

# The Final Word: Congress and the Express Commerce Clause

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## I. Introduction

The Commerce Clause of the United States Constitution provides that “[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign nations[] and among the several states.”<sup>1</sup> Congress’s use of this power to enact federal legislation is sometimes called use of the “express” Commerce Clause because such action is expressly provided for in the Constitution. Historically, Congress has rarely used this power to affect state taxation directly. But there is no reason to believe that this trend will—or should—continue. As the states become more and more aggressive in enacting legislation and pursuing audit activity that targets out-of-state businesses and individuals, there is a growing recognition of the need for federal legislation to prohibit overreaching state taxation. As this becomes more apparent to those who work on Capitol Hill, there very well could be a spate of new laws enacted that circumscribe state taxing authority.<sup>2</sup> Several such bills have been introduced in Congress in recent years.<sup>3</sup>

This Article examines Congress’s authority under the Commerce Clause of the U.S. Constitution to enact legislation that restricts state and local taxing power. The Article concludes, generally, that Congress’s ability to legislate in this area is extremely broad and is clearly consistent with the intent of the drafters of and signatories to the Constitution. The Article is divided into four parts. Part II provides the history of the express Commerce Clause and examines how the U.S. Supreme Court has interpreted the reach of Congress’s power in this area. Part III considers Congress’s exercise of its Commerce Clause authority in the specific context of state taxation and considers challenges that have been made to Congress’s authority to enact legislation restricting state taxation practices. Part IV examines preemption, and reverse

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<sup>1</sup>U.S. CONST. art. I, § 8, cl. 3.

<sup>2</sup>It is important to note that restrictions on state and local taxation, absent state-level reactions, such as rate increases, increase federal revenues. This occurs because taxpayers receive a federal income tax deduction for taxes paid to states and localities. If less tax is paid to states and localities, this yields a decrease in state and local tax-related federal deductions and, accordingly, results in more federal tax owed. This point might be important during a federal budget crisis.

<sup>3</sup>For more on the modern proposed legislation, see Part V.A of this Article.

preemption, of state tax laws. Part V concludes by calling on Congress to enact legislation that would curb state taxing powers and would bring much-needed clarity and uniformity to state and local taxation, thus meeting the Constitutional goal of ensuring the stability and growth of the American economy.

## II. The Express Commerce Power

### A. *Commerce Clause Historical Background*

The Articles of Confederation did not contain a commerce clause, nor did it grant one legislative body the power to regulate interstate commerce. In the absence of such central oversight, many states enacted laws that interfered substantially with the national economy,<sup>4</sup> such as those imposing port fees and exclusionary trade barriers. Businesses often responded by following only local laws while simply disregarding unfavorable laws of foreign states.<sup>5</sup> Some states even encouraged this behavior. For example, some states encouraged in-state businesses not to pay debts owed to out-of-state creditors by enacting “debtor relief” laws, which allowed in-state debtors to cancel debts owed to out-of-state debtors.<sup>6</sup> Further, some states printed and provided paper money to in-state debtors, enabling the debtors to “pay” their debts to out-of-state creditors; such paper money was unsupported and, accordingly, was worthless. States began grouping into “debtor” and “creditor” states. There was some concern that actual war among the states might break out.<sup>7</sup>

The Continental Congress was powerless to respond. The Articles of Confederation provided it with no authority to address the economic problems wrought by this interstate tax warfare. Many thought that something needed to be done to create order out of the economic chaos. Granting Congress the power to regulate interstate commerce was found to be the answer. As the Supreme Court later put it, “the object of vesting in Congress the power to regulate commerce with foreign nations and among the several States was to issue uniformity of regulation against conflicting and discriminating state legislation.”<sup>8</sup> This was an idea Alexander Hamilton championed. He wrote that “[a] unity of commercial . . . interests[] can only result from a unity of government.”<sup>9</sup> In his view “the competitions of commerce” would always be

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<sup>4</sup>See THE FEDERALIST NO. 7 (Alexander Hamilton).

<sup>5</sup>*Id.* (“It is not at all probable that [the] unbridled spirit [of enterprise] would pay much respect to those regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.”).

<sup>6</sup>See *id.*; THE FEDERALIST NO. 10 (James Madison).

<sup>7</sup>See 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.3, at 574–77 (4th ed. 2007).

<sup>8</sup>Kidd v. Pearson, 128 U.S. 1, 21 (1888).

<sup>9</sup>THE FEDERALIST NO. 11 (Alexander Hamilton).

a “fruitful source of contention” among the states unless a federal body was given the authority to regulate commerce to prevent the states from engaging in destructive economic warfare.<sup>10</sup> Thus, the Commerce Clause was enacted to empower the federal government to regulate commerce and to prevent state legislation and other state actions that harmed the American economy as a whole.<sup>11</sup>

## B. *The Commerce Power as Interpreted by the United States Supreme Court*

### 1. *Gibbons v. Ogden*

The Supreme Court’s first substantial foray into addressing the scope of the Commerce Clause was *Gibbons v. Ogden*.<sup>12</sup> The facts in the case were simple. New York law granted two steamboat operators a monopoly between New York City and New Jersey. Another individual, Gibbons, operated a competing ferry service in that same area and attempted to break the monopoly. Gibbons argued that he was entitled to operate his ferry between New York City and New Jersey because under federal law the operation of a “vessel in the coasting trade” was authorized by statute. Under the New York statute, Gibbons was clearly wrong to operate his ferry in New York waters because New York had granted a monopoly to the two steamboat operators, and Gibbons had not received a license from those steamboat operators. However, under federal law, Gibbons did have a legal basis for operating his vessel in New York, since he did have a license to operate a vessel in the coastal trade and he was exercising that right when operating his ferry between New York City and New Jersey. The Court therefore had to decide: (1) whether the Commerce Clause granted Congress the power to enact the statute which allowed Gibbons to operate his vessel in the coastal trade; and (2) whether federal law trumped state law, or vice-versa.

Gibbons relied on the Commerce Clause while Ogden, a steamboat operator who was granted an exclusive license to operate between New York and New Jersey by the two New Yorkers holding the monopoly rights, argued that the federal statute in question was an extra-constitutional use of the commerce power because it focused on licensing ships and vessels, rather than on commercial transactions taking place aboard ships or vessels. Therefore, Ogden argued that the statute did not regulate “commerce” and hence was unconstitutional and outside the scope of the Commerce Clause.

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<sup>10</sup>*Id.*

<sup>11</sup>See *Gonzales v. Raich*, 545 U.S. 1, 16 (2005) (“The Commerce Clause emerged as the Framers’ response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.”).

<sup>12</sup>22 U.S. 1 (1824).

The Court's famous response to this was that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."<sup>13</sup> In other words, Congress has the power to regulate not only actual "trade" (the most explicit and direct type of commercial activity) but also forms of commerce associated with trade.<sup>14</sup> Once holding that the federal statute represented a constitutionally valid exercise of the commerce power, the Court had little trouble ruling that the federal law took precedence over the New York law and, thus, that Gibbons had the legal right to operate his ferry between New York City and New Jersey.

## 2. Cases Between 1824 and 1887

There were not a large number of important cases interpreting the scope of the commerce power immediately following *Gibbons v. Ogden*. The decisions from 1824 to 1887 generally approved federal legislation in this area but provided little analysis. Perhaps the most notable case from this era was *United States v. Dewitt*.<sup>15</sup> In that case, the Supreme Court ruled that Congress did not have the power under the Commerce Clause to prohibit the mixture and sale of certain illuminating oils susceptible to burning at temperatures less than 110 degrees Fahrenheit. The rationale for the decision was that the power to outlaw such oils was a police power—a power that rested with the states. The case marked the first time the Court declared a federal law unsupported by the Commerce Clause.

## 3. Cases Between 1888 and 1936

The Supreme Court's jurisprudence between 1888 and 1936 was marked by "economic Darwinism." Legislation that was perceived to hinder business interests was struck down by the Court. The Court took a narrower view of

<sup>13</sup>*Id.* at 189–90.

<sup>14</sup>There is some disagreement among scholars about precisely what types of indirect economic activities may be regulated pursuant to the Commerce Clause under *Gibbons*. Professor Chemerinsky reads *Gibbons* to mean that Congress can regulate "all phases of business, including navigation, which was the issue in that case." ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 244 (3d ed. 2006). Professor Tribe's reading is similar: "Marshall indicated that, in his view, congressional power to regulate 'commercial intercourse' extended to all commercial activity having any interstate component or impact—however indirect." 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 808 (3d ed. 2000). Professor Bork argues that the passages in *Gibbons* that Chemerinsky and Tribe rely upon for what he perceives to be an expansive reading of indirect powers go more to whether Congress's ability to regulate commerce is intrastate rather than on a definition of what exactly it is Congress can regulate. 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, 874–76 (2002).

<sup>15</sup>76 U.S. 41 (1869).

the commerce power than at any other time in the Court's history. Its definition of "commerce" differed from the definition the Court had set forth in *Gibbons v. Ogden*. Under the Court's understanding of the Commerce Clause between 1888 and 1936, Congress had the authority to regulate interstate commerce, understood to mean actual "trade," but did not have the authority to regulate indirect effects of trade. Congress could not regulate non-commercial activity leading up to a commercial transaction; for example, Congress could not regulate "manufacturing" preceding a commercial sale.

Perhaps the best known case from this period is *United States v. E.C. Knight Co.*, sometimes referred to as "the Sugar Trust Case," which dealt with the constitutionality of the Sherman Antitrust Act.<sup>16</sup> The plaintiff purchased the stock of four Philadelphia sugar refineries, giving it "nearly complete control of the manufacture of refined sugar within the United States."<sup>17</sup> This was barred as being monopolistic under the Sherman Antitrust Act and the plaintiff was challenging the Act's constitutionality. The argument went as follows: (1) the Act forbade a manufacturing monopoly; (2) manufacturing and commerce are different things (manufacturing occurs at a point in time prior to commerce); and (3) accordingly, the Act was unconstitutional to the extent that it regulated manufacturing (which was not commerce) rather than trade (which was commerce). The Court agreed with this argument, writing in a key passage that "[s]light reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."<sup>18</sup> The theme of reserving an area for state control was commonly echoed by the Court during this period. Accordingly, the Court at this time took an expansive view of the Tenth Amendment and a concomitant narrow view of the commerce power.<sup>19</sup>

#### 4. Cases Between 1937 and 1995

In 1937, the Supreme Court again shifted course in its Commerce Clause jurisprudence. The Court explicitly rejected the commerce-production distinction that had been central to its *E.C. Knight* decision, writing that whether regulated entities are "engaged in production is not determinative."<sup>20</sup> Instead, the constitutional test was focused entirely on the extent of a regulated activity's "effect upon interstate commerce."<sup>21</sup>

<sup>16</sup>156 U.S. 1 (1895).

<sup>17</sup>*Id.* at 9.

<sup>18</sup>*Id.* at 16.

<sup>19</sup>See *infra* Part I.C for further discussion of Congress's interpretation of the Tenth Amendment.

<sup>20</sup>NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 40 (1937).

<sup>21</sup>*Id.*

The major representative decision from that period, and one of the most important Commerce Clause decisions from any period, was *Wickard v. Filburn*.<sup>22</sup> The case concerned a farmer, Roscoe Filburn, who raised dairy cattle and poultry and harvested wheat. He would sell part of his wheat crop, feed part to his cattle, ground part into flour for household consumption, and keep the rest as seed for the following season. A 1938 federal statute, the Agricultural Adjustment Act (AAA), set limits on how many acres of wheat farmers could harvest. The basis for the legislation was that the federal government wanted to ensure agricultural “parity,” meaning that the ratio of current prices, wages, interest rates, and taxes paid by farmers would be relative to the general level of these items during the period January 1910 to December 1914.<sup>23</sup> For the years at issue, the Secretary of Agriculture, Claude Wickard, had projected a wheat surplus and, therefore, put limits on how much wheat farmers could harvest. Filburn was allotted an entitlement to cultivate 11.1 acres of wheat, but he cultivated substantially more than that, resulting in an extra 239 bushels of wheat.

Filburn was assessed a penalty of \$0.49 for each of the 239 excess bushels of wheat, resulting in a total penalty of \$117.11. A lien was placed on his entire wheat crop until the penalty was paid. Filburn filed suit, challenging the penalty. Filburn won at the trial court level on non-constitutional grounds (the argument essentially was that the AAA could not have been legally enacted without a particular referendum, and the particular referendum was fraudulent because it was described to voting farmers in an inaccurate and incomplete way).

The Court dismissed as “frivolous” the claim that the statute was illegitimate because of a tainted referendum.<sup>24</sup> With respect to the Commerce Clause, Filburn argued that the AAA plainly regulated the production and consumption of wheat. These activities were local in character and, therefore, any impact they had on interstate commerce was at best indirect. After all, if the regulation of the annual amount of wheat harvested on Filburn’s farm was interstate, then it is hard to imagine something that was not interstate.

It is extremely noteworthy that the Court focused not on the application of the AAA to Filburn, but on the application of the AAA to the national economy.<sup>25</sup> It stated that the:

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<sup>22</sup>317 U.S. 111 (1942). For a comprehensive factual and legal summary of the case, see Jim Chen, *The Story of Wickard v. Filburn*, in *CONSTITUTIONAL LAW STORIES* 69, 69–118 (Michael C. Dorf ed., 2004).

<sup>23</sup>Chen, *supra* note 22, at 75. The idea was that the limitations would work as a tool for controlling the supply of federally subsidized crops.

<sup>24</sup>*Filburn*, 317 U.S. at 118.

<sup>25</sup>Filburn challenged the constitutionality of the wheat marketing quota provisions of the AAA as applied to him, rather than the constitutionality of the provisions generally.

effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similar situated, is far from trivial.<sup>26</sup>

This concept of aggregation was monumental. It meant that federal statutes covering almost exclusively intrastate matters were supportable under the Commerce Clause if, cumulatively, the effect of all the intrastate activity was substantial on a nationwide basis.

Due to this reliance on aggregation, coupled with a general acceptance of congressional studies showing the potential effect of legislation on interstate commerce, the Court did not strike down any federal legislation as falling outside of Congress's commerce power between 1937 and 1995.<sup>27</sup>

### 5. *Modern Cases: Lopez, Morrison, and Raich*

*Time Magazine* described the *Miranda* decision, which held that criminal suspects had to be informed of their rights before being taken into custody, as a "constitutional thunderbolt."<sup>28</sup> The same could be said of the Court's 1995 decision in *United States v. Lopez*.<sup>29</sup> The decision showed that there were at least some limits to Congress's power to enact legislation under the Commerce Clause. The notion that any limits existed had been in doubt following *Wickard v. Filburn*.

The statute at issue in *Lopez* was the Gun-Free School Zones Act of 1990, which made it a federal offense "knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."<sup>30</sup> In the appeal of *Lopez*'s conviction for violating that law, the Government argued that the statute constituted a valid congressional regulation of interstate commerce because: (1) firearms in school zones may result in violent crime, which can affect the functioning of the national economy by raising insurance costs, which are spread throughout the population; (2) violent crime makes individuals less inclined to travel to parts of the country that are perceived to be unsafe, potentially resulting in less commerce in those areas; and (3) the presence of guns in schools threatens the quality of education students may receive, which in turn produces a less productive citizenry, leading to an adverse effect on the nation's economic health.<sup>31</sup>

<sup>26</sup> *Filburn*, 317 U.S. at 127–28.

<sup>27</sup> See *TRIBE*, *supra* note 14, at 816.

<sup>28</sup> *Concern About Confessions*, *TIME*, Apr. 29, 1966.

<sup>29</sup> 514 U.S. 549 (1995), *superseded by statute as stated in* *United States v. Tucker*, 90 F.3d 1135 (6th Cir. 1996).

<sup>30</sup> *Id.* at 551 (citing 18 U.S.C.S. § 922(q)(1)(A) (1988 ed. & Supp. V)).

<sup>31</sup> *Id.* at 563–64.

The Court's response was that these arguments went too far. If the Government won the day, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens."<sup>32</sup> There would then be nothing left for the states to regulate, "even in areas such as criminal law enforcement or education where States historically have been sovereign."<sup>33</sup> Further, bringing a handgun to school does not affect interstate commerce even in the aggregate.<sup>34</sup>

In presenting its analysis, the Court gave a synopsis of its Commerce Clause jurisprudence. The Court acknowledged that decisions such as *Wickard* ushered in a new "era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause."<sup>35</sup> However, the Court repeatedly emphasized that the Commerce Clause does have some limits.<sup>36</sup>

The Court also provided a somewhat unwieldy framework for evaluating activities that Congress may regulate under its commerce power. This framework consisted of three things. First, the Court wrote, Congress may regulate the use of the channels of interstate commerce.<sup>37</sup> Second, Congress may regulate and protect the instrumentalities of interstate commerce or persons or things that are in interstate commerce, even if the threat to interstate commerce comes only from intrastate activities.<sup>38</sup> Finally, Congress may regulate activities having a substantial relation to interstate commerce, or that substantially affect interstate commerce.<sup>39</sup>

While *Lopez* was immediately perceived to be an important decision, its long-range impact was called into question. Some predicted that *Lopez* would be nothing more than a footnote in Commerce Clause history and that subsequent federal statutes challenged on Commerce Clause grounds would be upheld. Another opinion was that the holding in *Lopez* was narrow enough not to have much effect in future decisions.<sup>40</sup> The smart money was on future

<sup>32</sup>*Id.* at 564.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.").

<sup>35</sup>*Id.* at 556.

<sup>36</sup>*Id.* at 553 ("The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause."); *id.* at 556–57 ("But even these modern-era precedents [*Wickard*] which have expanded congressional power under the Commerce Clause confirm that the power is subject to outer limits.").

<sup>37</sup>*Id.* at 558.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 558–59.

<sup>40</sup>See Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685, 693 (1996) ("As a practical matter, *Lopez* has deprived Congress of very little power."); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 176 (1998) (musing that *Lopez* might be "destined to be a 'but see' citation").

statutes being upheld under Congress's commerce power despite the holding in *Lopez*.

The smart money was proven wrong five years later. In *United States v. Morrison*,<sup>41</sup> the Court ruled that another statute, 42 U.S.C. § 13981, which provided a federal civil remedy for victims of gender-based violence,<sup>42</sup> could not be justified under Congress's commerce power. The Fourth Circuit had ruled that Congress's authority to enact the statute was not supportable under the Commerce Clause based on the *Lopez* decision, and the Supreme Court affirmed.

The Court viewed *Morrison* as featuring the same issue as *Lopez*, namely whether the cumulative effects of violence could have an impact on interstate commerce. Many passages of the *Morrison* opinion restate *Lopez*'s rationale and provide that the answer is "no."<sup>43</sup> The same federalism concerns expressed in the *Lopez* opinion were present in *Morrison*. Particularly, the Court wrote that "[t]he Constitution requires a distinction between what is truly national and what is truly local."<sup>44</sup> Regulating violent criminal conduct was viewed as a quintessentially local activity.

Another recent significant Commerce Clause case, *Gonzales v. Raich*, concerned the Controlled Substances Act (CSA).<sup>45</sup> The plaintiffs in *Gonzales v. Raich* cultivated marijuana for medicinal purposes, as they were permitted to do under a California statute.<sup>46</sup> They sought an injunction against the United States Attorney General and head of the Federal Drug Enforcement Agency prohibiting the enforcement of the CSA to the extent it would prevent them from possessing or cultivating marijuana for medicinal purposes. The plaintiffs argued that passage of the CSA was not a valid exercise of Congress's commerce power.

The Court's opinion confirmed the continuing validity of *Wickard*, writing that "[t]he similarities between this case and *Wickard* are striking."<sup>47</sup> In *Wickard*, the individual farmer's impact on the market was trivial, but the combined effect of regulating all the wheat grown by all the farmers like *Wickard* was significant enough to produce an effect on interstate commerce. Similarly, the marijuana grown by the plaintiffs in *Raich* had no effect on interstate commerce by itself, but the combined effect of regulating all marijuana grown

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<sup>41</sup>529 U.S. 598 (2000).

<sup>42</sup>*Id.* at 601–02.

<sup>43</sup>Then-Chief Justice Rehnquist authored the Court's decision for both cases.

<sup>44</sup>*Id.* at 617–18.

<sup>45</sup>*Gonzales v. Raich*, 545 U.S. 1 (2005). The CSA is located at 21 U.S.C.S. § 801 et seq.

<sup>46</sup>*Raich*, 545 U.S. at 5–7 (describing the California statute in question, CAL. HEALTH & SAFETY CODE § 11362.5). The statute creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician.

<sup>47</sup>*Id.* at 18.

by all growers was significant enough to produce an effect on interstate commerce. That Congress sought to regulate wheat and proscribe marijuana was a distinction without a difference. The Court wrote that Congress's commerce power includes the ability to prohibit as well as to regulate.<sup>48</sup>

#### 6. *Where Do These Decisions Leave Us?*

The Supreme Court's Commerce Clause jurisprudence has clearly changed over time, and it is not difficult to imagine it changing further still. Where are we now? Based on *Lopez*, *Morrison*, and *Raich*, two things appear to be true. First, the Court is of the view that Congress does not have power under the Commerce Clause to enact statutes targeted at violent crime that is clearly not interstate in nature. This is evident because in both *Lopez* and *Morrison* the Court struck down federal statutes enacted to deter local violent criminal activity. The Court wrote in both cases that crime prevention is a quintessentially local activity and, accordingly, it is best left for states and localities to regulate, rather than Congress. Based on these precedents, it is likely that the Court will turn a skeptical eye to federal statutes passed under the Commerce Clause that clearly seem aimed at deterring local, violent crime.

Second, based on *Raich*, the current Court does not appear to be seeking to narrow the scope of existing precedent to any great degree. *Raich* presented the Court with the perfect opportunity to reverse *Wickard*. The Court could have easily disavowed the aggregation concept, ruling that under Commerce Clause analysis the focus is on how the statute at issue affects the litigants, not on the statute's effect on large groups impacted by the statute. If the Court had wanted to take this approach, it would have struck down the federal legislation in *Raich* on the ground that the cultivation of marijuana by the plaintiffs did not have any impact on interstate commerce. Rather than proceed in this manner, the Court reaffirmed *Wickard* and the vitality of the aggregation concept. At least for now, then, *Wickard* remains good law. The ability of Congress to rely on *Wickard* and aggregation means that the scope of the commerce power continues to be quite broad.

#### C. *The Tenth Amendment and the Commerce Clause*

The major potential constraint on Congress's power to enact legislation under the Commerce Clause is the Tenth Amendment, which states 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."<sup>49</sup> As with the Commerce Clause, the Tenth Amendment has been a longstanding source of scholarly debate, and the Court's interpretation of the Tenth Amendment has changed over time.

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<sup>48</sup>*Id.* at 19.

<sup>49</sup>U.S. CONST. amend. X.

One view is that the Tenth Amendment does not add much to the Constitution and does not vest power in the courts to do anything. Under this interpretation, the Tenth Amendment is best viewed as a reminder that Congress cannot act without express authority. Perhaps the most well-known exposition of this interpretation is contained in Justice Stone's *Darby* opinion:

There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.<sup>50</sup>

The competing interpretation is that the Tenth Amendment protects states' rights and may be used by the courts to strike down federal legislation that intrudes on areas that should be left solely to state control.

Historically, the Court has tended to favor the former interpretation, and has seldom used the Tenth Amendment to strike down federal laws. Those rare instances suggest that there may be certain areas that belong exclusively to the states and are protected by the Tenth Amendment; however, the areas appear to be very narrow. One such area, at least historically, was manufacturing. In *Hammer v. Dagenhart*, the Court relied on the Tenth Amendment to strike down a federal statute prohibiting the shipment in interstate commerce of goods produced in factories employing underage children.<sup>51</sup> The Court held that the law, although explicitly focused on interstate commerce, had the effect of regulating manufacturing and labor hours, areas left "purely [to] state authority." Likewise, a federal statute placing a tax on goods produced by underage children was struck down as an unconstitutional regulation of manufacturing and child labor hours.<sup>52</sup>

Manufacturing and production, however, are no longer considered state-only realms. *Hammer* was explicitly overruled in *United States v. Darby*, where the Court held that Congress could restrict articles or goods from interstate commerce and could "choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities."<sup>53</sup>

A case from the 1970s held that the Fair Labor Standards Act, which required that state and local employees be paid the minimum wage, was unconstitutional under the Tenth Amendment.<sup>54</sup> The rationale in *National*

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<sup>50</sup>*United States v. Darby*, 312 U.S. 100, 124 (1941), *overruled in part by* *Paloti v. Univ. of Maryland College Park*, 959 F. Supp. 714 (D. Md. 1997).

<sup>51</sup>247 U.S. 251, 276 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

<sup>52</sup>*Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

<sup>53</sup>312 U.S. at 121.

<sup>54</sup>*Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

*League of Cities* was that the law interfered with state government functions and, if such a law was permitted to stand, it could undercut state sovereignty.<sup>55</sup> Mandating that government workers receive the minimum wage would, in short, interfere with the states' ability to arrange "their affairs."<sup>56</sup> For example, many states and localities paid workers reduced rates while the workers were in training programs. That would no longer be possible if the federal law were passed. There was evidence in the record that some government training programs would be curtailed or eliminated if workers were required to be paid a minimum wage while attending the programs.<sup>57</sup> In the Court's view, the Fair Labor Standards Act "stepped on the states' toes" by limiting state employment and training programs. A weakness in the Court's *National League of Cities* opinion, according to some commentators, was that it suggested that Congress could not interfere with certain state and local government functions, but then failed to articulate what those particular functions were.<sup>58</sup>

It was entirely possible that *National League of Cities* could have opened the floodgates. If Congress could not, consistent with the Tenth Amendment, require the states to pay their employees a minimum wage, were there not many other legal requirements that Congress was attempting to impose on the states that also were unconstitutional? The *National League of Cities* opinion seemed to pave the way for greater state autonomy; however, it was not to be. The Court considered several challenges to federal laws where the challengers relied on *National League of Cities* to no avail.<sup>59</sup> The holdings in these cases chipped away at *National League of Cities*.

The holding in *Equal Employment Opportunity Commission v. Wyoming* is of particular interest.<sup>60</sup> The issue in the case was whether Congress could enact a statute (The Age Discrimination in Employment Act) that, consistent with the Tenth Amendment, required states and localities to comply with federal age discrimination laws. The Court held that the Act was a valid exercise of Congress's power, and was not unconstitutional under the Tenth Amendment, because it did not "directly impair' the State's ability to 'structure integral

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<sup>55</sup>*Id.* at 855 ("Congress may not exercise [its commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked, would indeed . . . 'devour the essentials of state sovereignty' . . . and would therefore transgress the bounds of authority granted Congress under the Commerce Clause." (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968))).

<sup>56</sup>*Id.* at 849.

<sup>57</sup>*Id.* at 846.

<sup>58</sup>See, e.g., CHEMERINSKY, *supra* note 14, at 319 ("The Court, however, did not attempt to define what is such a traditional function; the Court only held that forcing payment of the minimum wage was unconstitutional.").

<sup>59</sup>See *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982); *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

<sup>60</sup>460 U.S. 226 (1983).

operations in areas of traditional governmental functions.”<sup>61</sup> Obviously, the opinion is difficult to reconcile with *National League of Cities*.

The Court’s current Tenth Amendment jurisprudence employs a passive-active distinction. The logic is that Congress cannot, consistent with the Tenth Amendment, commandeer states into performing a particular activity. But Congress can place restrictions on the states that do not require any action on the part of the states. These principles are perhaps best illustrated by example. In *New York v. United States*, the Court struck down the Low-Level Radioactive Waste Policy Amendments Act, which required states to “take title” to any in-state radioactive waste as of January 1, 1996 that was not properly eliminated; the Act also held the states legally responsible for any damage stemming from the waste.<sup>62</sup> The Court struck down the Act, ruling that the “take title” provision forced the states into doing something, either claiming title to the waste or complying with the Act’s regulations. This was said to be the equivalent of “commandeering” state governments, requiring the states to administer a federal regulatory program. Such a practice ran afoul of the Tenth Amendment and the scope of Congress’s powers under Article I.<sup>63</sup>

The same passive-active distinction evident in *New York v. United States* controlled the analysis in *Printz v. United States*.<sup>64</sup> There the Court considered the Brady Handgun Violence Prevention Act, which required state and local law enforcement officers to conduct background checks on individuals attempting to buy guns. The Court held that the Act violated the Tenth Amendment because it involuntarily conscripted state officials to implement the program; the states had to hire or set aside a state official to conduct the background checks mandated by the Act.

That the passive-active distinction is the current state of the law was made clear in *Reno v. Condon*, a unanimous decision.<sup>65</sup> The case concerned the Driver’s Privacy Protection Act, which prohibits state employees from giving out information obtained in connection with motor vehicle records. First, the Court wrote that the Act represented a constitutional exercise of the commerce power, since drivers’ information is “used in the stream of interstate commerce” and is therefore “an article of commerce” subject to congressional regulation.<sup>66</sup> Next the Court moved on to the Tenth Amendment issue. It used *New York* and *Printz* to develop a Tenth Amendment framework. Distinguishing them, the Court held that in those cases the federal statute at issue

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<sup>61</sup>*Id.* at 239.

<sup>62</sup>505 U.S. 144 (1992).

<sup>63</sup>*Id.* at 188 (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

<sup>64</sup>521 U.S. 898 (1997).

<sup>65</sup>528 U.S. 141 (2000).

<sup>66</sup>*Id.* at 148.

required the help of state or local workers to execute the statute. In contrast, the Driver's Privacy Protection Act (DPPA) was a restriction:

The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.<sup>67</sup>

In summary, the current state of the law is that Congress may, consistent with the Tenth Amendment, enact laws that restrict the states from acting in certain ways. However, Congress cannot, consistent with the Tenth Amendment, enact laws that force state and local government officials to implement a federal program.

### III. Exercise of the Commerce Clause Power in State Taxation

#### A. Congress's Authority to Regulate State Taxation Using the Commerce Power

A strong line of cases clearly demonstrates that Congress has the power to regulate state taxation. State taxation obviously affects interstate commerce; therefore, Congress may regulate it. Congress may do so either by restricting state tax practices or by specifically authorizing state tax practices. This point was emphasized in *Prudential Insurance Co. v. Benjamin*.<sup>68</sup> There the Court wrote:

The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, 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.<sup>69</sup>

The Court has recently affirmed this principle.<sup>70</sup>

<sup>67</sup>*Id.* at 151.

<sup>68</sup>328 U.S. 408 (1946).

<sup>69</sup>*Id.* at 434.

<sup>70</sup>*See* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) ("We have subsequently endorsed Justice Johnson's appraisal of the central importance of federal control over interstate and foreign commerce and, more narrowly, his conclusion that the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power.").

Even in the absence of Supreme Court cases explicitly approving congressional regulation of state taxation, it is easy to conclude that this is the right result based on the purposes of the Commerce Clause and how it has been interpreted in nontax cases. The rationale for the adoption of the Commerce Clause, explained earlier, was to put an end to state practices, such as excessive import taxation, that greatly harmed interstate commerce. Therefore, it only makes sense that the commerce power may be used to regulate other types of state and local taxation that are harmful to interstate commerce.

The nontax cases addressing the Commerce Clause, such as *Wickard*, reveal that Congress can regulate in a subject area if the area's affect on interstate commerce is substantial. Thus, in *Wickard*, Congress had the power under the Commerce Clause to put a restriction on the farmer's growing of wheat because, in the aggregate, the effects of regulating the national wheat crop in any given year produces a substantial effect on interstate commerce. Under the same reasoning, it seems clear, indeed obvious, that the realm of state and local taxation can be regulated by Congress because, in the aggregate, state and local taxation has a substantial effect on interstate commerce. Anyone doubting this proposition need only spend a minimal amount of time with a state tax professional; important decisions, such as where to incorporate and where to expand operations, are often made at least partly based on tax considerations. Further, there is little doubt that changes to national state and local tax practices would impact interstate commerce significantly. Accordingly, under the reasoning of *Wickard*, it is clear that state taxation is within Congress's purview under its commerce power.

### B. *Public Law 86-272 and Challenges to Its Constitutionality*

Public Law 86-272 is the broadest state tax-related legislation that Congress has ever enacted. It prevents states from imposing an income tax if the putative taxpayer's only activities in the state are the solicitation of orders of sales for tangible personal property, provided that the orders are approved outside the state and filled by shipment or delivery from outside the state. Thus, it cordons off a fairly substantial area.

Almost immediately after Public Law 86-272 was enacted, a number of states challenged the statute's constitutionality. There were also a number of articles published in tax journals and written by state government officials and their supporters arguing that Public Law 86-272 did not represent a legitimate use of Congress's commerce power.<sup>71</sup> The Louisiana Collector of Revenue at the time, Robert L. Roland, gave the tax press notice that he intended to chal-

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<sup>71</sup>See, e.g., Fred L. Cox, *Federal Limit on States Taxes is Unfair to Consuming States and to Local Firms*, 11 J. TAX'N 354 (1959) (the author was an official at the Georgia Department of Revenue).

lenge Public Law 86-272 as soon as the right case came along, and he was true to his word.<sup>72</sup>

The case was *International Shoe Co. v. Cocreham*.<sup>73</sup> It concerned a corporation with a commercial domicile in Missouri. The corporation was clearly protected by Public Law 86-272 because its only activities in Louisiana consisted of sending traveling salesmen into the state to solicit orders for shoes. Louisiana imposed tax on the corporation anyway, and the corporation protested that it could not be subject to tax because it was protected by Public Law 86-272.

The Louisiana Collector argued that Public Law 86-272 was not a valid exercise of Congressional power under the Commerce Clause and, hence, the putative taxpayer was not shielded from Louisiana taxation by Public Law 86-272. Further, the Louisiana Collector stated that “Public Law 86-272 necessarily impinges upon the rights reserved to [the states] by the Tenth Amendment to the Constitution.”<sup>74</sup> The state supreme court disagreed with the Louisiana Collector. In upholding the constitutionality of Public Law 86-272, the court first quoted several U.S. Supreme Court decisions which clearly provide that Congress possesses authority to protect and assume control over the field of state taxation.<sup>75</sup> In response to the state’s argument that Public Law 86-272 was an unreflective and unwise law, the court quoted the Senate Finance Committee’s reasons for approving Public Law 86-272, namely, the existence of “sprawling diverse revenue systems with underlying potential for great harm for the economy of the country and to . . . individual taxpayers.”<sup>76</sup> The court noted that it is not the role of the judiciary to question Congress’s wisdom in passing a law, and it stated that it is poorly suited to do so anyway, in that it does not have the facilities or the means for weighing all conflicting interests with respect to particular bills or laws.

A similar state supreme court case considering the constitutionality of Public Law 86-272 was heard in Oregon at roughly the same time.<sup>77</sup> The Oregon Tax Court had ruled that Public Law 86-272 was unconstitutional.<sup>78</sup> It wrote that Public Law 86-272 was not a valid exercise of the commerce power because “plaintiff’s realization of net income properly apportionable to Oregon and the Oregon tax imposed thereon are not part of interstate commerce, but rather are beyond Congress’s power to regulate that commerce.”<sup>79</sup>

<sup>72</sup>*Id.* at 357.

<sup>73</sup>164 So. 2d 314 (La. 1964).

<sup>74</sup>*Id.* at 317.

<sup>75</sup>*Id.* at 319–20.

<sup>76</sup>*Id.* at 321.

<sup>77</sup>*Smith Kline & French Labs. v. State Tax Comm’n*, 241 Ore. 50 (1965).

<sup>78</sup>*Smith Kline & French v. State Tax Comm’n*, 1 OTR 532 (Or. T.C. 1964), *rev’d*, *Smith Kline & French Labs.*, 241 Ore. 50.

<sup>79</sup>*Id.* at 557.

Thus, in the Oregon Tax Court's view, while Congress could regulate items in interstate commerce, Congress could not regulate the fruits of interstate commerce (*i.e.*, it could not regulate the taxation of revenue earned in interstate commerce). This distinction was rejected by the Oregon Supreme Court, which wrote that limiting when states could impose tax on multi-state taxpayers was surely a way of regulating interstate commerce.

Public Law 86-272 was also challenged in Missouri in a case that reached the Missouri Supreme Court.<sup>80</sup> The State, opposing a putative taxpayer's reliance on Public Law 86-272, argued that the enactment of Public Law 86-272 did not regulate interstate commerce because the state used formula apportionment to tax income; since the state apportioned income, it was not clear where that apportioned income was really earned. It was not clear, for example, if the apportioned income was interstate or intrastate income. Since the income might not have been interstate income, it was not something Congress could regulate under Public Law 86-272. This was not a very convincing argument, and there was no shortage of potential responses.<sup>81</sup> The Missouri Supreme Court did not even respond to this argument directly, but did provide a sensible explanation for why passage of Public Law 86-272 was not outside the scope of the commerce power:

The mentioned act is in our view a regulation which Congress was authorized to make. It was intended to protect foreign corporations engaged in interstate commerce from state income taxes which Congress believed to be an excessive and unreasonable burden on interstate commerce. Respondent distributes its products into all of the fifty states and every state that seeks to levy an income tax on any such foreign corporation doing interstate commerce within its boundaries necessarily imposes an income tax under a different statute. The determination of the amount of the tax due each state and whether [sic] the amount bears a proper relationship to the particular activities carried on in each of the taxing states would alone impose a heavy burden, hindering and limiting interstate commerce.<sup>82</sup>

Thirty years later, the Massachusetts high court addressed the constitutionality of Public Law 86-272 in *National Private Truck Council, Inc.*<sup>83</sup> The Commonwealth sought to tax a putative taxpayer on the ground that its trucks made deliveries in the state; the Commonwealth relied on its own regulation as support for its position and, when the taxpayer argued that the regulation

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<sup>80</sup>State *ex rel.* Ciba Pharm. Prods., Inc. v. State Tax Comm'n, 382 S.W.2d 645 (Mo. 1964).

<sup>81</sup>One obvious rejoinder was that *any* money the state was seeking to tax in the case of a Public Law 86-272 taxpayer was interstate income because the orders are filled outside the state and the goods are shipped from outside the state.

<sup>82</sup>*Id.* at 657.

<sup>83</sup>Nat'l Private Truck Council, Inc. v. Commissioner of Revenue, 688 N.E.2d 936 (Mass. 1997).

was contrary to Public Law 86-272, the Commonwealth responded that Public Law 86-272 was unconstitutional under the Tenth Amendment.<sup>84</sup>

By the time *National Private Truck Council, Inc.* was heard, *New York v. United States*, discussed *supra*, had been decided. The Massachusetts Supreme Judicial Court relied on the passive-active distinction made in *New York* in rejecting the commonwealth's arguments. The court noted that Public Law 86-272 does *not* implement a program that state or local officials are required to put into action. Accordingly, Public Law 86-272 is a passive restriction placed on interstate commerce and, therefore, is not contrary to the Tenth Amendment under *New York* and is well within the scope of Congress's commerce power.

### C. Other Exercises of the Commerce Power Affecting State Taxation

A number of federal laws, besides Public Law 86-272, also curb state taxing power. The Federal Aviation Act prohibits states and localities from levying a ticket tax, head charge, or gross receipts tax on individuals traveling by air.<sup>85</sup> It provides that airline employees may be taxed only in their state of residence and the state in which they perform at least 50% of their duties.<sup>86</sup> It allows only states in which an aircraft takes off or lands to tax the aircraft or service on the aircraft,<sup>87</sup> and it prevents states from taxing airlines or employees-passengers in airlines who merely fly over a state.<sup>88</sup>

The Railroad Revitalization and Regulatory Reform Act of 1975 prohibits states from imposing differing taxes on railroad property.<sup>89</sup> The Soldiers' and Sailors' Civil Relief Act of 1940 includes a provision stating that members of the U.S. Armed Forces do not become residents of a state for tax purposes merely because they are temporarily stationed there while on duty.<sup>90</sup> The ICC Termination Act of 1995 bars states from taxing "passenger[s] traveling in interstate commerce by motor carrier."<sup>91</sup> The Mobile Telecommunications Sourcing Act prohibits states from taxing mobile telecommunications service unless the state is the user's place of primary use of the service.<sup>92</sup> The Employment Retirement Income Security Act "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."<sup>93</sup>

<sup>84</sup>*Id.* at 937–39. The regulation subjected to tax persons delivering their own merchandise to customers using their own trucks.

<sup>85</sup>49 U.S.C. § 40116(b) (2000).

<sup>86</sup>*Id.* § 40116(f)(2).

<sup>87</sup>*Id.* § 40116(c).

<sup>88</sup>*See id.* § 40116(b), (c).

<sup>89</sup>49 U.S.C. § 14501 (2000 & Supp. V 2005).

<sup>90</sup>50 U.S.C. app. § 571 (2000 & Supp. III 2003).

<sup>91</sup>49 U.S.C. § 14505 (2000).

<sup>92</sup>Pub. L. No. 106-252, § 2(a), 114 Stat. 626, 627 (2000) (codified at 4 U.S.C. § 117).

<sup>93</sup>29 U.S.C. § 1144 (2000).

## IV. Preemption: Consequences of Congress's Exercise of the Commerce Power

### A. *The Three Categories of Preemption*

When state and federal law are inconsistent, federal law supersedes state law. This is a basic principle of the American federal system of government. The authority for this principle is contained in Article VI of the Constitution, the Supremacy Clause, which provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>94</sup>

The basis for federal preemption and the Supremacy Clause is easy to understand. In the absence of federal preemption, the federal government would be extremely weak, as the states could flout federal laws by enacting their own contrary laws. The nation could then quickly become divided. Preemption prevents this from occurring.

There are three categories of preemption. The categories are not tidy; to some extent the categories overlap, and it is often unclear which of the three categories most directly applies to any given conflicting state law. The categories were articulated in *Gade v. National Solid Waste Management Ass'n*, a U.S. Supreme Court case:

Pre-emption may be either expressed or implied, and “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” Absent explicit preemptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” and conflict pre-emption, where “compliance with both federal and state regulations is a physical impossibility,” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>95</sup>

Of the three preemption categories, express preemption is the most basic and straightforward. It holds that a state law is preempted where a federal statute explicitly states that it is meant to nullify any contrary state laws.

The other preemption categories are more amorphous. Field preemption occurs when Congress passes a law that occupies a field; the states then cannot enact their own laws covering territory in the field that the federal law occupies. The trouble is determining what fields Congress intended to occupy and what fields Congress intended to leave open to state regulation. This task falls on the courts.

<sup>94</sup>U.S. CONST. art. VI., § 1, cl. 2.

<sup>95</sup>505 U.S. 88, 98 (1992) (citations omitted).

*City of Burbank v. Lockheed Air Terminal, Inc.* is a textbook example of field preemption.<sup>96</sup> The issue in the case was whether a city ordinance restricting flight times was preempted by the Federal Aviation Act. The Court determined that the Federal Aviation Act was meant not only to control aircraft noise, but also to control the amount of air traffic, and that the city ordinance was attempting to occupy an area meant exclusively for federal control. Accordingly, the city ordinance intruded on the Federal Aviation Act and was preempted.

The third preemption category, conflict preemption, is brought into play where a state law and a federal law conflict in some non-obvious way. The federal law and the state law will not say opposite things, but compliance with one law will make impossible compliance with the other law. Conflict preemption also occurs where a state law is inharmonious with the objectives of a federal law: “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”<sup>97</sup>

A frequently cited case illustrating field preemption is *Nash v. Florida Industrial Commission*.<sup>98</sup> The federal statute at issue, the National Labor Relations Act, authorized the National Labor Relations Board to initiate unfair labor practice proceedings whenever some person charged that another party had engaged in an unfair labor practice. But a Florida law disqualified a discharged employee from unemployment benefits if the employee filed an unfair labor practice charge. The Supreme Court struck down the Florida law on conflict preemption grounds. The Florida law interfered with the objectives of the federal law: the federal law encouraged employees to file unfair labor practice charges, while the Florida law punished employees for those filings. Thus, the Florida law hampered the federal law and was struck down on conflict preemption grounds.

### B. Preemption of State and Local Tax Laws: Supreme Court Cases

Several Supreme Court cases address federal preemption of state and local tax laws. *Aloha Airlines, Inc. v. Director of Taxation* is one prominent example.<sup>99</sup> By way of background, the Airport Development Acceleration Act of 1973 unambiguously provided that states could not tax persons traveling in air commerce or the gross receipts derived from air commerce.<sup>100</sup> Despite this

<sup>96</sup>411 U.S. 624 (1973).

<sup>97</sup>*Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

<sup>98</sup>389 U.S. 235 (1967).

<sup>99</sup>464 U.S. 7 (1983).

<sup>100</sup>*Id.* at 9–10 (“No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.” (quoting Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, § 7(a), 87 Stat. 90 (codified at 49 U.S.C. § 1513))).

federal statute, Hawaii enacted a gross receipts tax of four percent on airlines, although it couched the levy in property taxation language.<sup>101</sup> Hawaii conceded on brief that its tax was in fact a gross receipts tax rather than a property tax.<sup>102</sup> The Hawaii Supreme Court had ruled for Hawaii on the basis that, in its view, the federal provision at issue was aimed at curbing the proliferation of taxes on airline passengers, whereas the Hawaiian statute taxed the airline, rather than the airline's passengers. The U.S. Supreme Court disagreed with the Hawaii Supreme Court's interpretation of Congress's legislative intent.<sup>103</sup> But it also held that legislative intent was irrelevant because the state tax statute is preempted where a state tax statute conflicts with the plain language of a federal statute.<sup>104</sup>

*McGoldrick v. Gulf Oil Corp.* is arguably both a conflict preemption and a field preemption case.<sup>105</sup> The federal provisions central to the case, part of the Tariff Act of 1930 and its regulations, authorized the importation of crude oil free from tax, provided that the oil was stored at a bonded warehouse either for export or for sale to vessels in foreign commerce. Gulf Oil fit within the terms of the exemption, as it imported oil and stored that oil at a bonded warehouse in New York City. Regardless, New York City determined that Gulf Oil was responsible for collecting sales tax on sales of its crude oil to foreign vessels. Gulf Oil appealed the New York City determination.

The Court noted the weighty policy reasons for the Tariff Act, particularly relieving importers of crude oil from import tax so that importers could compete with the prices of foreign competitors. The Court determined that any tax at the state or local level would conflict with this objective. Thus, the New York City tax was preempted by the Tariff Act and its regulations.

It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax that would lessen the competitive advantage conferred on the importer by Congress and that might equal or exceed the remitted import duty. The Congressional legislation, read in the light of its purpose, is tantamount to a declaration that, in order to accomplish constitutionally permissible ends, the

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<sup>101</sup>*Id.* at 10–11 (“The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the [general excise] tax . . . .” (quoting HAW. REV. STAT. § 239-6 (1976))).

<sup>102</sup>*Id.* at 11 n.4.

<sup>103</sup>*Id.* at 12–13 (“[N]othing in the legislative history of the ADAA suggests that Congress intended to limit [the statute’s] pre-emptive effect to taxes on airline passengers or to save gross receipts taxes like [the Hawaii statute at issue].”).

<sup>104</sup>*Id.* at 12 (“We cannot agree with the Hawaii Supreme Court’s analysis . . . . [W]hen a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted.”).

<sup>105</sup>309 U.S. 414 (1940).

imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ships' stores, and such merchandise shall not become subject to the state taxing power. The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case, states only what is implicit in the Congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce.<sup>106</sup>

Categorizing *McGoldrick* neatly is difficult. There is a strong argument that *McGoldrick* is a conflict preemption case because placing the New York City tax on the sale of crude oil clearly conflicted with the goals of the Tariff Act and its regulations. On the other hand, *McGoldrick* could be viewed as a field preemption case in that Congress wished to occupy the field of taxation of imported and exported crude oil. The case illustrates that the categories of preemption can and do overlap.

A taxpayer relied on *McGoldrick* to invalidate a state tax statute in *Xerox Corp v. County of Harris*.<sup>107</sup> Like *McGoldrick*, *Xerox* involved a federal exemption, under 19 U.S.C. § 1557(a), for goods and merchandise stored in a duty-free bonded warehouse for eventual sale into foreign commerce.<sup>108</sup> In the case, Xerox manufactured copiers in New Mexico and then stored them in a bonded warehouse in Texas awaiting shipment to Latin America. Xerox clearly seemed to fit within the terms of the exemption. However, property taxes were imposed on the copiers by both the city and county in which the warehouse was located. The Court invalidated those taxes, writing that “[t]he analysis in *McGoldrick* applies with full force.”<sup>109</sup> It noted that *McGoldrick* was factually distinct in that it involved a sales tax rather than a property tax, and that Xerox had the option of paying a tax and selling its goods domestically (whereas the taxpayer in *McGoldrick* did not), but it deemed those distinctions to lack any “legal difference.”<sup>110</sup> Again, arguments could be made that *Xerox* is a field preemption case, but it also clearly fits within the conflict preemption category, since the taxes were invalidated because they conflicted with a federal statute.

Another taxpayer victory in a U.S. Supreme Court federal preemption case is worthy of mention.<sup>111</sup> The case, *Maryland v. Louisiana*, like *Xerox* and *McGoldrick*, could be considered either a conflict preemption case or a field preemption case. At issue was a Louisiana statutory scheme that prevented owners of natural gas, mostly pipeline companies, from passing the burden of the Louisiana tax to producers. Under the scheme, Louisiana tax was owed at

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<sup>106</sup>*Id.* at 429 (citations omitted).

<sup>107</sup>459 U.S. 145 (1982).

<sup>108</sup>*Id.* at 148.

<sup>109</sup>*Id.* at 153.

<sup>110</sup>*Id.*

<sup>111</sup>*Maryland v. Louisiana*, 451 U.S. 725 (1981).

the time of the first “use” of the natural gas in Louisiana.<sup>112</sup> Use was defined extremely broadly as including any activity in Louisiana involving natural gas; particularly, transporting the natural gas into the state or processing the tax gave rise to the tax.<sup>113</sup> The tax was “deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas.”<sup>114</sup> Owners were expressly prohibited from making agreements or contracts under which they would receive a right to reimbursement or refund of the taxes except from consumers of the tax. This meant that the pipeline companies could not pass the burden of the tax to natural gas producers; instead, the tax could only be collected from consumers, which usually were out-of-state consumers. The Court held that this scheme interfered with the Federal Energy Regulatory Commission’s (FERC) authority to regulate the price of gas. Specifically, FERC had permitted that any tax on natural gas could be passed on to producers (the Supreme Court had previously noted this principle in a prior case).<sup>115</sup> Since the Louisiana tax conflicted with FERC’s power to regulate the natural gas industry, it was deemed preempted by federal law.<sup>116</sup>

It is surprising that there have not been more preemption challenges to state tax laws, both at the U.S. Supreme Court level and at the state court level. There is no shortage of state tax laws that seem to beg to be preempted. One obvious contender is New Jersey’s Alternative Minimum Assessment (AMA), which currently applies only to corporations that are protected by Public Law 86-272 from the net income component of the New Jersey corporation business tax. The AMA law clearly conflicts with Public Law 86-272 and should be struck down when and if challenged.<sup>117</sup>

### C. *Reverse Preemption of State and Local Tax Laws: Northwest Airlines*

Preemption can be used as a sword by taxpayers. But it can also be used as a shield by state taxing authorities. In a recent case, Wisconsin relied on preemption to defend one of its statutes from attack.<sup>118</sup> The Wisconsin statute under attack provided an ad valorem tax exemption to air carriers in Wisconsin operating a “hub facility.” The term hub facility was defined two ways: (1) a facility where an air carrier company operates “at least 45 common carrier departing flights each weekday” and “from which it transported passengers to at least 15 nonstop destinations”; or (2) “an airport or any combination

<sup>112</sup>*Id.* at 731 (citing LA. REV. STAT. ANN. §§ 47:1301–47:1307 (West. Supp. 1981)).

<sup>113</sup>*Id.* at 732 n.8 (citing LA. REV. STAT. ANN. § 47:1302(8) (West. Supp. 1981)).

<sup>114</sup>*Id.* at 734 (quoting LA. REV. STAT. ANN. § 47:1303C (West. Supp. 1981)).

<sup>115</sup>*Id.* at 748 (“Under the present law, natural gas owners are entitled to recover from their customers all legitimate costs associated with the production, processing, and transportation of natural gas.”) (citation omitted).

<sup>116</sup>*Id.* at 747–48.

<sup>117</sup>For more on this topic, see Arthur R. Rosen & Jeffrey S. Reed, *The New Jersey AMA and P.L. 86-272: A Constitutional Violation*, 43 ST. TAX NOTES 207 (Jan. 22, 2007).

<sup>118</sup>*Nw. Airlines, Inc. v. Wisconsin Dept’t of Revenue*, 717 N.W.2d 280 (Wis. 2006).

of airports [in Wisconsin] from which an air carrier company cumulatively operated at least 20 common carrier departing flights each weekday,” if the air company’s headquarters is in Wisconsin.<sup>119</sup>

Northwest Airlines (Northwest) did not qualify for the exemption, but several of its competitors did. If Northwest had qualified for the exemption, it would have received a tax break of \$1.5 million in Wisconsin for the 2002 tax year alone. Northwest challenged the constitutionality of the exemption on a number of grounds. One ground was that the exemption violated the discrimination prong of *Complete Auto*. The basis for this argument was that it was much easier for in-state taxpayers to qualify for the exemption compared with out-of-state taxpayers, due to the lower qualification threshold for taxpayers with headquarters in Wisconsin. Northwest argued that the disparity in treatment between in-state and out-of-state headquartered air carriers constituted unconstitutional discrimination.

Wisconsin defended by arguing that Northwest’s argument was preempted by federal statute. It cited to the tax portions of the Federal Aviation Act.<sup>120</sup> One provision in that law lists a number of state tax practices that are considered to “unreasonably burden and discriminate against interstate commerce.”<sup>121</sup> The key provision states that “[e]xcept as provided in subsection (d) [the provision listing the discriminatory state tax practices], a State or political subdivision of a State may levy or collect [taxes on aircraft operators].”<sup>122</sup> When those two provisions are combined, the effect is that states and localities, at least arguably, may impose any type of taxes on aircraft operators except for the tax practices that are proscribed in subsection (d) as discriminating against interstate commerce.

Wisconsin, therefore, argued that, since its exemption was not singled out as a discriminatory tax practice by 49 U.S.C. § 40116, it was constitutional. It argued that Congress had occupied the field by listing all the state tax practices on air carriers that would be considered unconstitutionally discriminatory. This meant that Northwest, and the state courts, were preempted from creating new categories of discriminatory taxes that were contrary to the exclusive list provided in 49 U.S.C. § 40116.

This argument carried the day. The Wisconsin Supreme Court wrote that:

Congress intended to allow state taxation of air carriers but also prevent unfair methods of taxation. In 49 U.S.C.A. § 40116(b) and (d) it enumerated the unfair methods of taxation. When Congress enacted § 40116, its power under the Commerce Clause ceased to be dormant in the field of state taxation of air carriers. . . . Because § 40116(e) authorizes the states to collect property taxes from air carriers,

<sup>119</sup>*Id.* at 282–83 (citing WIS. STAT. § 70.11(42)(a)2 (2003–2004)).

<sup>120</sup>*Id.* at 284; see 49 U.S.C. § 40116 (2000); *supra* text accompanying notes 85–88.

<sup>121</sup>*Nw. Airlines, Inc.*, 717 N.W.2d at 288–89 (citing 49 U.S.C. § 40116(d)(2)(A)).

<sup>122</sup>*Id.* at 289 (citing 49 U.S.C. § 40116(e)).

and because the hub exemption does not fall within any of the assessment or collection practices prohibited by the statute, we conclude the hub exemption is not subject to dormant Commerce Clause review.<sup>123</sup>

There is a very good argument that reverse preemption can produce absurd or illogical results. It may not be possible in any given instance for Congress to think of every possible dubious tax scheme. Under the Wisconsin Supreme Court's logic, *any* tax scheme on air carriers not specifically listed as discriminatory in 49 U.S.C. § 40116(d) cannot be invalidated as discriminatory by the courts.<sup>124</sup> Obviously, the ability of Congress to preempt constitutional challenges to entire realms of state taxation could potentially be dangerous if the federal legislation is unsound or is not updated to bar newly-enacted burdensome or discriminatory state laws.

## V. Recent Federal Tax Legislation Curbing State Taxing Power

### A. Recent Federal Bills Affecting State Taxation

As is shown in the authorities discussed in this article, Congress possesses broad authority to enact legislation using the commerce power. Once such legislation is enacted, the states must accept the legislation; any contrary state legislation is preempted by the federal legislation. A number of recent federal bills would curb state taxing power. These bills and their constitutionality will be examined below.

#### 1. *The Business Activity Tax Simplification Act*

The Business Activity Tax Simplification Act (BATSA) was introduced in June 2007.<sup>125</sup> The legislation modernizes Public Law 86-272 in three ways. First, it ensures that Public Law 86-272 protects solicitation for all types of sales, not just solicitation for sales of tangible personal property as under current law. Second, it extends Public Law 86-272's protections to cover all business activity taxes, rather than just income taxes, as under present law. Third, it adds the following to the list of "protected" activities: the furnishing of information to customers or affiliates in a state and the coverage of events or other information gathering in the state.

<sup>123</sup>*Id.* at 294 (citations omitted).

<sup>124</sup>Walter Hellerstein gives the following example: "[I]f Wisconsin chose to exempt from taxation the property of any air carrier that served Wisconsin cheese (but not cheese produced in other states), under the Northwest Airlines court's analysis, the exemption would pass muster." Walter Hellerstein, *Congressional Consent to State Taxation Under the Commerce Clause*, 41 ST. TAX NOTES 629 (Sept. 4, 2006).

<sup>125</sup>More information on this bill, and on BATSA generally, is available online. BATSA, <http://www.batsa.org> (last visited Oct. 22, 2008).

BATSA also mandates a physical presence standard for business activity taxation. Under the bill, states and localities can impose business activity taxes only on taxpayers that have a physical presence (*i.e.*, employees, agents, or property in the state). The legislation prevents aggressive states from shifting the tax burden to out-of-state taxpayers who receive only insignificant benefits and protections from the state. It would undercut the economic nexus position some states have adopted.

Congress could pass BATSA using the express Commerce Clause under *United States v. Lopez* and other U.S. Supreme Court precedents. This is because BATSA (1) regulates the taxation of things in interstate commerce (*i.e.*, multi-state businesses); (2) keeps with the Commerce Clause's intention of preventing burdensome state legislation; and (3) concerns a subject (*i.e.*, state business activity taxation) that affects interstate commerce (identical to the issues relating to the validity of Public Law 86-272). Additionally, there is no valid argument that BATSA is unconstitutional under the Tenth Amendment because BATSA does not require the states to implement a federal program.

## 2. *The Streamlined Sales Tax Legislation*

The Federal Streamlined Sales Tax Project legislation<sup>126</sup> would override *Quill Corp. v. North Dakota's* physical presence standard and thereby permit states that are members of the streamlined sales tax governing board to impose sales tax collection duties on remote sellers.<sup>127</sup> The legislation specifies "minimum" sales and use tax simplification requirements that would have to continue to be met by governing board member states. The legislation also implements a governance mechanism for the Streamlined Sales Tax Act—taxpayers could bring definitional claims in the Court of Federal Claims, and constitutional challenges could be brought before federal district courts.

Congress could pass this legislation under its Commerce Clause power. The legislation (1) regulates the taxation of things in interstate commerce (*i.e.*, multi-state businesses); (2) keeps with the Commerce Clause's intention of preventing burdensome state legislation (sales tax compliance burdens are clearly significant under *Quill*); (3) concerns a subject (*i.e.*, state sales and use taxation) that affects interstate commerce; and (4) the Supreme Court explicitly condoned federal legislation to clarify sales and use tax laws in its *Quill* opinion. There is no valid argument that this legislation is unconstitutional

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<sup>126</sup>Two recent versions of this bill were enacted in 2005. S. 2152, 109th Cong. (2005); S. 2153, 109th Cong. (2005). The difference between the bills is that S. 2152 provides a small business exception for the *Quill* override—there is no collection obligation if the remote seller and affiliates had less than \$5 million in nationwide gross taxable sales in the preceding year unless the individual remote seller only had \$100,000 of its own nationwide gross taxable sales in the preceding year. S. 2153 does not provide for this small business exception.

<sup>127</sup>504 U.S. 298, 318 (1992).

under the Tenth Amendment because it does not require the states to implement a federal program.

### 3. *Internet Tax Freedom Act Moratorium Legislation*

The Internet Tax Freedom Act (ITFA), which established a moratorium on state and local taxes on internet access, was enacted in 1998.<sup>128</sup> It prevented state taxation on Internet access over a three-year period that ended October 1, 2001. The Internet Tax Non-Discrimination Act of 2003 extended the moratorium until November 1, 2007. The current federal legislation would permanently ban taxes on Internet access.<sup>129</sup>

Congress could pass this legislation under its commerce power. The legislation (1) regulates the taxation of an instrumentality or channel (*i.e.*, the Internet) of interstate commerce; (2) is in keeping with the Commerce Clause's intent of preventing burdensome state legislation; and (3) concerns a subject (*i.e.*, the internet) that affects interstate commerce. There is no valid argument that this legislation is unconstitutional under the Tenth Amendment because it does not require the states to implement a federal program.

### 4. *The Telecommuter Tax Fairness Act*

The Telecommuter Tax Fairness Act is designed to prevent the double taxation of telecommuters' income.<sup>130</sup> It is a direct response to the "convenience of the employer" rule. Under that rule, a non-resident telecommuter may apportion her wage income in her employer's state (such as where the non-resident actually is working) only if she works outside of her employer's state for the employer's necessity. At least four states follow a version of this rule.<sup>131</sup> The rule is criticized because it often results in double taxation, since a telecommuter may be taxed on 100% of her wages both in her state of residence and in the state where her employer is based. The federal legislation would prevent states from deeming non-resident individuals to be physically present in the employer's state absent the employee's actual physical presence.

Congress could pass this legislation under its commerce power. The legislation (1) regulates the taxation of persons in interstate commerce; (2) keeps with the Commerce Clause's intention of preventing burdensome state tax legislation; and (3) concerns a subject (*i.e.*, taxation of people living in different states from where they work) that affects interstate commerce. There is no valid argument that this legislation is unconstitutional under the Tenth Amendment because it does not require the states to implement a federal program.

<sup>128</sup>Internet Tax Freedom Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681.

<sup>129</sup>S. 156, 110th Cong. (2007).

<sup>130</sup>H.R. 2558, 109th Cong. (2005); S. 1097, 109th Cong. (2005).

<sup>131</sup>New York, New Jersey, Pennsylvania, and Nebraska follow a version of the convenience of the employer rule. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18 (2008).

### 5. *The EDSTAR Legislation*

The End Discriminatory State Taxes on Automobile Renters Act of 2007 (EDSTAR) legislation bans new state and local taxes that are imposed more heavily on automobile rentals compared with other transactions.<sup>132</sup> For example, if a state's general sales tax rate is five percent, that state cannot, under the legislation, pass a new law creating an additional one percent excise tax on the rental of motor vehicles, as this would drive the rate on motor vehicle rentals to six percent, compared to the ordinary five percent sales and use tax rate. The legislation would "grandfather" in current state and local taxes on car rentals, but would prevent such future laws from being enacted.

Congress could pass the EDSTAR legislation under its commerce power, because the legislation regulates things in interstate commerce (*i.e.*, motor vehicles) and the things being regulated (*i.e.*, motor vehicles) have a substantial effect on interstate commerce. There is no valid argument that this legislation is unconstitutional under the Tenth Amendment because it does not require the states to implement a federal program.

#### B. *How Come Congress is not Acting?*

To date, Congress has rarely exercised its Commerce Clause authority to enact legislation focused on state taxation. Why is this? It could be that Congress does not want to interfere with state independence and sovereignty by restricting the states' ability to enact their own taxing schemes and make their own decisions about how the state tax burden should be distributed.<sup>133</sup> Another explanation is tradition. It could be that traditionally Congress has refrained from involvement with state tax legislation, so it is disinclined to do so now unless there is tremendous, immediate, and burning need for legislation. A practical explanation is that, since Congress is charged with enacting federal tax legislation, it focuses its tax policy attention on that legislation first, and state tax-related legislation only gets secondary consideration. A cynical explanation is that Congress may be unlikely to enact state tax-based legislation because there are conflicting interests at play: the states and business organizations. It may be safer politically to defer to agencies and courts under such circumstances rather than to enact legislation that would make one interested group furious.<sup>134</sup>

None of those explanations are particularly satisfying to those who practice in the state and local tax area or who are affected by questionable state and

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<sup>132</sup>H.R. 2453, 110th Cong. (2007).

<sup>133</sup>See Charles E. McLure, Jr. & Walter Hellerstein, *Congressional Intervention in State Taxation: A Normative Analysis of Three Proposals*, 31 ST. TAX NOTES 721 (Mar. 1, 2004).

<sup>134</sup>A similar point is made in Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 954 (1992).

local tax practices. Nor have those explanations been satisfactory to judges analyzing state tax provisions, who are left to determine which activities place an undue burden on interstate commerce because Congress is not making those determinations itself. On a number of occasions, the Court has invited Congress to provide some guidance, or has been left to infer that a state tax policy was acceptable because Congress has not said otherwise.<sup>135</sup> For example, in *Quill*, the Supreme Court wrote that retention of the *National Bellas Hess* physical presence rule was

made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions . . . . Accordingly, 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.<sup>136</sup>

It should be clear that Congress is best positioned to make nationwide state and local tax policy. It is most easily able to give all interested parties a hearing, ensuring that diverse views are brought to the table. Unlike the courts, which must make decisions based on the facts before them, Congress can make law based on what makes the most sense as a general policy matter.

The consequences of Congress not acting are unsurprising. The states are enacting their own tax laws based generally on what favors in-state interests, leaving out-of-state interests to share a disproportionate percentage of the tax burden.<sup>137</sup> Also, the states, when enacting their own tax laws, are not necessarily taking into account what sister states are doing. As a result, state tax laws can vary significantly from state-to-state. There is no solid policy reason for these differences. Moreover, the differences negatively affect interstate commerce by raising compliance burdens on multi-state taxpayers to unreasonable levels. It is not clear when Congress will step in and provide much-needed clarity and uniformity to state taxation. Perhaps it will take a taxpayer-unfriendly decision like *Northwestern States Portland Cement Co. v. Minnesota* to goad businesses into pushing Congress for change and for Congress to

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<sup>135</sup>See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637–38 (1981) (White, J., concurring) (“Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. . . . The constitutional authority and the machinery to thwart efforts such as those of Montana, if thought unacceptable, are available to Congress . . .”).

<sup>136</sup>*Quill Corp v. North Dakota*, 504 U.S. 298, 318 (1992) (footnote omitted) (citation omitted).

<sup>137</sup>With respect to in-state interests generally, see David Brunori, *Incentive Programs—The New Patronage*, 17 ST. TAX NOTES 1603 (Dec. 13, 1999). With respect to states attempting to tax out-of-state individuals and businesses not receiving any significant benefits from the states, one only has to consider the increasing number of states adopting economic nexus positions.

act.<sup>138</sup> The Court's recent refusal to review the West Virginia Supreme Court's constitutionally suspect decision in *MBNA v. West Virginia* could potentially be such an impetus for change.<sup>139</sup> One thing seems clear: in the absence of Congressional action, state tax laws will likely continue to become increasingly confusing and burdensome for individuals and businesses crossing state lines.

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<sup>138</sup>That decision, coupled with the Supreme Court's refusal to hear other cases on the same issue with better facts for the putative taxpayers, provided the impetus for Public Law 86-272. See *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), *superseded by statute as stated in* *Silent Hoist & Crane Co. v. Dir., Div. of Taxation*, 494 A.2d 775 (1985).

<sup>139</sup>*Tax Commissioner v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226 (W. Va. 2006), *cert denied*, *FIA Card Servs., N.A. v. Tax Commissioner*, No. 06-1228, 2007 U.S. LEXIS 7868 (June 18, 2007).