce Clause case, Gibbons v. Ogden—the Court has evaluated the power of Congress to displace a non-protectionist state statute by evaluating whether the area of law addressed by the statute is one delegated to Congress, one reserved to the states, or an area to be concurrently regulated by both Congress and the states. In those latter cases of concurrent regulation where most affirmative Commerce Clause cases reside, federal law nearly always stands supreme, but Morrison and Lopez evaluated fact patterns that were in the middle classification, where the regulatory power at issue was reserved to the states. Situations in which Congress seeks to preempt a state tax likewise fall into this middle classification of state supremacy and are not circumstances where federal-state concurrent power allows for federal preemption, as only a state can impose a state tax.

Notably, apart from their specific holdings, the Supreme Court’s two sets of post-1995 Usery-like cases, New York and Printz, and Lopez and Morrison, each emphasized the importance of a separate realm of regulation that is sovereign to the states. For example, in New York, the Court noted suggesting that the power is not one properly within the reach of federal power.”) (Kennedy, J., concurring); see also Gary Lawson, A Truism with Attitude: The Tenth Amendment in Constitutional Context, 83 NOTRE DAME L. REV., 469, 472 (2008) (“[Federal] [l]aws . . . violate the Tenth Amendment when they interfere with the federalist structure of government in such a manner and to such an extent that they are not necessary and proper for carrying into Execution national power.”) (quotes omitted).

205. THE FEDERALIST No. 33, supra note 9, at 173 (Alexander Hamilton); see also supra notes 10-11, 55 and accompanying text.

206. 22 U.S. (9 Wheat.) 1 (1824); see supra notes 69-77.

207. Gibbons recognized the possibility for conflict in the latter such cases because “when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.” 22 U.S. (9 Wheat.) at 199-200.

208. See supra note 23; see also Gibbons, 22 U.S. (9 Wheat.) at 199 (recognizing that unlike in the case of federal-state concurrent jurisdiction, “[t]he power of taxation is indispensable to [the states’] existence, and is a power, which, in its own nature, is capable of residing in, and being exercised by, different authorities [the state and federal Government] at the same time”).
that there is a "constitutional line" that separates and distinguishes between permissible exercises of state and federal power;\textsuperscript{209} whereas \textit{Printz} stated that the Constitution establishes "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."\textsuperscript{210} In addition, both \textit{Lopez} and \textit{Morrison} repeatedly emphasized that the Constitution requires a distinction between what is truly national and what is truly local.\textsuperscript{211} State taxation is in the realm of what is truly local—it is the epitome of such actions—and in cases in which the state tax at issue is not protectionist within the meaning of the Commerce Clause, it is not apparent that Congress has any authority under the Commerce Clause to preempt that tax.

III. CONGRESSIONAL AND JUDICIAL FORAYS INTO STATE TAXATION PREEMPTION

The two previous Parts of this Article note the Supreme Court's analytic progression in its recent affirmative and dormant Commerce Clause cases, an effort intended to bring the Court's jurisprudence into closer alignment with the text and purpose of the U.S. Constitution.\textsuperscript{212} However, there are pre-existing Congressional preemptions of state taxes that were enacted when the Court's affirmative Commerce Clause cases suggested a more permissive approach to federal regulation. Also, there are earlier dormant Commerce Clause cases that themselves effect a judicial nullification of a state tax and/or include dicta that specifically reference the prospect for federal preemption of a state tax. It is therefore important to evaluate the significance of these prior statutory and judicial precedents. In gen-

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\item \textsuperscript{209} 505 U.S. 144, 155 (1992).
\item \textsuperscript{211} United States v. Morrison, 529 U.S. 598, 608, 615-16 (2000) (citation omitted); United States v. Lopez, 514 U.S. 548, 557, 567-68 (1995) (citation omitted). Sensitivity to state governmental functions has also characterized the Court's recent dormant Commerce Clause cases. See United Haulers Ass'n, Inc., v. Onieda-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 344 (2007) ("We should be particularly hesitant to interfere with the Counties' efforts under the guise of the [dormant] Commerce Clause because waste disposal is both typically and traditionally a local government function") (citation omitted); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 341-42 (noting municipal bond financing, a practice that dates back to the seventeenth century and that plays a vital role in municipal finance, is a traditional government function to which the Court's dormant Commerce Clause deference is to apply with "even greater force" than the public waste disposal at issue in United Haulers, 550 U.S. 330); see also United Haulers, 550 U.S. at 342-43 ("But States and municipalities are not private businesses—far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens . . . . These important responsibilities set state and local government apart from a typical private business.") (citation omitted).
\item \textsuperscript{212} See supra Parts I, II.
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eral, these legal precedents divide into two groupings: (1) statutes and cases that address what are generally Due Process concerns and (2) statutes that are focused on the elimination of an asserted form of discrimination in which the effective claim is not that the states have engaged in some form of economic protectionism, but rather have acted to tax one industry group less favorably than another industry group.

A. Public Law 86-272; Quill Corp. v. North Dakota ex rel. Heitkamp; and the Address of Due Process Concerns

1. Public Law 86-272

Public Law 86-272 was the first general Congressional preemption of state tax. The law prohibits a state from imposing a net income-based tax on a corporation when the corporation limits its contact with the taxing state to the in-state solicitation of sales of tangible personal property to be delivered into the state from a location outside the state.

Public Law 86-272 was enacted in response to the Supreme Court's decision in Northwestern States Portland Cement Co v. Minnesota ("Portland Cement"), in which the Supreme Court held that a state could impose a non-discriminatory, fairly-apportioned income tax as to a corporation doing business in the state merely through in-state sales activity. The holding in Portland Cement had been presaged, if not effectively delivered, in the Court's prior cases and reflected an emphatic rejection of the Court's once-held but previously-discarded notion that a state could not tax, or regulate, anything other than "intrastate" commerce—generally, manufacturing, production, and mining. The property sold in Portland Cement was produced outside the taxing state, where it was merely sold and delivered.

Congress took issue with the result in Portland Cement, concluding that, despite the decision, the law remained unsettled. Congress also concluded that, whether or not the Court's result reflected prior case law, it

214. See supra note 5 and accompanying text.
217. Id. at 452.
218. Id. at 459-61 (discussing the Court's prior cases and stating, among other things, that "[w]e believe that the rationale of these cases, involving income levies by States, controls the issues here"); see supra notes 83-91 and accompanying text.
219. Id. at 454-57.
220. See H.R. Rep. No. 86-936, at 2 (1959) (stating, that, despite the decision, by a six-to-three vote, "it may be argued that the Supreme Court has not yet decisively disposed of the precise question of whether solicitation alone is a sufficient activity for the imposition of a State income tax upon an out-of-state business").
would come as a surprise to smaller companies that would—even if they were aware of it—not be able to sufficiently track their sales such that they could reasonably comply. The general Congressional notion was that the case effected a practical discrimination against these smaller companies that would, because of their compliance issues, be disadvantaged vis-à-vis their larger competitors, and that Congress should therefore act to eliminate this disadvantage. However, Public Law 86-272 was generally worded, and its application was not limited to smaller companies. A primary problem to be solved by the Act—permitting smaller companies time to adjust to the reasoning of Portland Cement—was something that would resolve itself in time. Consistent with this fact, Public Law 86-272 was described as “temporary” and as a “stop-gap” measure in the Act’s legislative history, but the law was passed without the inclusion of a sunset date.

Elsewhere, this Author has commented in more detail on the problematic history and practical aftermath of Public Law 86-272. Though the law was the first general preemption of a state tax, and therefore represented a highly significant Constitutional moment, the law was introduced, debated, and passed in less than six months. Though the law was claimed to be

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221. The Act’s legislative history, albeit brief, refers multiple times to the cost of compliance that would potentially be imposed upon smaller businesses, which would have difficulty with the “maintenance of records” and would have to retain “legal counsel and accountants . . . familiar with the tax practice of each jurisdiction.” H.R. Rep. No. 86-936, at 2 (1959); see also S. Rep. No. 86-658, at 2-4 (1959); In re Disney Enters., Inc. v. Tax Appeals Tribunal, 888 N.E.2d 1029, 1037 (NY 2008) (discussing the Act’s legislative history). A Congressional commission that studied the Act shortly after its enactment stated that the problem was that smaller businesses were disadvantaged because they possessed, not “electronic” equipment, like “larger companies,” but rather only the “simplest of machinery such as adding machines.” H.R. Rep. No. 88-1480, at 91 (1964).

222. See generally S. Rep. No. 86-658, at 2-4 (1959); see also Timothy J. Sweeney, State Taxation of Interstate Commerce Under Public Law 86-272: “A Riddle Wrapped in an Enigma Inside a Mystery,” 1984 BYU L. Rev. 169, 173-74 (1984) (stating that one perceived problem was that “expanded state taxation of interstate commerce would discriminate against small business vis-à-vis big businesses” and that therefore “Congress sought a remedy that would allow small businesses to compete effectively with large businesses”).

223. See 15 U.S.C. §§ 381-384; see also H.R. Rep. No. 88-1480, at 438 (stating that “the jurisdictional line drawn [by Public Law 86-272] is not one that distinguishes between the large and the small”).

224. Compare S. Rep. No. 86-658, at 4, 438 (1959) (referring to the law as a “temporary” or “stop gap” measure), with 15 U.S.C §§ 381-384 (text of the law including no sunset date). The House and Senate had drafted competing bills, the former with a sunset date and the latter without one; the resulting conference committee chose the Senate bill, in part because “[u]nlike the House bill, the Senate bill contains no time limitation on the effectiveness of the immunity granted in the bill.” H.R. Rep. No. 86-1103, at 4 (1959) (Conf. Rep.).

225. See Fatale, supra note 36.

226. See Paul J. Hartman, Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 1008 (1962) (stating that “[e]ven those who in the main favor congressional intervention have criticized the technical draftsmanship exhibited in the act
necessary to assist smaller companies, it was lobbied for by bigger companies, and a Congressional study done after the law’s enactment—the type of evaluation that would typically precede a law’s enactment—concluded that the law mostly benefited these larger companies. Consequently, applying the notion of discrimination employed by the Act—which does not encompass the type of protectionist acts that the Commerce Clause was directed towards—the law actually discriminates against the very taxpayers that it was supposed to assist.

Congress had thought that larger companies would not restructure their operations to take advantage of the law’s provisions, and that, therefore, the bill would likely not be very costly to the states. In fact, the amount of tax planning that was brought about by Public Law 86-272, in particular over time, has been enormous. And the fact that the law operates largely through definitions that are each subject to multiple interpretations means that the law has resulted in a significant amount of costly state litigation. Public Law 86-272, though stated to be “temporary,” was

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227. See Fatale, supra note 36, at 474-84. The later Congressional report concluded, among other things, that the conventional view that the law would benefit “primarily . . . small- and medium-sized businesses” does not “receive support from the data now available.” H.R. REP. NO. 88-1480, at 426.

228. See infra note 285 and accompanying text; Fatale, supra note 36, at 479-84.

229. A Congressional Committee report evaluating the law after its enactment noted Congress’s view that “if small and medium-sized taxpayers would be the primary beneficiaries of the statutory policy, it would appear that the States would not gain significant amounts of revenue even if permitted to impose income taxes on the basis of the activities protected by the statute.” H.R. REP. NO. 88-1480, at 422. That same report suggested that Congress did not foresee that larger businesses—which because of their resources are better able to engage in tax planning—would change their methods of doing business, eliminating in-state “physical” contacts, to take advantage of the Act’s provisions. See id. at 425 (stating that the law’s enactment was not “expected to be the signal for widespread changes in methods of doing business”).

230. Charles E. McLure, Jr., Legislative, Judicial, Soft Law and Cooperative Approaches to Harmonizing Corporate Income, 14 COLUM. J. EUR. L. 377, 426 (2008) (“The effect of P.L. 86-272 has been to create an open invitation to tax planning, [to] undermine state revenues, and [to] give interstate sellers a competitive advantage over intrastate sellers.”); William F. Fox & John A. Swain, The Federal Role in State Taxation, A Normative Approach, 60 NAT’L TAX J. 611, 622 (2007) (noting Public Law 86-272 “has been widely criticized on tax policy grounds” and observing that the law “has the effect of excluding otherwise taxable income from the tax base, thus violating principles of equity and neutrality” and also “encourages tax planning and the associated economic efficiencies”—for example, by encouraging “firms to artificially minimize their activities in market states”); see also Charles F. Barnwell, State Tax Planning—What’s Left?, ST. TAX TODAY, Dec. 21, 2009, at 242-2 (noting specific past state tax planning techniques effected using the provisions of Public Law 86-272 and suggesting some future such tax planning techniques).

231. See, e.g., Fatale, supra note 36, at 439-40, 477.
never repealed—nor has there ever even been Congressional consideration of such repeal. The continuing existence of the law suggests, among other things, that big business and the states do not stand on equal footing in the federal legislative process, at least when it comes to state taxes.

That Congress may have relied ""upon incomplete information'" in enacting Public Law 86-272 does not, without more, suggest that the law is constitutionally questionable. Rather, the primary constitutional problem with Public Law 86-272 is that it is not premised in Commerce Clause concerns. There was no state-based economic protectionism or discrimination, as those terms are generally understood, that was addressed by the law. If one takes on faith that the law was intended to undo a practical discrimination effected by Portland Cement vis-à-vis smaller companies, nonetheless this discrimination is not discrimination within the meaning of the Commerce Clause. Indeed, Portland Cement specifically ruled that its holding only applied where the tax in question was non-discriminatory, as well as fairly apportioned. Further, Public Law 86-272 was not an example of Congress engaging in the regulation of "'commerce . . . among the several States.'" The law effected no regulation of private commercial actors, not even of states acting as commercial actors; the law merely effected a direct infringement of a sovereign state right, perhaps the most traditional and integral of all such rights, the right to impose taxes.

232. A Congressional committee established to evaluate state taxation after the enactment of the Act concluded in 1964 that the law was unexpectedly costly to the states, but—rather than recommending a repeal of the statute—instead recommended that Congress consider legislating with respect to the states' corporate income tax apportionment rules to minimize this costliness. See Fatale, supra note 36, at 488-90. This suggested subsequent legislation never occurred. Id. Professor Kathryn Moore analyzed the Congressional bills introduced with respect to multistate corporate taxation for the period 1971 through May 1996. See Moore, supra note 5, at 179. She found that from 1971 to 1982 "'each of the bills limited the percentage of multistate business income or capital that states could tax,"' id. at 195-96, and that from 1982 to May 1996, the only bills impacting state corporate income taxation related to "'worldwide unitary taxation."' Id. at 198-200 & n.241. The latter issue is not related to the enactment or operation of Public Law 86-272. See id. This Author is familiar with the Congressional history since 1996, and there have been no Congressional attempts to repeal Public Law 86-272 since that time.

233. See supra notes 30-33 and accompanying text.

234. Cf. South Carolina v. Baker, 485 U.S. 505, 513 (1988) (rejecting the state's claim that a federal statute governing bond issuances could be struck down as applied to a state on the theory that the national political process failed in its enactment of the statute as suggested by the fact that the law was "'imposed by the vote of an uninformed Congress relying upon incomplete information'").

235. Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959) ("We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.").

236. Id.

237. U.S. Const. art. I, § 8, cl. 3.
Public Law 86-272, rather than having any logical Commerce Clause predicate, was in fact founded in Due Process concerns, i.e., concerning the fairness of applying the Supreme Court’s holding in *Portland Cement* to smaller taxpayers, especially given their presumed limited ability to comply. A high-profile dormant Commerce Clause case decided eight years later, *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, discussed in the next Subpart, would expressly suggest on similar facts pertaining to the states’ interstate application of sales and use taxes that the lack of Due Process notice and fairness could also raise a Commerce Clause issue. But Public Law 86-272 and *Bellas Hess* came about during the post-New Deal era when virtually all private activity and state regulation as to such activity was believed to be a potential subject of Commerce Clause regulation—logic that the Supreme Court has since rejected. And both legal exercises reflect a “free market” approach to the Commerce Clause, which also is an approach that the Court has since discarded.

Before turning to *Bellas Hess* and its troubled offspring, *Quill Corp. v. North Dakota* ex rel. *Heitkamp*, it is worth noting some of the obvious difficulties with legislating to address Due Process concerns under the guise of the Commerce Clause—all of which are suggested by Public Law 86-272. As discussed in Part I of this Article, the primary thrust of the Commerce Clause is to police state-based economic protectionism. In the classic case in which a state has engaged in protectionism, Congress could simply legislate to preempt that protectionist act. Significantly, a protectionist

238. H.R. REP. NO. 86-936, at 1-2 (1959) (citing “apprehensions” of “small and moderate size businesses” resulting from the decision in *Portland Cement*, in part due to the presumed higher tax compliance costs that would result from the holding in the case); S. REP. NO. 86-658, at 2-3 (1959) (noting that “[m]any small- and medium-sized firms” were “fearful of the cost of compliance” resulting from the holding in *Portland Cement*); see also S. REP. NO. 86-658, at 4 (1959) (noting that absent the legislation, smaller business might be inclined to abandon their interstate markets to the benefit of “larger businesses,” which would be better able to comply with the Court’s holding); supra notes 220-22 and accompanying text.

239. 386 U.S. 753 (1967).

240. See generally supra notes 133-44 and accompanying text (discussing the Court’s progression of cases up through its 1964 affirmation of federal legislation in two civil rights cases on Commerce Clause grounds).

241. See generally supra Part II.B (discussing the Court’s cases subsequent to 1985, during which time the Court struck down as unconstitutional several acts of Congress that were enacted pursuant to the Commerce Clause).


244. See, e.g., *Ariz. Pub. Serv. Co. v. Snead*, 441 U.S. 141, 149-51 (1979) (upholding Congress’s preemption of a New Mexico tax that discriminated against the production of electricity within the state’s borders for consumption outside the state).
state measure would not cease to be protectionist over time, so a Congress­

sional act eliminating the protectionist component of a state regulation

would be both consonant with and proportional to Congress’s Commerce

Clause authority. But Due Process fairness considerations are not so rigid.

For example, persons’ lack of knowledge of recent legal developments and

the absence of inexpensive technology to address such developments—the

bases for Public Law 86-272—are both issues that resolve themselves over

time. Addressing such issues pursuant to a Congressional act that preempts

a state tax, as was done in the context of Public Law 86-272, is overkill,
certainly once the issue has been resolved, even if the underlying motive is

initially appropriate. Also, effecting a state tax preemption through rigid

statutory language that, by necessity, relies upon static definitions only

compounds the problem because, unlike such statutory language, commer­
cial behavior is subject to change. 245 Furthermore, cost estimates with re­
spect to state tax preemptions are unlikely to accurately estimate long-term

state revenue costs, primarily because commercial behavior changes, and
therefore the federal rules may come to apply in unexpected ways. 246 The

converse to all of this is that, as Public Law 86-272 demonstrates, once a tax

break is conferred upon taxpayers, it is very difficult for federal legislators
to take back that break, in part because taxpayers grow to rely upon the
break, including through subsequent tax planning.

2. Quill Corp. v. North Dakota ex rel. Heitkamp

The judicial equivalent of Public Law 86-272 in the sales and use tax
area is the legal rule established by the dormant Commerce Clause case,
Quill Corp. v. North Dakota ex rel. Heitkamp. 247 While Public Law 86-272
dates back to 1959, during the time that the federal Commerce power was
accorded its broadest construction, Quill was more recently decided in
1992. 248 But that later date is deceptive because Quill primarily upheld the
logic set forth in the Court’s prior 1967 case, National Bellas Hess, Inc. v.

245. See supra note 37 (referencing the 2011 AT&T Mobility settlement, wherein a
successful class action was brought against the states for a tax refund on the basis that a 1998
federal law preempting the application of a state tax applied to a specific type of transaction
that did not exist at the time the law was enacted).

246. See supra note 37 (referencing the 2011 AT&T Mobility settlement). The AT&T
Mobility settlement was the result of the application of a 1998 federal law preempting certain
state taxes as applied to a very prominent type of transaction that, despite its later promi­
nence, did not exist at the time the law was enacted. This specific revenue cost therefore—
though large—was simply not predicatable at the time the law was passed.

247. 504 U.S. 298.

Department of Revenue of Illinois—a case that Quill acknowledged was decided before the Court moved on to its more modern Commerce Clause reasoning.

The decision in Bellas Hess prohibited the states from imposing a use tax collection duty on a mail order vendor where the vendor limits its contacts with the state to communications effected by mail and common carrier. Bellas Hess was based on a dual determination under the dormant Commerce Clause and Due Process Clause concerning whether a mail order vendor’s connection to a state was sufficient to justify a state’s attempt to collect use tax. The Due Process question was “whether the state has given anything for which it can ask return”—the longstanding Due Process inquiry that continues to be referenced in state tax cases today. As to the Commerce Clause question, the issue was whether the tax was “justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys”—a line of analysis taken from Freeman v. Hewit, a case that was effectively overruled in 1977 by Complete Auto Transit, Inc. v. Brady. Bellas Hess concluded that the state’s use tax collection duty as applied to a mail order vendor was not justified under these “closely related” questions and emphasized the particular Due Process-like burdens, fair notice and compliance difficulty, that arise in the context of this duty. The Court also noted that “it is difficult to conceive...
of commercial transactions more exclusively interstate in character than . . . mail order transactions”—a fairly transparent reference to the interstate-intrastate line of Commerce Clause reasoning that the Court had abandoned in its prior dormant Commerce Clause cases. In its denouement, the Court stated that “[t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements”—a line of reasoning that the Court no longer adheres to.

Although Quill reaffirmed the rule stated in Bellas Hess, the Court questioned whether the prior decision had become economically outdated. In particular, the Court concluded that when a mail-order house “is engaged in continuous and widespread solicitation of business within a State,” this vendor “clearly has ‘fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign.’” Further, the Court noted the observation in the lower state court decision that “advances in computer technology greatly eased the burden of compliance with [what was noted in Bellas Hess to be] a ‘welter of complicated obligations’” imposed by state and local taxing authorities. As to the Commerce Clause analysis, the Court concluded that, on such facts, “there is no question that . . . the use tax is related to the benefits [the vendor] receives from access to the State.” The Court’s one reference to the economic protectionism principle that is now understood to be the purpose underlying its dormant Commerce Clause inquiries was a suggestion that its decision was inconsistent with that principle.

posed to an income tax, because the tax reporting applies to individual, continuous sales. See id.

257. Id. at 759; cf. supra notes 88-96 and accompanying text.
258. Bellas Hess, 386 U.S. at 760; cf. supra notes 95-96 and accompanying text.
259. For example, the Court noted that it would not necessarily reach the same result if the question were one of first impression. See Quill Corp., 504 U.S. at 311. Also, the Court initiated its analysis by noting that the lower court, the North Dakota Supreme Court, had refused to follow Bellas Hess because it concluded that “the tremendous social, economic, commercial, and legal innovations of the past quarter-century have rendered [the Bellas Hess] holding ‘obsolet[e].’” Id. at 301 (quoting State ex rel. Heitkamp v. Quill Corp., 470 N.W.2d 203, 208 (1991)). Quill responded to this critique of Bellas Hess by observing that the Court would reverse the North Dakota decision, although it noted that “we agree with much of the state court’s reasoning.” Id. at 302.
261. Id. at 303 (quoting State ex rel. Heitkamp v. Quill Corp., 470 N.W.2d at 215).
262. Id. at 308.
263. Id. at 304 n.2 (noting the lower state court’s observation that, because the “very object” of the Commerce Clause is protection of interstate business against discriminatory local practices, it would be ironic to exempt [a mail order vendor] from this burden and thereby allow it to enjoy a significant competitive advantage over local retailers” (quoting Quill Corp., 470 N.W.2d at 214-15)); see John A. Swain, State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective, 45 WM. & MARY L. REV. 319, 339 (2003) (noting
Although the Court in Quill apparently concluded that there was no Due Process or Commerce Clause issue on the facts, it nonetheless reaffirmed Bellas Hess on Commerce Clause grounds. The Court's Commerce Clause analysis was adopted by only five of the eight justices that supported the result, but each of these eight justices agreed that the judicial notion of "stare decisis" supported the retention of the Bellas Hess rule, primarily because the mail order industry affected had grown in reliance on it. The Court also noted, similarly, that if it were to strike the constitutionality of Bellas Hess in hindsight, the likely result would be "retroactive application" of the taxes in question resulting in "substantial unanticipated liability for mail order houses." Persons who are familiar with the Supreme Court proceeding have stated that, as a practical matter, it was on this latter, single point that the Quill case turned.

The eight Justices who agreed with the Quill result—five in the majority, three in a concurrence—all approved of the fact that by eliminating the Due Process underpinnings of Bellas Hess, the Court was making clear that Congress could address the virtues of that pre-existing rule under the affirmative aspect of the Commerce Clause. The majority noted that, prior to Quill, Congress may have considered itself restricted in its ability to modify or eliminate the rule in Bellas Hess because it was uncertain whether Congress could encroach upon the Supreme Court's interpretation of the Due Process Clause. Although the Court seemed prepared to strike down the Bellas Hess rule under both the Due Process and the Commerce Clause, it noted that an evaluation of "the burdens" that are imposed by the states’

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how the Quill rule "puts physically present businesses at a competitive disadvantage by tilting the economic playing field in favor of mail-order businesses").

265. See Quill Corp., 504 U.S. at 317 (noting that "the Bellas Hess rule has engendered substantial reliance and has become part of the basic framework of a sizable industry"); id. at 320 (Scalia, J., concurring) (agreeing with this statement and noting that "the demands of the [stare decisis] doctrine are at their acme . . . where reliance interests are involved") (internal quotation marks omitted).
266. Id. at 318.
267. See id. at 332 (White, J., dissenting) (speculating that "fears about retroactivity are driving the Court's decision in this case"); see also Michael T. Fatale, Geoffrey Sidesteps Quill: Constitutional Nexus, Intangible Property and the State Taxation of Income, 23 Hofstra L. Rev. 407, 424 n.123 (1994) (noting the comment of one of Quill's attorneys: "You know why we won Quill? Because the Attorney General [of North Dakota] stood before the Court and when Justice O'Connor asked 'What do you intend to do about past liability,' said 'We're going to collect every nickel that we're entitled to.'"); Billy Hamilton, Remembrance of Things Not So Past: The Story Behind the Quill Decision, 59 St. Tax Today, March 14, 2011, at 807 (discussing the state attorneys' strategy with respect to the retroactivity issue in Quill, including their conclusion that the Court could have applied existing law and struck down Bellas Hess prospectively).
268. Quill Corp., 504 U.S. at 318, 320 (Scalia, J., concurring).
269. See id. at 318.
use tax collection duty is one that Congress is “better qualified to resolve.” The Court tipped its own view of the issue by stating that, if it “overruled” Bellas Hess, it would raise difficult questions concerning the retroactivity of the states’ use taxes, and that the “precise allocation” of this tax burden would be better resolved by Congress. It stated that “Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.”

The dicta in *Quill* suggesting that Congress has a role with respect to state taxation and in particular that Congress can determine “whether” the states may “burden” mail order-concerns with a duty to collect use tax has caused at least one leading academic to suggest that Congress can broadly preempt various state taxes. But attaching that level of significance to this single sentence seems unjustified when one considers the unique context in which *Quill* arose, and in particular the fact that the case likely turned on the Court’s unwillingness to apply retroactive taxes to companies that had relied upon the Court’s prior precedent. Indeed, it could well be that the Court’s language merely meant to clarify that Congress could ensure, in

270. See id.
271. See id. at 318 n.10.
272. Id. at 318; see also Walter Hellerstein, *Supreme Court Says No State Use Tax Imposed on Mail Order Sellers, For Now*, 77 J. TAX’N 120, 123-24 (1992) (stating that the Court’s language may have been intended, as a practical matter, to elicit a Congressional response).
273. See Walter Hellerstein, *A Primer on State Tax Nexus: Law, Power and Policy*, 55 ST. TAX NOTES 555 (2010) (testimony of Professor Walter Hellerstein Before the House Subcommittee on Commercial and Administrative Law of the Committee on Judiciary, Hearing on State Taxation: The Role of Congress in Defining Nexus, February 4, 2010) (citing the language from *Quill* quoted in the text as supporting his conclusion that, with respect to positing rules that would govern determinations of state tax nexus, Congress can do “just about anything”). Also, in support of this conclusion, Professor Hellerstein cites “the plenary scope of the Congressional commerce power” and his conclusion that the Court’s recent federalism cases “do not seriously inhibit the extensive power that Congress plainly possesses to deal with the problems raised by state taxes affecting interstate commerce, and, in particular, state tax nexus rules.” Id. at 6-8. But see supra note 182 and accompanying text. In an earlier article, Professor Hellerstein noted, as to this later point, that the Court’s recent federalism cases do not specifically pertain to state taxes, something that is undeniable, but which the Author would contend misses the thrust of what those cases portend in the state tax area. See generally Walter Hellerstein, *Federal Constitutional Limitations on Congressional Power toLegislate Regarding State Taxation of Electronic Commerce*, 53 NAT’L TAX J. 1307 (2000); see also supra note 20 (referencing earlier, similar Congressional testimony of Professor Hellerstein).
274. See Charles Rothfeld et al., *Quill: Confusing the Commerce Clause*, 3 ST. TAX NOTES 111 (1992) (attorney that filed an amicus brief in the case concludes *Quill* was “a political decision” responding to concerns about retroactivity and the practical consequences of overruling Bellas Hess and was not meant “to be taken very seriously”); see also Swain, supra note 263, at 341 (concluding *Quill* is really more of “a regulatory burdens case, not a tax case”).
addressing *Quill*, that retroactive taxes could not be collected, and that the future collection of sales and use taxes from out-of-state vendors was to be made only by states that had endeavored to simplify their taxes, consistent with *Quill*'s Due Process concerns. Any other interpretation would seem to be inconsistent with the Court's modern understanding of the Commerce Clause—an understanding that did not inform the result in *Bellas Hess* and that therefore is generally missing in *Quill*—including the notion that "'[i]t was not the purpose of the [C]ommerce [C]lause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business." 275 While this notion has been referenced by the Court only in its dormant Commerce Clause cases, the dormant and affirmative Commerce Clause are animated by identical purposes.

As a rule based in Due Process concerns, the *Quill* rule reflects all of the same problems as Public Law 86-272, discussed in the previous Subpart. 276 For example, the sales tax burden of compliance that formed the basis for the 1967 case, *Bellas Hess*, and that was noted to be less of a burden at the time of *Quill* in 1992, is even less of a burden today because, among other things, easily-accessible computer technology can sufficiently determine the taxes due in various jurisdictions. 277 Also, as it is a judicial rule and not a statute, the *Quill* rule does not consist of statutory terms that require definition, yet the rule consists of a nexus standard, "physical presence," that had not been previously mentioned in *Bellas Hess*. This newly-created "physical presence" standard quickly became the subject of extensive state tax planning and voluminous state court litigation 278—even out-

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275. See *Quill Corp.*, 504 U.S. at 310 n.5 (quoting Commonwealth Edison Co. v. Montana, 486 U.S. 609, 623-24 (1981)); see also supra notes 96, 116 and accompanying text (referencing similar statements in other Supreme Court cases).

276. See supra notes 243-46 and accompanying text.

277. See, e.g., Robert D. Plattner, Daniel D. Smirlock & Mary Ellen Ladouceur, *A New Way Forward for Remote Vendor Sales Tax Collection*, 55 ST. TAX NOTES 187 (2010) (quoting one large Internet vendor’s CEO as stating, "We collect and provide to each of the states the correct sales tax. There are vendors that specialize in this. . . . It’s not very hard.") (citation omitted); see also *Quill Corp.* v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 332 (1992) (White, J., concurring in part and dissenting in part) (stating, "[T]he costs of compliance with the [states’ use tax collection duty], in light of today’s modern computer and software technology, appear to be nominal.").

278. See Swain, supra note 263, at 339 (noting how *Quill* "encourages businesses to artificially structure themselves to avoid tax"); *Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part) (“Also very questionable is the rationality of perpetuating a rule that creates an interstate tax shelter for one form of business—mail-order sellers but no countervailing advantage for its competitors"). A recent Wall Street Journal article commented on how the large Internet company, Amazon, engages in specific tax-motivated practices that are lacking in any business justification to ensure that the company does not create the "physical presence" in a state that would cause it to lose the protection of the *Quill* "physical presence" safe harbor. See Stu Woo, *Amazon Battles States Over Sales Tax*, WALL
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side the sales tax area in which Quill itself was decided.\textsuperscript{279} And of course there is no better example than Quill as to how changing technology can magnify the tax implications of a static tax preemption, as Quill now protects a staggering amount of Internet sales from being subject to state tax—when there was effectively no such thing as Internet sales at the time that the case was decided.\textsuperscript{280} Quill also demonstrates the difficulties with eliminating a state tax preemption once a preemption has been created—as the Court itself was unwilling to overrule its twenty-five-year-old decision in Bellas Hess, given the fact that taxpayers had previously relied upon it.

3. The Address of Due Process Considerations

The purpose of the Commerce Clause, to police state-based economic protectionism, does not support the preemption of a state tax on Due Process grounds.\textsuperscript{281} Further, the text of the Commerce Clause, which allows the regulation of "commerce" among the states, does not support the preemption of a non-discriminatory state tax in any instance.\textsuperscript{282} Therefore, the enactment of Public Law 86-272 and the judicial pronouncement in Quill are both inconsistent with the Commerce Clause.

Neither Public Law 86-272 nor Quill are predicated on an attempt to prevent a state from favoring in-state interests over out-of-state interests and, conversely, both rules undo state law that otherwise would apply uniform, non-discriminatory rules to in-state and out-of-state interests. Public Law 86-272 was generally intended to protect smaller companies engaged in interstate commerce from the application of state taxes in a context in which it was presumed that they would not necessarily know the states' rule or be easily able to comply—a circumstance where these smaller companies were thought to be practically disadvantaged vis-à-vis their larger competitors.\textsuperscript{283} Quill reaffirmed the Bellas Hess rule that protected a specific type of interstate seller—generic mail order vendors without any in-state opera-

\textsuperscript{279} For a general discussion of the litigation activity in both the sales and income tax areas in the aftermath of Quill, see Michael T. Fatale, State Tax Jurisdiction and the Mythical "Physical Presence" Constitutional Standard, 54 TAX LAW. 105, 106 (2000).

\textsuperscript{280} A study by economists at the University of Tennessee concluded that the states will collectively lose $10.1 to $11.3 billion in sales tax for the 2012 tax year because of the rule in Quill. See Donald Bruce, William F. Fox & LeAnn Luna, State and Local Sales Tax Revenue Losses from E-Commerce, 52 ST. TAX NOTES 537 (2009).

\textsuperscript{281} See supra Part I.

\textsuperscript{282} See supra Part II.

\textsuperscript{283} See supra notes 220-22 and accompanying text.
tions—from the application of the states’ sales and use tax collection duties, a rule that was based on similar compliance concerns. Public Law 86-272 effectively backfired, generally favoring larger companies over smaller companies, whereas *Quill* created what may have turned into an unintended favoritism for certain mail order vendors, and later Internet vendors, at the expense of other similar vendors that merely pursued different business models. In any event, the goals reflected in Public Law 86-272 and *Quill*—whether they were achieved or not—are simply not the goals that the Constitutional Framers directed themselves towards in drafting the Commerce Clause.

The Supreme Court’s recent approach to the dormant Commerce Clause supports the conclusion that the preemption of a state tax based on Due Process considerations is inconsistent with the Commerce Clause. The Court has recently emphasized the policing of economic protectionism as the purpose of the Commerce Clause and has, for example, moved away

284. *See supra* notes 251-56 and accompanying text. *Quill* concluded that the Court’s prior decision in *National Bellas Hess v. Illinois Department of Revenue*, 368 U.S. 753 (1967), remained “good law.” 504 U.S. at 317. *Bellas Hess* pertained to “an out-of-state mail-order house,” *id.* at 301, and stood “for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier” could not be required by such state to collect sales or use tax. *Id.* at 311. The Court’s holding in *Quill* was justified in part by the fact that the Court presumed that the mail order industry had relied upon—and achieved “dramatic growth”—in part based upon its prior holding in *Bellas Hess*. *Id.* at 316-18.

285. The fact that Public Law 86-272 benefitted primarily larger companies—rather than the intended smaller companies—was apparent shortly after the law was enacted. *See*, e.g., H.R. Rep. No. 88-1480, at 428 (1964) (“[I]nsofar as the supporters of the statute believed that the law would be beneficial primarily to small businesses, they appear to have been mistaken.”); *id.* at 426 (“Among the supporters of Public Law 86-272, the view also seems to have been widely held that the protection given by the statute would be of value primarily to small- and medium-sized businesses. This view of the statute’s impact, however, does not receive support from the data now available.”). This unintended result followed in part because larger businesses, because of their size, are better able to engage in tax planning. *See supra* notes 230-31 and accompanying text. Also, some small businesses are not interstate in nature, and hence have no capacity to take advantage of the law’s tax planning possibilities. See S. Rep. No. 86-658, at 10 (1959) (Gore and McCarthy minority view) (stating that, Public Law 86-272, “if enacted into law, will discriminate against many small businesses. How can the typical small business, domiciled in and taxed upon its profits by a state, compete with a large multistate operator who pays no state income taxes where he sells his products?”); see also Paul J. Hartman, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 1009 (1962) (“The act prevents the states from reaching the income of numerous large-scale multistate enterprises, for which the cost of compliance is not a significant deterrent to conducting business and which are capable of limiting their marketing activities so as to come within the statute while realizing substantial revenues from sales into the state.”).

286. The rule in *Quill* puts “physically present” businesses at a competitive disadvantage by tilting the playing field in favor of mail order and Internet businesses that can sell into a state without making use of any in-state stores or personnel. *See supra* notes 263, 278 and accompanying text.
from applying the four prongs of *Complete Auto* in favor of an approach that focuses merely on *Complete Auto*'s discrimination test. Further, the Court has not taken a nexus case since it created the judicial rule in *Quill* and generally no longer even makes reference to the four-part *Complete Auto* test, which includes the nexus standard pursuant to which a state’s ability to impose tax is evaluated. This trend is consistent with the Court’s attempt to re-position its dormant Commerce Clause analysis within the actual intention embodied in the Commerce Clause. As noted by Professor Jesse Choper and Tung Yin, it does not make sense to “interpret the Commerce Clause to require a separate nexus more stringent than that imposed by the Due Process Clause because that is not required to further protect interstate commerce against state taxes that accord a preference to local enterprises.”

The four prongs of *Complete Auto*, the tests that the Court has posited to evaluate a state tax in the dormant Commerce Clause context, also include a test that determines whether the state tax is fairly apportioned, which the Supreme Court recently evaluated in *MeadWestvaco Co. v. Illinois Department of Revenue*. The fair apportionment concept is also arguably inconsistent with the economic protectionism rationale embodied in the Commerce Clause and, similar to the nexus analysis in *Bellas Hess* and *Quill*, has antecedents in Court cases applying the Due Process clause.

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287. See discussion supra I.C.
288. See supra notes 109-14 and accompanying text.
289. See discussion supra I.C, I.D.
290. Choper & Yin, supra note 108, at 213. The authors state also that *Quill* is problematic because, although it purports to differentiate the “substantial nexus” prong of *Complete Auto* from the Due Process minimum contacts requirement, it provides no guidance as to the difference. Id. at 202. The authors would abandon the substantial nexus requirement in favor of a minimum contacts standard. Id. at 242. See Swain, supra note 263, at 342 (stating that the ruling in *Quill* that a taxpayer's jurisdictional nexus with the state must include a Commerce Clause dimension as well as a Due Process dimension “makes it difficult to know how to fill Commerce Clause nexus with content” as “[m]ost of the nexus 'burdens' that come to mind are also due process concerns: notice, foreseeability, fundamental fairness, and the like”); Moore, supra note 107, at 1448 (stating that the Supreme Court in *Quill* did not “explain adequately why the Commerce Clause requires a different nexus standard than that required under the Due Process Clause”); see also John A. Swain, *Misalignment of Substantive and Enforcement Tax Jurisdiction in a Mobile Economy: Causes and Strategies for Realignment*, 63 NAt’L Tax J. 925, 943 (2010) (arguing for “the alignment of substantive [i.e., tax] and enforcement jurisdiction” and noting that the “major impediments” are “most notably the *Quill* physical presence test and the 'solicitation of orders' safe-harbor of P.L. 86-272”).
291. 553 U.S. 16, 25, 32 (2008). The Court’s disposition in *MeadWestvaco* was largely a remand for further state proceedings. Id.
292. See, e.g., Trinova Corp. v. Mich. Dep’t of Treasury, 498 U.S. 358, 373 (1991) ("The *Complete Auto* test[s], while responsive to Commerce Clause dictates, encompass[s] as well the due process requirement that there be a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to
However, fair apportionment—if not a measure of economic protectionism as such—is at least closer to that concept than is the nexus concept, as in any case where the state’s apportionment computation overreaches, it could potentially subject interstate commerce to more than 100% taxation, and therefore put such commerce at a disadvantage relative to commerce that is in-state only.\textsuperscript{293} Further, significantly, whatever the Court’s or Congress’s ability to provide parameters as to the states’ apportionment rules, generally-speaking the address of these rules would not result in the type of affront to state sovereignty that is occasioned by an outright preemption of a state tax.\textsuperscript{294}

the State and the intrastate values of the enterprise.”). Professor Donald S. Regan has stated that “the Court’s insistence that taxes levied on interstate enterprises must be fairly apportioned cannot be explained by reference to the [Commerce Clause’s] anti-protectionism principle or any variant of that principle” though he has noted that “[t]he Court has located the roots of the fair apportionment idea both in the commerce clause and the due process clause.” See Regan, supra note 56, at 1185-86.

293. Fair apportionment is an issue that is generally unique to the taxation of multi-state business income because states that impose a sales and use tax invariably offer a use tax credit for a sales tax paid in another state. See, e.g., MASS. GEN. LAWS, ch. 641, §7(c). Portland Cement, which heralded the later advent of the Court’s modern Commerce Clause jurisprudence, held that a state could apply a non-discriminatory, fairly apportioned tax to a corporation doing business in the state. 358 U.S. 450, 452 (1959); see supra notes 88-91 and accompanying text. In a later case, Moorman Mfg. Co. v. Bair, 437 U.S. 267, 279-80 (1978), the Court upheld the state’s use of an apportionment methodology that conflicted with that of a neighboring state, but expressed some concern that differing state apportionment methods could subject states to “duplicative” or “multiple” taxation on the same income. Professor Regan has argued that the fair apportionment requirement, if not a protectionism principle per se, “is necessary to avoid a situation in which businesses that operate in more than one state are taxed more heavily, just because they operate in more than one state, than businesses operating in a single state.” See Regan, supra note 56, at 1186; see also Bradley W. Joondeph, The Meaning of Fair Apportionment and the Prohibition of Extraterritorial State Taxation, 71 FORDHAM L. REV. 149, 159-61 (2002) (stating that the fair apportionment requirement is a “lower order” constitutional requirement because it serves only to police the more important Commerce Clause and Due Process concerns that are reflected in the Complete Auto tests, specifically state discrimination and nexus).

294. Moorman stated in dicta that “[i]t is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income,” but stated also that in so doing Congress would have to balance “the interests of all affected States.” 437 U.S. at 280. As a practical matter, while federal bills to preempt state tax have proliferated in recent years, these bills do not usually address multiple taxation, the issue that elicits the Moorman fair apportionment concern, since the larger companies that support the preemption bills engage in tax planning with respect to the states’ apportionment and other rules—like with respect to Public Law 86-272, see supra note 230 and accompanying text—such that they are taxed on less than 100% of their income rather than more than 100% of their income. See Moore, supra note 5, at 196-98. The current proposed federal bill that would expand the provisions of Public Law 86-272 does include a provision that would strike down a particular apportionment principle used by the states—the use of so-called “Finnigan” apportionment—but that bill makes no pretense towards attempting to address
State tax preemption statutes that are grounded in what are generally Due Process considerations are not supported by the language and purpose of the Commerce Clause and the Supreme Court’s contemporary Commerce Clause analysis. Nonetheless, some such statutes, like Public Law 86-272 and the Internet Tax Freedom Act,\(^\text{295}\) have been enacted under the Commerce Clause and remain as law.\(^\text{296}\) *Quill* suggests that the Court would be reluctant to overturn a state tax preemption that has been relied upon by taxpayers irrespective of the law’s merits as viewed in hindsight.\(^\text{297}\) And, moreover, it may be that the Court would be reluctant to completely foreclose similar, future Congressional enactments in which a state tax is preempted based on what are generally Due Process rather than Commerce Clause concerns.\(^\text{298}\) If either or both of these latter points are true, it nonetheless remains the case that a Due Process-based Congressional preemption of a state tax should be subject to heightened judicial scrutiny because such

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\(^\text{296}\) Another example is the 1995 State Income Taxation of Pension Income Act, which preempts state income tax imposed upon certain retirement income of non-residents derived from these persons’ prior employment within the state. Pub. L. No. 104-95, 109 Stat. 979 (1996). As the persons to whom the law applies are no longer even engaged in commerce, the Act’s relationship to the free flow of interstate commerce seems undeniably tenuous—and in fact Due Process-like fairness issues dominated the legislative debate. *See* generally Kaye, *supra* note 32, at 167-77; Moore, *supra* note 5, at 183-86; *cf* Gonzalez *v.* Raich, 545 U.S. 1, 25-26 (2005) (“economic” activity within the meaning of the Commerce Clause refers to “the production, distribution and consumption of commodities”).

\(^\text{297}\) *Quill* cited as one fact that supported the re-affirmation of the Court’s prior decision in *Bellas Hess* that “we have, in our decisions, frequently relied on the *Bellas Hess* rule in the last 25 years . . . and we have never intimated in our review of sales or use taxes that *Bellas Hess* was unsound.” 504 U.S. 298, 317 (1992). Somewhat similarly, the Supreme Court has twice revisited Public Law 86-272 to evaluate questions about the law’s intended application—though it has never considered the law’s constitutionality. *See* Wisc. Dep’t of Revenue *v.* William Wrigley, Jr., Co., 505 U.S. 214 (1992); Heublein, Inc. *v.* S.C. Tax Comm’n, 409 U.S. 275, 280 (1972). *Quill* also referred to the enactment of 86-272 as supporting its decision. 504 U.S. at 316 n.9.

\(^\text{298}\) *See* Paul J. Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 1022-28 (1986) (noting that if judicial evaluations like that in *Bellas Hess* were considered to be in the nature of Due Process, then arguably Congress would have no way of eliminating or modifying such evaluations when it disagreed with them, a result that the Court would not favor); *see also Quill Corp.*, 504 U.S. at 318 (theorizing that Congress may have refrained from addressing the Court’s *Bellas Hess* decision in the aftermath of that case because of “respect” for the Court’s Due Process analysis therein).
enactments do not reflect the language or purpose of the Commerce Clause and because, as has been mentioned, such enactments—given the difficulties they invariably raise—tend to be particularly intrusive with respect to the states’ sovereignty.

The specific problems occasioned by a state tax preemption effected pursuant to the Commerce Clause where the legislation generally reflects Due Process concerns includes, for example, overbroad application, rigid statutory language that inevitably results in unexpected costs as well as voluminous litigation, and needlessly long terms that are difficult to terminate once the law is enacted. These specific problems suggest that an appropriate judicial standard of review would be one that evaluates the legitimacy of both the intended legislative aim and the chosen legislative means. One possible judicial standard would be the “congruence and proportionality” standard, which the Supreme Court adopted in 1997 in City of Boerne v. Flores to evaluate Congressional actions taken in furtherance of Congress’s enforcement powers under Article 5 of the Fourteenth Amendment. Under Article 5 of the Fourteenth Amendment, Congress has the authority to authorize private rights of action against the states for a violation of the principles of the Fourteenth Amendment, which includes the Due Process Clause as made applicable against the states. However, when Congress authorizes such a private right of action it must demonstrate that there is “congruence and proportionality” between the legitimate problem that it has chosen to address and the means that it has selected to do so, or the statute will not stand.

Boerne was based on the idea that a private right of action conferred under Article 5 of the Fourteenth Amendment ceases to be remedial within the meaning of that provision and becomes a substantive act of regulation

299. See supra notes 243-46 and accompanying text.
300. See supra notes 243-46 and accompanying text.
302. Boerne’s “congruence and proportionality” requirement replaced the previous rule stated in Katzenbach v. Morgan, 384 U.S. 641, 651 (1966), that the Equal Protection Clause “is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.” See Boerne, 521 U.S. at 527-29. Katzenbach had stated, “‘Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.’” 384 U.S. at 650 (quoting McCullough v. Madison, 17 U.S. (4 Wheat), 316, 421 (1819)).
303. U.S. CONST. amend. XIV § 1 (stating, “[N]or shall any state deprive any person of life, liberty, or property, without the due process of law”); id. § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).
304. Boerne, 521 U.S. at 520. In Boerne, the statute in question, a provision set forth in the Religious Freedom Restoration Act of 1993, was determined to be disproportionate in its effects compared to its objective and was thereby struck down. Id. at 532.
on the part of Congress when the action is not congruent with or proportion­
al to Congress's authority—including with respect to the Due Process
Clause as set forth in the Fourteenth Amendment. 305 Although state tax
preemptions that are purported to be based on the Commerce Clause do not
raise the historical concerns that underlie Article 5 of the Fourteenth
Amendment, they nonetheless raise similar, significant sovereignty con­
cerns. When a state tax preemption is proposed based generally on Due Pro­
cess considerations that can also be fairly posited as similarly raising a
Commerce Clause issue, it should be the case that Congress is held to the
Boerne-like standard of making clear how the Due Process concern engen­
ders a "threat to a national market," 306 and also of limiting its legislative
remedy to the narrow address of that specific problem. Absent such a rule,
similar to the concerns that justified Boerne, Congress could use state tax
preemptions merely to effectuate federal preferences, as opposed to per­
forming its Constitutional function to protect the national economy. 307
Boerne emphasized the importance of respect for the federal-state constitu­
tional "balance." 308 State tax preemptions raise similar concerns, and per­
haps even greater concerns, given the importance of the states' taxing func­
tion. 309

It may seem late in the day for the Court to announce a standard of re­
view for certain Commerce Clause cases in which Congress preempts a
state tax. But the rule in Boerne is itself recent, and the Court has posited
several other federalism rules in recent years to rein in federal power, such
as the commandeering principle applied in New York and Printz. 310 Indeed,
another area where the Court has recently engaged in positing new federal­
ism principles is in the area of state sovereign immunity, where the Court
has acted to narrow the circumstances in which Congress can authorize suits
for damages against the states, on the theory that such actions burden the
states with costly litigation and can result in judgments that threaten the

305. Id. at 519-20.
306. Gonzalez v. Raich, 545 U.S. 1, 17 (2005); see Quill Corp. v. North Dakota ex
rel. Heitkamp, 504 U.S. 298, 310 n.5 ("It was not the purpose of [the] [C]ommerce [C]lause
to relieve those engaged in interstate commerce from their just share of [the] state tax burden
even though it increases the cost of business." (quoting Commonwealth Edison Co. v. Mon­
tana, 486 U.S. 609, 623-24 (1981))).
307. See Elisabeth Zoller, Congruence and Proportionality for Congressional En­
(noting the view of some scholars that the congruence and proportionality test "is nothing but
Maryland to review the constitutionality of implied powers").
308. See Boerne, 521 U.S. at 536.
309. See supra notes 3, 9-11, 55 and accompanying text.
310. See New York v. United States, 505 U.S. 144 (1992); Printz v. United States,
521 U.S. 898 (1997); see also supra notes 170-75 and accompanying text.
states' treasuries. Identical concerns are also prevalent when Congress acts to preempt a state tax, and therefore similar safeguards of federalism would be appropriate. Further, as has been discussed, the creation of such principles would be consistent with the text and purpose of the relevant provisions of the Constitution—which is the line of analysis that has been the basis for the Court's new federalism rules.

If one is to apply the congruence and proportionality test to Public Law 86-272, the law should be struck down as unconstitutional. This is because, assuming the Act's asserted goal to protect small companies from the compliance difficulties implicated by the Court's holding in Portland Cement is a legitimate Commerce Clause goal, the Act is not proportional to this goal. The Court might be reluctant to strike down Public Law 86-272.

311. Professor William F. Carter has argued that "Boerne and its progeny" derive in part from the Court's Eleventh Amendment State sovereign immunity cases. William M. Carter, Jr., Judicial Review of Thirteenth Amendment Legislation: "Congruence and Proportionality" or "Necessary and Proper," 38 U. Tol. L. Rev. 973, 979-80 (2007); see Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58 (1996) (observing that the Eleventh Amendment was "to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties") (quotes omitted). The Eleventh Amendment prevents Congress from authorizing private actions against the states in federal court. In a case decided after Seminole Tribe, the Court concluded that the Tenth Amendment bars Congress from authorizing a private suit for money damages against a non-consenting state in state court. Alden v. Maine, 527 U.S. 706 (1999). Alden noted that "[a] general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." Id. at 750-51. Both Seminole Tribe and Alden noted that the notion of state sovereign immunity is implicit in the Constitution even apart from the Eleventh and Tenth Amendments. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); Alden, 527 U.S. at 713-14; cf. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007) (expressing concern that finding against the state in a dormant Commerce Clause case alleging a state engaged in impermissible discrimination by favoring state trash facilities "would lead to unprecedented and unbounded interference by the courts with state and local government").

312. Fed. Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 765 (2002) ("While state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens, the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns.") (quotes omitted); see generally John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003, 2005 (2009) (discussing the Court's "'new federalism' cases").

313. Professor John F. Manning has stated that "the Court has evidently concluded that, if modern Commerce Clause doctrine threatens its minimum conception of state sovereignty, it will handle the problem by recognizing implied limitations in federal power that are traceable to some form of historically reconstructed original understanding of the appropriate federal-state balance." See Manning, supra note 312, at 2024-25. He states further that in creating its "new federalism" rules the Court has "sought to root its understanding of constitutional meaning . . . [as] drawn from the constitutional structure as a whole." Id. at 2025.

314. See supra notes 220-33 and accompanying text. This Author made a similar argument that 86-272 is unconstitutional in a prior article. See generally Fatale, supra note 36.
given that it has a long history and “has engendered substantial reliance”—
the Court’s verbiage in *Quill*—mostly by big companies engaged in ag­
gressive state tax planning. But even if that is so, it is nonetheless the case
that the Court should strike down as unconstitutional any attempt to expand
the provisions of Public Law 86-272. Such an expansion of Public Law
would be similarly inconsistent with modern Commerce Clause doc­
trine and, unlike Public Law 86-272, would not raise any reliance concerns.

If one were to apply the congruence and proportionality test to the In­
ternet Tax Freedom Act, which was enacted in 1998 and has been extended
three times—most recently to 2014—the result should be the same. The
Act was intended to eliminate taxes on Internet access fees as well as “dis­
criminatory” taxes and the consequence of “multiple taxation”—all for the
asserted purpose of protecting a once-fledgling industry. But the Internet
was likely not in need of protection in 1998 and certainly does not need that

316. See supra note 230 and accompanying text. On the other hand, it would seem
that, as suggested by Justice White in his dissent in *Quill*, the Court could strike down 86-
272 on a prospective basis rather than on a retroactive basis and thereby minimize reliance
concerns. 504 U.S. at 332 (White, J. dissenting) (stating that the Court could have worked
around the prospect of retroactive taxes had it overruled *Bellas Hess*); see also Bradley Scott
Shannon, The Retroactive and Prospective Application of Judicial Decisions, 26 HARV. J.L.
& PUB. POL’Y 811, 857 n.216 (2003) (discussing the prospect, suggested by Justice White’s
dissent in *Quill*, that *Quill* could have overruled the prior case, *Bellas Hess*, prospectively on
the theory that the Court’s holding was creating a “new principle of law”); Chevron Oil Co.
v. Huson, 404 U.S. 97, 105-06 (1971) (stating that a “new principle of law” may be denied
retroactive effect to avoid injustice or hardship); Fatale supra note 36, at 451 n.68 (noting instances
where the Supreme Court did not hesitate to strike down long-standing federal statutes as unconstitutional).
317. See supra note 7 (referencing a recent such legislative attempt). Professors
McLure and Hellerstein have argued that such an extension “would expand the scope for the
creation of nowhere income, and thus aggravate the opportunities for tax planning and the
revenue loss created by Public Law 86-272.” See Charles E. McLure & Walter Hellerstein,
Congressional Intervention in State Taxation: A Normative Analysis of Three Proposals, 31 ST.
318. See The Internet Tax Freedom Act, 47 U.S.C. § 151 (1998), as most recently
1024 (2007).
319. Professors McLure and Hellerstein noted back in 2004 that the “argument for
exempting Internet access is no longer valid, if it ever was” and that, with over two billion
users at the time of their writing, the notion that the Internet was an “infant industry” was
“ludicrous.” McLure & Hellerstein, supra note 317, at 728. As they further note, the Act’s
concept of “discrimination” seemed to simply be a nexus prohibition since “[there are] no
taxes of which we are aware that single out transactions in electronic commerce for invidious
treatment.” Id. at 726. Further, the “multiple taxation” provisions are “not a model of clarity”
reading “more like cocktail party conversation than a carefully thought-out restraint on state
taxing power.” Id. at 726.
protection now—despite recent attempts to make the law permanent.® Further, the manner in which a federal preemption bill can have expensive unanticipated consequences to the states was amply demonstrated by the Internet Act in 2011, when, by reason of the Act, a class action determined that the states potentially owed over $1 billion in refunds for sales tax collected with respect to the sale of data access plans—transactions that did not exist when the law was originally enacted.321

B. Discrimination and Economic Protectionism

Congress can of course act to remedy state-based economic protectionism by preempting a discriminatory state tax.322 Further, when Congress is acting pursuant to the affirmative Commerce Clause, it has the right to conclude that a particular type of state tax is impermissibly discriminatory even if the Court itself has concluded otherwise, given that it has greater investigative powers.323 However, as discussed in Part I of this Article, state-based discrimination has a specific meaning under the Commerce Clause, and while Congress may conclude that there is a violation of this principle when the Court has concluded otherwise, Congress has no constitutional license to take the concept itself and to twist it into something that it was not intended to be.324 In particular, Congress has no constitutional license to preempt a particular type of state tax on the basis that it discriminates against an industry, and therefore burdens that industry vis-à-vis another

320. See S. REP. No. 105-104, at 21 (1998) (Dorgan minority view concerning the Act) (stating that “[t]here is no policy justification to enact a federal tax break that will cost state and local governments millions of dollars simply because a new industry has emerged into commerce”); see also id. at 25 (Dorgan minority view) (noting that “[t]he beneficiaries of the tax break provided by this legislation will include some very significant telecommunications and computer companies”); Jane G. Grevelle & Jennifer Grevelle, How Federal Policymakers Account for the Concerns of State and Local Governments in the Formulation of Federal Tax Policy, 3 NAT'L TAX J. 631, 646 (2007) (noting that the Internet act is an example of the proposition that “at times, the concerns of state and local governments are given short shrift or apparently ignored entirely when the federal government is pursuing other goals, including accommodating business interests”).


322. See, e.g., Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979) (upholding Congress’s ability to strike down a New Mexico tax that discriminated against the production of electricity within the state’s borders for consumption outside the state).


324. See supra notes 120-28 and accompanying text.
industry. Most of the recent bills being considered by Congress that would preempt a state tax are justified on this basis—sometimes in cases in which even this purported discrimination is illusory—and therefore the enactment of such bills would apparently be unauthorized under the Commerce Clause. However, as in the case of a state tax preemption that has been enacted based on Due Process concerns, there is some prior history as to these types of bills, and it is appropriate to consider what, if anything, this history suggests as a matter of law.

The recently proposed federal bills seeking to preempt a discriminatory state tax rely by analogy on the enactment of the “4R Act,” the Railroad Revitalization and Regulatory Reform Act of 1976. The 4R Act prohibits states from taxing railroad property at a higher rate (whether by means of assessment practices, assessment ratios, or tax rates) than other commercial and industrial property in the same assessment jurisdiction. Though finally passed in 1976, the Act had a long history. A comprehensive study issued in 1944 revealed that the states taxed interstate carriers more heavily than intercity transportation carriers. A later comprehensive Senate report on national transportation policy issued in 1961 found that this pattern of taxation continued through that time. Accordingly, the Senate Report recommended that Congress enact legislation to address this non-uniform treatment in the taxation of interstate carriers. Following that report numerous such bills were introduced and a number of hearings were held—sometimes solely addressed to the issue of state taxation and sometimes considering the issue of state taxation in the broader context of industry-wide regulation. Consistent with this latter fact, the state tax component of the resulting 4R Act was only a small part of the Act’s comprehensive railroad reform, and the lengthy committee reports paid only minor attention to the state tax federalism issue. In the aftermath of the enactment of the 4R Act, Congress extended its prohibition against “discriminatory” state taxation to motor

325. See supra note 16 and accompanying text.
326. See supra note 17 and accompanying text.
327. See supra Subsection III.A.3.
330. See Moore, supra note 5, at 188-89.
331. Id. at 189.
332. Id.
333. Id.
334. Id. at 189-90.
carriers and then air carriers. In those latter cases, as in the case of the 4R Act, the state tax aspect of the Act was only a small part of a larger comprehensive regulatory reform.

The 4R Act and its progeny did not address state-based economic protectionism, but rather focus on "discrimination" as between industry types. However, perhaps significantly, Congressional regulation of the railroads and other means of interstate travel have a distinct and "long Constitutional pedigree." Professor Donald H. Regan has concluded that the protection of "interstate transportation" is one of the rare areas where the Supreme Court "appears to do more under the dormant Commerce Clause than merely suppress state protectionism," likely because "there is a genuine . . . national interest in the existence of an effective transportation network linking the states" even though the "Constitution does not say that explicitly."

Moreover, the first major piece of Congressional legislation that generally resulted in conflicts with state laws was the Interstate Commerce Act of 1887, pursuant to which Congress sought to regulate railroad rates, and it was railroad rate regulation cases decided nearly one hundred years ago that first convinced the Supreme Court that Congress could regulate wholly intrastate as well as interstate commerce. Therefore, while the state tax

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336. Id.

337. See Bork & Troy, supra note 15, at 892 (noting that "[t]he federal regulation of certain aspects of transportation has a long constitutional pedigree"). The railroads played an especially important role in the development of the country in the mid to late 1800's as they affected "virtually every major interest group" making "economic development of the Midwest possible [as well as] greatly hasten[ing] the pace of development in the eastern seaboard, the South, and the West." See Hovenkamp, supra note 83, at 1031 (1988).

338. Regan, supra note 56, at 1182-84. Professor Regan notes also that "[m]y suggestion is that the existence of an effective transportation network is essential to genuine political union just as the suppression of protectionism is essential to genuine political union (and as economic efficiency, unlimited access to potential markets, and the actual movement of goods are not)." Id. at 1184. Professor Regan notes state taxation as being the other area where the Court has seemed historically to do more than merely police state-based economic protectionism through the concept of "fair apportionment." Id. at 1185-86; see supra notes 291-93 and accompanying text.


340. See Ely, supra note 83, at 969-73 (evaluating judicial developments leading up to the Minnesota Rate Cases, 230 U.S. 352 (1913) and Shreveport Rate Cases, 234 U.S. 342 (1914), where the Court made clear that Congress could legislate with respect to intrastate railroad rates when such a step was deemed necessary for control of interstate commerce); see also Lopez v. United States, 514 U.S. 549, 558 (1995) (noting, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."). The broader significance of the decision notwithstanding, the Shreveport Rate Cases were a situation where Congress did not preempt the state tax at issue but rather merely eliminated the
preemption included within the 4R Act may not be consistent with the pur-
pose or text of the Commerce Clause, the thrust of that law, including the
state tax preemption therein, is at least consistent with the historic applica-
tion of the Clause.\textsuperscript{341}

Previously, in the discussion of state tax preemptions that derive from
Due Process considerations—also circumstances that are not squarely root-
ed in the purpose or text of the Commerce Clause—this Article posited that
an appropriate analytic approach might be to evaluate the “congruence and
proportionality” of the Congressional Act vis-à-vis its asserted basis in the
Constitution.\textsuperscript{342} This approach can be extended to preemptive legislation that
addresses more distinctly Commerce Clause—as opposed to Due Process—
concerns, in the interest of safe-guarding the states’ sovereign right of taxa-
tion. Applying this approach to the 4R Act, one finds that the Act is argua-
ably congruent with a valid Constitutional aim, i.e., the historic action under
the Commerce Clause to protect a means of interstate travel and shipment.
However, the Act’s proportionality to this purpose is more questionable
because the scope of the statute is generally ambiguous—a fact that has
resulted in significant litigation—and, further, certain actions under the law
can be brought in federal, as opposed to state, court.\textsuperscript{343} On the other hand, in
its favor, the 4R Act is not an outright preemption of state tax, but rather an
attempt—however imperfect—to equalize the state tax to be applied to in-
terstate carriers relative to other in-state businesses in cases in which the
Act is implicated.\textsuperscript{344}

discriminatory aspect of the tax, consistent with the purposes that underlie the Commerce
Clause. See Ely, supra note 83, at 971 (noting with respect to the Texas rate-making that was
addressed by the case that “[t]he Texas Commission made no secret of its desire to foster
economic development within the state” and that “[t]he result of its rate scheme was to aid
Dallas and Houston at the expense of Shreveport”); see also supra notes 195-96 and the
accompanying text.

\textsuperscript{341} Cf. Arizona v. Atchison, Topeka & Santa Fe R.R. Co., 656 F.2d 398, 407 (9th
Cir. 1981) (upholding the 4R Act against a Commerce Clause challenge since “the legitimate
end” of the Act was to “revitalize the nation’s railroads to improve the flow of interstate
commerce” and the means adopted, “prohibiting states from assessing railroad property at
higher ratios than other commercial and industrial property,” was “‘plainly adapted to that
end”).

\textsuperscript{342} See supra notes 300-13 and accompanying text.

\textsuperscript{343} For example, there has been decades of litigation “over the identification of
which commercial and industrial property taxes constitute[] the comparison class for rail-
roads, the jurisdiction and role of the federal courts, what taxes besides property taxes [are]
included and how to deal with exempt property.” FED. TAX ADMINISTRATORS RES. 2010-3,

\textsuperscript{344} In this latter respect, the Act is similar to Congress’s legislative action as upheld
by the Court in Shreveport Rate Cases, 234 U.S. 342 (1914); see supra note 340.
In contrast to the analysis with respect to the 4R Act, the recently proposed federal bills that attempt to analogize to that Act345 are not congruent to an appropriate Commerce Clause goal, as the mere fact that two industries are being taxed differently (while the interstate and in-state actors within the state are taxed uniformly) does not—certainly without more—raise constitutional concerns. When the congruence standard is not met, application of the proportionality standard is not necessary. However, assuming that the affected industries supporting the proposed federal bills could assert some valid constitutional basis for these bills—justifying why they should not be taxed less favorably than some other industry, where there was in fact some discrepancy—the appropriate proportionality would apparently be to eliminate, not the entire tax, but merely the differential.

CONCLUSION

Analysis of the U.S. Constitution and concerns about federalism have recently found their way from U.S. Supreme Court precedent into the public consciousness, as reflected in the debate about the constitutionality of the recently-enacted federal health care bill. But at the same time Congressional attempts to preempt state taxes have become more prevalent and in some cases successful, in part because there are no stated judicial rules that specifically impose limitations on such federal preemptions. The absence of such rules means not only that there are no obvious practical impediments to such Congressional actions, it suggests that Congress has virtually unlimited capacity to preempt state taxes, whether or not it chooses to exercise this power. That mindset is reflected in much of the academic literature—what little there is—and also the legislative debate.

Despite the legal history and the prevalent legal thinking, a common sense evaluation of the dual sovereignty system established by the Constitution's Framers suggests that the U.S. Constitution does impose implicit limitations as to a proposed Congressional attempt to preempt a state tax, pursuant to which most of the recently proposed state tax preemptions would likely be unconstitutional upon passage. Federal legislators should act with this understanding, in appreciation of the importance of the U.S. Constitution's structural framework and the considerable benefits that derive from our nation's system of dual sovereignty. In addition, hopefully in the near future the Supreme Court will clarify the rightful protective limitations to be imposed with respect to the Congressional preemption of a state tax.

345. See supra note 16 and accompanying text.