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# Exploring the “Myth of Parity” in State Taxation: State Court Decisions Interpreting Public Law 86–272

Bradley W. Joondeph\*

## I. INTRODUCTION

Since 1875, federal courts have had the authority to hear most “cases” or “controversies” in which the plaintiff has alleged the deprivation of a right or privilege protected by federal law.<sup>1</sup> Article III of the Constitution, which establishes the limits of the subject matter jurisdiction of the federal courts,<sup>2</sup> states that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .”<sup>3</sup> And through 28 U.S.C. § 1331, Congress has provided the federal courts with jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>4</sup>

General “federal question” jurisdiction, however, does not extend to cases in which plaintiffs challenge the lawfulness of state or local taxes. Longstanding equity practice dictates that federal courts must

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\* Associate Professor, Santa Clara University School of Law. I owe thanks to the participants in a workshop on empirical research in taxation at Washington University in St. Louis, especially Nancy Staudt and Peter Wiedenbeck. I received helpful comments on previous drafts from Andrew Berke, Jeff Kahn, Gary Neustadter, Gary Spitko, Srija Srinivasan, and John Swain. Finally, a special thanks to Chris DiCarlo, whose research assistance made this article possible.

1. Act of Mar. 3, 1875, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2000)). See also *Palmore v. United States*, 411 U.S. 389, 401–02 (1973); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 913 (1984).

2. See *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–75 (1803); ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 3.4, at 207 (3d ed. 1999).

3. U.S. CONST. art. III, § 2, cl. 1.

4. 28 U.S.C. § 1331 (2000).

withhold equitable relief in such cases when the taxpayer has an adequate legal remedy in state court.<sup>5</sup> In 1937, Congress codified this practice in the Tax Injunction Act, which states that “[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”<sup>6</sup>

The Supreme Court has interpreted the Tax Injunction Act quite broadly, such that federal district courts are now virtually precluded from hearing any state or local tax suit.<sup>7</sup> The Court has also ruled that the principle of comity between federal courts and state governments precludes taxpayers from bringing actions for damages against state tax administrators in federal court under 42 U.S.C. § 1983, at least when state law offers an adequate legal remedy.<sup>8</sup> Moreover, even in cases where these barriers are inapplicable, the Eleventh Amendment prevents taxpayers from suing unconsenting states in federal court to obtain retrospective relief.<sup>9</sup> In short, state courts are generally the only forum available to taxpayers for claims that state or local taxes violate federal law.

In recent years, the Supreme Court has expressed its belief that the lack of a federal forum for such claims should not concern taxpayers. Aside from its rather expansive readings of the Tax Injunction Act, the Act’s antecedent equity practice, and the principle of comity, the Court has more generally embraced a theory of “parity” between the federal and state courts—a belief that the federal and state judiciaries

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5. This practice dates back to the mid-1800s. *See, e.g.*, *Matthews v. Rogers*, 284 U.S. 521, 525–26 (1932); *Singer Sewing Mach. Co. v. Benedict*, 229 U.S. 481, 488 (1913); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909); *Shelton v. Platt*, 139 U.S. 591, 595–96 (1891); *Union Pac. Ry. Co. v. Ryan*, 113 U.S. 516, 525 (1885); *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870).

6. 28 U.S.C. § 1341 (2000).

7. *See California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297 (1943); JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE AND LOCAL TAXATION* 1062 (7th ed. 2001); Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 Tax Challenges*, 103 HARV. L. REV. 1888, 1888 (1990).

8. *See Fair Assessment in Real Estate Ass’n v. McNary*, 454 U.S. 100, 116 (1981).

9. *See Bd. of Trs. v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 462 (1945). *See also* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-25, at 521-29 (3d ed. 2000) (discussing Eleventh Amendment jurisprudence).

are equally competent in deciding questions of federal law.<sup>10</sup> The Court has stated that it is “unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States,”<sup>11</sup> and that a “doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.”<sup>12</sup>

Many observers dispute this parity theory, labeling it a convenient but dangerous myth.<sup>13</sup> Specifically in the field of state and local taxation, lawyers have expressed their distrust of state courts’ capacity or willingness to protect the federal rights of taxpayers, especially when those taxpayers are domiciled outside the taxing state.<sup>14</sup> The common view seems to be that, because a “state’s own judges, under the existing system, define the state’s power to tax,” the “taxpayer’s likelihood of success is not great.”<sup>15</sup>

Although several scholars have explored the question of parity between federal and state courts in a variety of other contexts,<sup>16</sup> the empirical question whether state courts are systematically biased against taxpayers seeking the protection of federal law has gone largely unexamined. This Article offers a preliminary exploration of that issue. Specifically, it presents a study of all reported state court decisions interpreting Public Law 86–272,<sup>17</sup> a federal statute enacted in 1959 that provides businesses with immunity from state income taxes when they keep their activities in the taxing state beneath a specific threshold. State court decisions interpreting Public Law 86–

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10. See, e.g., *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997); *Sumner v. Mata*, 449 U.S. 539, 550 (1981); *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976).

11. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

12. *Coeur d’Alene Tribe of Idaho*, 521 U.S. at 275.

13. This phrasing comes from Burt Neuborne’s seminal article on the subject. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977).

14. See, e.g., William J. Quirk & C. Rhett Shaver, *Does Congress Put Federalism at Risk When It Limits the States’ Power to Tax?*, 21 STATE TAX NOTES 649, 649 (2001) (criticizing lack of federal forum as unfair); Doug Sheppard, *Shining a Blue Light on Nexus: Katz and Rosen Debate the Kmart Decision*, 23 STATE TAX NOTES 847, 849 (2002) (reporting criticism of the Tax Injunction Act); Doug Sheppard & Timothy Catts, *U.S. Senator’s Reconciliation Has No Sales Tax “Streamlining” Language*, 28 STATE TAX NOTES 528, 528 (2003) (describing taxpayer support for giving the United States Court of Federal Claims jurisdiction to hear certain disputes concerning the Streamlined Sales and Use Tax Agreement).

15. Quirk & Shaver, *supra* note 14, at 649.

16. See *infra* notes 73–84 and accompanying text.

17. Act of Sept. 14, 1959 §§ 101–04, Pub. L. No. 86–272, 73 Stat. 555, 555 (codified at 15 U.S.C. §§ 381–84 (2000)).

272 may provide a means for measuring systemic bias. Because, depending on the circumstances, taxpayers and state tax administrators can be on either side of the legal issue. In most cases, the taxpayer seeks a broader reading of the statutory immunity, so as to establish its immunity from taxation in the taxing state. In some cases, however, the taxpayer seeks a *narrower* reading of the statute because doing so will establish its taxability in a state other than the taxing state, thus reducing its liability to the taxing state. Hence, while the legal issue in the cases—whether the taxpayer falls within the immunity provided by Public Law 86–272—remains roughly constant, the party benefiting from a broader or narrower construction of the statute varies from case to case. If state courts have consistently ruled in favor of state tax administrators, rather than adhering to consistent interpretations of the statute, this would be a fair indication of systemic bias. On the other hand, if state courts have interpreted the breadth of the immunity provided by Public Law 86–272 consistently, regardless of which party stood to benefit, this would suggest state court impartiality.

Unfortunately, due to the limited number of reported state court decisions interpreting Public Law 86–272 (only fifty-six decisions in all), this study cannot offer a statistically rigorous assessment of state court bias. Still, the study shows that, at least as a *prima facie* matter, these decisions provide little support for the assertion that state courts systematically disfavor taxpayers that seek the protection of federal law. Rather, state courts appear to have interpreted the immunity of Public Law 86–272 reasonably consistently, regardless of whether those holdings have benefited taxpayers or state governments. Again, these results do not reflect true statistical analysis; this evidence is only anecdotal. But the study at least suggests that substantial investigation will be necessary to determine whether the common “wisdom” concerning the bias of state courts against taxpayers is itself more myth than reality.

## II. STATE TAXES, FEDERAL CLAIMS, AND STATE COURTS

Under 28 U.S.C. § 1331, federal district courts have subject matter jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>18</sup> But this general rule of federal question jurisdiction does not apply to cases in which a plaintiff challenges the validity of a state or local tax.<sup>19</sup> With rare exception, taxpayers contending that a state or local tax violates federal law must assert their claims in state court. The principal reason is the longstanding equity practice of federal courts to withhold relief that would restrain the administration or collection of a state tax when an adequate legal remedy is available in state court.<sup>20</sup> In the 1870 case of *Dows v. City of Chicago*,<sup>21</sup> for example, the Supreme Court explained that it was “of the utmost importance to [the states] that the modes adopted to enforce the taxes levied should be interfered with as little as possible.”<sup>22</sup> Consequently, no court sitting in equity shall “allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law.”<sup>23</sup>

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18. 28 U.S.C. § 1331 (2000).

19. See *supra* notes 5-7 and accompanying text.

20. See *supra* note 5.

21. 78 U.S. (11 Wall.) 108 (1870).

22. *Id.* at 110. A more recent (and often quoted) expression of this idea is found in Justice Brennan’s separate opinion in *Perez v. Ledesma*, 401 U.S. 82 (1971):

If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State’s budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

*Id.* at 128 n.17 (Brennan, J., concurring in part and dissenting in part).

23. *Id.* In *Mathews v. Rogers*, 284 U.S. 521 (1932), the Court likewise stated,

[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. . . . If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that

In 1937, Congress codified this well-established practice in the Tax Injunction Act.<sup>24</sup> Since its enactment, the Supreme Court has interpreted the Act (as well as the underlying principles that motivated its adoption) to mandate that federal district courts lack jurisdiction to award *any* prospective relief in state tax cases unless “a plain, speedy and efficient remedy” is unavailable under state law.<sup>25</sup> For example, in *Great Lakes Dredge & Dock Co. v. Huffman*,<sup>26</sup> the Court held that, although the text of the Tax Injunction Act only forbids relief that “enjoin[s], suspend[s] or restrain[s]” state taxes, “its enactment is hardly an indication of disapproval of the policy of federal equity courts, or a mandatory withdrawal from them of their traditional power to decline jurisdiction in the exercise of their discretion.”<sup>27</sup> Thus, independent of the Act, the antecedent equity practice prevents district courts from granting declaratory judgments, rather than only injunctions.<sup>28</sup> Further, in *California v. Grace Brethren Church*,<sup>29</sup> the Court held that, “because Congress’ intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes,” the Act itself “prohibits declaratory as well as injunctive relief.”<sup>30</sup>

Meanwhile, the Court has construed the Tax Injunction Act’s exception, which permits federal jurisdiction when no “plain, speedy and efficient remedy may be had in the courts of such State,”<sup>31</sup> quite narrowly.<sup>32</sup> Specifically, the Court has held that a state remedy is

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remedy in the state courts.

*Id.* at 525–26. *See also* *Singer Sewing Mach. Co. v. Benedict*, 229 U.S. 481, 488 (1913); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909); *Shelton v. Platt*, 139 U.S. 591, 595–96 (1891).

24. 28 U.S.C. § 1341 (2000).

25. *See, e.g.*, *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 424 (1999). This reading is in line with the statutory text of 28 U.S.C. § 1341. However, as will be explained, the Court’s construction of the statute has been exceedingly broad, leading to questions of parity.

26. 319 U.S. 293 (1943).

27. *Id.* at 301.

28. *Id.* at 301–02.

29. 457 U.S. 393 (1982).

30. *Id.* at 411.

31. 28 U.S.C. § 1341 (2000).

32. *See* *California v. Grace Brethren Church*, 457 U.S. 393, 413 (1982). “In order to . . . be faithful to the congressional intent ‘to limit drastically’ federal-court interference with state tax systems, we must construe narrowly the ‘plain, speedy and efficient’ exception to the Tax Injunction Act.” *Id.*

“plain, speedy, and efficient” if it “meets certain minimal *procedural* criteria,”<sup>33</sup> such that the taxpayer is afforded a meaningful opportunity to “assert his federal rights.”<sup>34</sup>

In *Rosewell v. LaSalle National Bank*, for example, a taxpayer sought relief in federal court from her allegedly inequitable property assessment on the grounds that the remedy available under Illinois law was inadequate.<sup>35</sup> Although Illinois typically forced taxpayers to wait two years for relief and paid no interest on refunds ultimately found due, the Court found Illinois’s remedial procedure to be plain, speedy, and efficient. The procedure ensured that all federal claims would be heard and decided, it imposed no undue hardships on the taxpayer, and the two-year delay was typical, even without paying interest.<sup>36</sup>

Similarly, in *Tully v. Griffin*,<sup>37</sup> the Court held that “a State’s remedy does not become ‘inefficient’ merely because a taxpayer must travel across a state line in order to resist or challenge the taxes sought to be imposed.”<sup>38</sup> In *Tully*, a Vermont retailer sought an injunction in federal court to prevent the State of New York state from requiring the retailer to collect sales taxes on sales to New York customers.<sup>39</sup> Because New York law permitted the taxpayer “to press its constitutional claims while preserving the right to challenge the amount of tax due,” the state’s procedure was fully adequate, thus precluding federal jurisdiction.<sup>40</sup>

Wholly aside from the Tax Injunction Act or the underlying equity practice that it codified, the Supreme Court has held that the “fundamental principle of comity between federal courts and state governments” prohibits actions for damages against state or local tax administrators in federal court under 42 U.S.C. § 1983.<sup>41</sup> Section 1983 creates a private right of action for anyone who suffers “the

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33. *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 512 (1981).

34. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 301 (1943).

35. *Rosewell*, 450 U.S. at 510.

36. *Id.* at 512–24.

37. 429 U.S. 68 (1976).

38. *Id.* at 73. *See also Rosewell*, 450 U.S. at 517.

39. *Tully v. Griffin, Inc.*, 429 U.S. 68, 69 (1976).

40. *Id.* at 74.

41. *Fair Assessment in Real Estate Ass’n, Inc. v. McNary*, 454 U.S. 100, 103 (1981).



deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States at the hands of a person acting “under color of” state law.<sup>42</sup> As the Court held in *Monroe v. Pape*,<sup>43</sup> § 1983 plaintiffs generally can file suit directly in federal court, regardless of any remedies available under state law.<sup>44</sup> In *Fair Assessment in Real Estate v. McNary*,<sup>45</sup> however, the Court held that the principle of comity trumps this general rule of immediate access to federal court under § 1983. Taxpayers “are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts,” at least where state remedies “are plain, adequate, and complete.”<sup>46</sup>

Furthermore, even if a taxpayer were otherwise entitled to sue for damages in federal court, the Court has held that the sovereign immunity of the states protected by the Eleventh Amendment bars private actions for retrospective relief against unconsenting states in federal court.<sup>47</sup> In other contexts, plaintiffs may partially circumvent a state’s Eleventh Amendment immunity by suing the relevant state officer in her official capacity under the doctrine of *Ex parte Young*.<sup>48</sup> Such actions, however, are only permissible in the pursuit of

42. 42 U.S.C. § 1983 (2000).

43. 365 U.S. 167 (1961), *overruled on other grounds by* *Monell v. N.Y. City Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

44. *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (“It is immaterial whether ‘the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.’”). See also *Steffel v. Thompson*, 415 U.S. 452, 472–73 (1974) (“When federal claims are premised on 42 U.S.C. § 1983 . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.”); *McNeese v. Bd. of Educ.*, 373 U.S. 668, 674 (1963) (“It is immaterial whether respondents’ conduct is legal or illegal as a matter of state law. Such claims are entitled to be adjudicated in the federal courts”).

45. 454 U.S. 100 (1981).

46. *Id.* at 116.

47. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1997) (“[F]ederal jurisdiction over suits against unconsenting States ‘was not contemplated by the Constitution when establishing the judicial power of the United States.’”) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). See also *TRIBE*, *supra* note 2, § 3–25, at 522–23.

Note that this bar does not apply to suits against counties or municipalities. See *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *TRIBE*, *supra* note 2, § 3–25, at 534 n.94.

48. 209 U.S. 123 (1908). See also *TRIBE*, *supra* note 2, § 3–25, at 535.

*prospective* relief<sup>49</sup>—relief that is expressly foreclosed in state tax cases by the Tax Injunction Act and its antecedent equity practice.<sup>50</sup> Moreover, actions against state officers in their official capacities for retrospective relief (e.g., tax refunds) are treated as actions against the state itself, and are thus precluded by the Eleventh Amendment.<sup>51</sup> Consequently, state tax disputes are effectively barred from federal court, except in those rare instances when the Supreme Court grants *certiorari* to review a state court decision.<sup>52</sup>

The common wisdom among state and local tax lawyers seems to be that the absence of a federal forum for state tax disputes strongly favors state governments. As recently stated by Arthur Rosen,<sup>53</sup> perhaps the most prominent practicing attorney in the field, granting state judiciaries the authority to decide all state tax cases “allows the foxes to guard the chickens.”<sup>54</sup>

Commentators have offered a number of institutional explanations for why state courts might be prone to bias. First, state judges are often selected or retained through judicial elections. These majoritarian pressures might incline judges towards the interests of state governments rather than those of taxpayers, which are often out-of-state corporations.<sup>55</sup> Second, state judges are employees of the defendant state governments, and thus are paid from the same public

49. See *Edelman v. Jordan*, 415 U.S. 651, 663–66 (1974). See also Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1225 (2001); TRIBE, *supra* note 2, § 3–25, at 535–36.

50. See *supra* text accompanying notes 18–40.

51. See, e.g., *Edelman*, 415 U.S. at 663 (“[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment . . .”); *Ford Motor Co. v. Dep’t of Treasury of Ind.*, 323 U.S. 459, 464 (1945) (“[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.”).

52. The Supreme Court typically hears no more than two state tax cases each year. The Court heard two state tax cases this past Term. See *Racing Ass’n of Cent. Iowa v. Fitzgerald*, 648 N.W.2d 555 (Iowa 2002), *cert. granted*, 123 S. Ct. 963 (2003) (mem.); *Franchise Tax Bd. v. Hyatt*, 123 S. Ct. 1683 (2003). The Court decided no state or local tax cases in October Term 2001, and only one case in October Term 2000. See *Dir. of Revenue v. Cobank ACB*, 531 U.S. 316 (2001). The Court decided only one state or local tax case in October Term 1999. See *Hunt-Wesson, Inc. v. Franchise Tax Bd.*, 528 U.S. 458 (2000).

53. Arthur Rosen is chairman of the state and local taxation department of McDermott, Will & Emery.

54. Sheppard, *supra* note 14, at 849.

55. See *Neuborne*, *supra* note 13, at 1127–28.

fisc that the taxpayers seek to diminish. Third, there may be “a series of psychological and attitudinal characteristics” that make state judges more inclined to construe rights protected by federal law more narrowly so as to avoid displacing state law.<sup>56</sup> That is, a range of factors influencing the composition of state judiciaries might cause state judges to have a stronger allegiance to state law than would be ideal. Individually or collectively, these institutional characteristics could systematically and unfairly disadvantage taxpayers litigating legitimate claims in state court.

Such distrust of state courts’ willingness to protect federal rights is hardly new. To the contrary, it is a deeply ingrained aspect of our constitutional fabric. As the Framers drafted Article III in the summer of 1787, one of their principal fears was that state courts would be unable or unwilling to enforce federal policy.<sup>57</sup> For example, during the debates at the Convention as to whether the Constitution should provide for lower federal courts, James Madison asserted that “confidence [cannot] be put in the State Tribunals as guardians of the National authority and interests.”<sup>58</sup> As Erwin Chemerinsky has explained, Madison believed that state judges were biased against federal law “and could not be trusted, especially in instances where there were conflicting State and federal interests.”<sup>59</sup> In the famous case of *Martin v. Hunter’s Lessee*,<sup>60</sup> which established the Supreme Court’s appellate jurisdiction over decisions from state courts, Justice Story explained that the Constitution itself embraces this premise of mistrust:

[A]dmitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit,) it does not aid the argument. It is manifest that the

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56. *Id.* at 1124.

57. See CHEMERINSKY, *supra* note 2, § 1.1, at 2; RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 4 n.17 (4th ed. 1996); Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 U. KANS. L. REV. 1219, 1229 (1997) (“The framers created authority for a federal judiciary because of a belief that federal courts were essential to enforce federal law.”).

58. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 27 (1937).

59. CHEMERINSKY, *supra* note 2, § 1.1, at 3 (citing 2 FARRAND, *supra* note 58, at 27).

60. 14 U.S. (1 Wheat.) 304 (1816).

constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. . . . The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.<sup>61</sup>

Today, the distrust of state courts as guarantors of federal rights remains a prominent justification for the federal question jurisdiction conferred by Article III and 28 U.S.C. § 1331.<sup>62</sup> According to the American Law Institute, for example, federal question jurisdiction is necessary “to protect litigants relying on federal law from the danger that state courts will not properly apply the law, either through misunderstanding or lack of sympathy.”<sup>63</sup>

In short, the suspicion that state courts may be biased against taxpayers seeking the protection of federal law enjoys a distinguished constitutional pedigree. Nevertheless, over the past thirty years, the Supreme Court has embraced a contrary view, finding that such distrust of the state courts is misplaced.<sup>64</sup> This theme has been most prominent in the Court’s habeas corpus jurisprudence, where it has narrowed or closed various avenues for federal post-conviction review of state court proceedings.<sup>65</sup> For instance, in *Stone v. Powell*,<sup>66</sup>

61. *Id.* at 346–47.

62. See CHEMERINSKY, *supra* note 2, § 5.2.1, at 263.

63. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 168 (1969).

64. See CHEMERINSKY, *supra* note 2, § 5.2.1, at 263 (“[T]he Supreme Court often has proclaimed that state courts are equal to federal courts in their ability and willingness to protect federal rights.”). As the Court recently stated in *Alden v. Maine*, 527 U.S. 706 (1999):

We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”

*Id.* at 755 (quoting U.S. CONST. art. VI, cl. 2).

65. See *Bush v. Gore*, 531 U.S. 98, 136–37 (2000) (Ginsburg, J., dissenting). “[I]n the habeas context, the Court adheres to the view that there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [federal law] than his neighbor in the state courthouse.” *Id.* (internal quotations omitted). See also *Miller v. Fenton*, 474 U.S. 104, 112 (1985) (“[T]he federal habeas court, should, of course, give great weight to the considered conclusions of a coequal state

the Court held that a state prisoner cannot raise a Fourth Amendment claim in a federal habeas petition if he has been afforded “an opportunity for full and fair litigation of his claim in the state courts.”<sup>67</sup> In so holding, the Court stated that “there is ‘no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the State Courthouse.’”<sup>68</sup>

The Court has applied this reasoning in other contexts as well, endorsing the broader notion that the “Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity.”<sup>69</sup> Instead, the “Constitution is the basic law of the Nation, a law to which a State’s ties are no less intimate than those of the National Government itself.”<sup>70</sup> Most significantly for present purposes, the Court has specifically stated that plaintiffs in state and local tax cases should not presume that they are disadvantaged merely from having to litigate in state court.<sup>71</sup> In *Grace Brethren Church*, the Court quoted at length from *Stone v. Powell*, explaining that there was no reason for taxpayers to “assume . . . a general lack of appropriate sensitivity to constitutional rights in the . . . courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.”<sup>72</sup>

In the years since *Stone v. Powell*, a large body of literature has developed assessing the Court’s thesis concerning the parity of

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judiciary.”).

66. *California v. Grace Brethren Church*, 457 U.S. 393, 417 n.37 (1982) (quoting *Stone v. Powell*, 428 U.S. 465 (1976)).

67. *Id.* at 469.

68. *Id.* at 493 n.35. (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963)).

69. *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997).

70. *Id.* at 275-76. See also Sandra Day O’Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 813 (1981) (“There is no reason to assume that state court judges cannot and will not provide a ‘hospitable forum’ in litigating federal constitutional questions.”).

71. See *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

72. *Id.* (“State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.”).

federal and state courts in the protection of federal rights.<sup>73</sup> In his seminal article, *The Myth of Parity*, Burt Neuborne provided an institutional explanation for why federal courts were likely to enforce federal constitutional rights more vigorously than state courts.<sup>74</sup> He reasoned that federal courts possess a superior level of technical competence, that federal judges’ “psychological set” and attitudinal characteristics make them more inclined to protect federal rights, and that the federal judiciary enjoys greater insulation than state judiciaries from majoritarian pressures.<sup>75</sup> He therefore argued that the Supreme Court’s idea of parity was at best a “dangerous myth,” and at worst a disingenuous means to facilitate the underenforcement of constitutional rights.<sup>76</sup>

In contrast, Michael Solimine and James Walker published an empirical study in 1983 that found only a relatively small difference between federal and state courts in the frequency with which they upheld federal claims.<sup>77</sup> Solimine and Walker examined 438 federal district court decisions and 608 state appellate court decisions addressing First Amendment, Fourth Amendment, and Equal Protection Clause claims between 1974 and 1980.<sup>78</sup> They found that federal district courts upheld the federal claim in 41 percent of the cases, while state courts upheld the federal claim in 32 percent of the cases.<sup>79</sup> They therefore concluded that there was “no clear reluctance on the part of state courts to uphold a federal claim that would be

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73. See, e.g., Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL’Y 233 (1999); Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797 (1995); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609 (1991).

74. Neuborne, *supra* note 13, at 1105–06.

75. *Id.* at 1121–25.

76. *Id.* at 1105–06.

77. See generally Solimine & Walker, *supra* note 73 (examining judicial parity between state and federal courts).

78. *Id.* at 238–46.

79. *Id.* at 240.

upheld in federal district courts.”<sup>80</sup>

More recently, William Rubenstein evaluated the performance of federal and state courts in cases involving civil rights claims made by gays and lesbians.<sup>81</sup> He found that “federal courts have not proved uniformly more hospitable to civil rights claims” and that “state courts have not abdicated their responsibilities to civil rights claimants.”<sup>82</sup> To the contrary, Rubenstein found that gay litigants have actually been more successful in state courts than in federal courts.<sup>83</sup>

These studies, along with several others,<sup>84</sup> are helpful in assessing the general question of the comparative competencies of federal and state courts in the enforcement of federal law and individual rights. But, they fail to address the specific issue of the performance of state courts in state and local tax cases, where the relevant institutional pressures and incentives could be, for whatever reason, quite different. The following study, if nothing more, is intended to initiate a discussion of that question.

### III. STUDY DESIGN

In attempting to design a study that could test whether state courts are biased against taxpayers asserting federal rights in state and local tax cases, it quickly became apparent that measuring such bias empirically would be extremely difficult. An inherent problem is that there is no obvious baseline against which to measure the performance of state courts, as federal courts rarely decide state and local tax cases.

Unlike in some other areas of the law, then, the issue is not whether there is “parity” between state and federal courts in the protection of federal rights. Instead, the relevant question is whether state courts are biased against taxpayers that make federal claims. And assessing whether the outcomes of judicial decisions demonstrate bias is no easy task. By itself, examining a large sample

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80. *Id.*

81. *See* Rubenstein, *supra* note 73.

82. *Id.* at 611.

83. *Id.* at 599.

84. *See supra* note 73.

of state and local tax decisions in which taxpayers asserted federal claims would tell us next to nothing. If taxpayers prevailed forty percent of the time, for example, we would have no basis for evaluating whether this showed bias, as we would have no way of determining how often taxpayers *should have* prevailed.

One possible means of solving this problem is limiting the study to cases in which the question presented is whether federal law permits a state to assert its jurisdiction to tax a particular taxpayer. In most state and local tax cases raising the issue of jurisdiction, the question is whether the litigating state has jurisdiction to impose a levy on the protesting taxpayer. In a minority of jurisdiction cases, however, the dispute concerns the jurisdiction of a state other than the litigating state.

A taxpayer will litigate the second type of jurisdiction issue because it can affect the portion of its income subject to taxation by the taxing state (that is, the state the taxpayer is suing for a refund). For instance, states that impose corporate income taxes generally permit multistate corporations to apportion their income among the states in which they are taxable.<sup>85</sup> Thus, if a corporation is subject to another state’s jurisdiction, this will reduce the portion of the taxpayer’s income that is attributable to the taxing state, and hence its tax liability to that state. Moreover, states imposing corporate income taxes apportion a taxpayer’s income at least in part (and sometimes in full) based on the percentage of that corporation’s total sales made to customers in that state.<sup>86</sup> Sales to customers in states where the

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85. See JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION §§ 6.25, 8.02[4] (3d ed. 2002). The Uniform Division of Income for Tax Purposes Act (UDITPA), which has been adopted in whole or in part by roughly half of the states that impose corporate income taxes, provides that “any taxpayer having income from business activity which is taxable both within and without this state . . . shall allocate and apportion his net income as provided in this Act.” UNIF. DIV. OF INCOME FOR TAX PURPOSES ACT § 2, 7A U.L.A. 155 (2002). See also HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 571 (providing information on states that have adopted UDITPA). Section 3 of UDITPA further states that “a taxpayer is taxable in another state if [he is subject to tax on his income in that state or] that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.” UNIF. DIV. OF INCOME FOR TAX PURPOSES ACT § 3, 7A U.L.A. 160 (2002).

86. See RIA ALL STATES TAX GUIDE ¶ 223 (2001) (chart). Most states’ apportionment formulas use a combination of the taxpayer’s sales, property, and payroll in the state relative to the taxpayer’s total sales, property, and payroll. *Id.* For instance, UDITPA prescribes a formula that places equal weight on the taxpayer’s sales, property, and payroll factors. UNIF. DIV. OF



corporation is not taxable are usually “thrown back” to the state of origin, meaning that they are attributed to the state of shipment for purposes of computing the taxpayer’s sales factor.<sup>87</sup> By successfully establishing its taxability in another state, the taxpayer can avoid the attribution of these sales to the taxing state and thereby reduce the portion of its income taxed by that state.

We can therefore divide jurisdiction-to-tax cases into two basic categories: (1) cases in which the dispute concerns the litigating state’s jurisdiction (“Type A cases”); and (2) cases in which the dispute concerns the jurisdiction of a state other than the taxing state (“Type B cases”). In Type A cases, the state argues that the taxpayer’s contacts are sufficient to establish jurisdiction, while the taxpayer resists this characterization. In Type B cases, the roles are reversed: the taxpayer argues that its contacts are sufficient to establish its taxability in a particular state, while the litigating state contends that jurisdiction is lacking. At a broad level, the legal issue in both sets of cases remains constant: whether the taxpayer is subject to the taxing jurisdiction of a particular state. The variable is which party—the taxpayer or the state—stands to gain from a finding that the state in question has jurisdiction to tax the taxpayer.

Because taxpayers and state tax authorities alternatively argue opposite sides of the same issue, these cases may allow us to overcome the problem of lacking a baseline. Specifically, comparing the results in Type A cases with those in Type B cases might provide a means for evaluating the existence of systemic bias. If state courts are impartial, one would expect them to decide that the state in question has jurisdiction to tax the taxpayer at roughly the same rate in all cases; there would be no correlation between the courts’ decisions and which party stood to gain from these rulings. In

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INCOME FOR TAX PURPOSES ACT § 9, 7A U.L.A. 168 (2002). See also John A. Swain, *Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?*, 75 S. CAL. L. REV. 419, 438 (2002). In recent years, a number of states have moved to a single-factor sales apportionment formula. See HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 491.

87. See Walter Hellerstein, *State and Local Taxation of Electronic Commerce: Reflections on the Emerging Issues*, 52 U. MIAMI L. REV. 691, 703 (1998). Section 16(b) of UDITPA, for example, adopts a “throw back” rule for computing a taxpayer’s sales factor: “Sales of tangible personal property are in this state if . . . the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and . . . the taxpayer is not taxable in the state of the purchaser.” UNIF. DIV. OF INCOME TAX PURPOSES ACT § 16(b), 7A U.L.A. 183-84 (2002).

contrast, if state courts were substantially more inclined to find jurisdiction in Type A cases than in Type B cases, this would be decent evidence of systemic bias.

Under the fairly broad heading of jurisdiction, we can isolate a more discrete legal issue so that the disputed legal issue remains more constant from case to case, yielding a cleaner means for assessing potential state court bias. Most reported decisions concerning the jurisdiction to tax involve questions of constitutional law under either the Due Process Clause of the Fourteenth Amendment or the dormant Commerce Clause.<sup>88</sup> But, there is also a significant federal statute governing the jurisdiction of states to impose income taxes on out-of-state businesses engaged in the sale of tangible personal property: Public Law 86–272 (sometimes called the “Interstate Commerce Tax Act” or the “Interstate Income Act”).<sup>89</sup> Congress enacted Public Law 86–272 in 1959, shortly after the Supreme Court’s decision in *Northwestern States Portland Cement Co. v. Minnesota*,<sup>90</sup> in which the Court held for the first time that a state could impose a nondiscriminatory, fairly apportioned income tax on an out-of-state business engaged in purely interstate commerce in the taxing state.<sup>91</sup>

Public Law 86–272 essentially creates a safe harbor for taxpayers that keep their activities in a given state below a specified threshold level.<sup>92</sup> If a company does no more in a state than solicit orders,

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88. See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992) (holding that while the Due Process Clause permits a state to require an out-of-state vendor to collect use taxes on sales to the state’s residents, it may still lack the “substantial nexus” with the vendor necessary to take such action, as required by the dormant Commerce Clause); *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 251 (1987) (holding that the state’s imposition of a gross receipts tax on the taxpayer based on the physical presence of the taxpayer’s selling agent in the state was consistent with both the Due Process Clause and the Commerce Clause). See also HELLERSTEIN & HELLERSTEIN, *supra* note 85, at §§ 6.01–15.

89. Act of Sept. 14, 1959, Pub. L. No. 86–272, 73 Stat. 555 (codified at 15 U.S.C. §§ 381–84, 391 (2002)).

90. 358 U.S. 450 (1959).

91. See HELLERSTEIN & HELLERSTEIN, *supra* note 85, at § 4.10[1].

92. See *Heublein, Inc. v. S.C. Tax Comm’n*, 409 U.S. 275, 279–82 (1972); HELLERSTEIN & HELLERSTEIN, *supra* note 85, at §§ 6.16–17; Michael T. Fatale, *Federalism and State Business Activity Tax Nexus: Revisiting Public Law 86–272*, 21 VA. TAX REV. 435, 474–79 (2002). Public Law 86–272 provides in relevant part:

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within

engage in activities that are entirely ancillary to the solicitation of orders, or engage in activities unrelated to such solicitation that are not more than *de minimis*, that state is prohibited from imposing an income tax on the company.<sup>93</sup> To maintain this safe harbor, the taxpayer cannot maintain an office in the taxing state, and any orders taken by the taxpayer's employees must be "sent outside the State for approval or rejection, and, if approved . . . filled by shipment or delivery from a point outside the State."<sup>94</sup> The taxpayer may employ an independent contractor who maintains an office in the state, but that contractor must work for more than one principal.<sup>95</sup>

Since its enactment, Public Law 86-272 has engendered a number of disputes concerning the exact contours of the immunity it provides. The resulting body of state court decisions therefore offers a chance to explore the issue of state court bias against taxpayers asserting federal rights in state tax cases. Most Public Law 86-272 cases are Type A cases, in which the dispute concerns an out-of-state taxpayer's activities in the state against which it is litigating. For example, in the recent case of *Peterson v. State Tax Assessor*,<sup>96</sup> the taxpayer operated a dental supply business that was domiciled in New Hampshire and conducted business in Maine.<sup>97</sup> When Maine imposed an income tax on the business, the taxpayer argued that its contacts in Maine (which included picking up items from customers,

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such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

15 U.S.C. § 381(a) (2000).

93. *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 228-31 (1992); see also HELLERSTEIN & HELLERSTEIN, *supra* note 85, at § 6.18.

94. 15 U.S.C. § 381(a)(1).

95. 15 U.S.C. § 381(c)-(d).

96. 724 A.2d 610 (Me. 1999).

97. *Id.* at 611.

loaning items to customers, and accepting payment for certain orders) were either ancillary to the solicitation of orders or *de minimis*.<sup>98</sup>

A minority of Public Law 86–272 cases, however, are Type B cases, in which the dispute concerns the taxpayer’s activities in some other state. For instance, in *Miles Laboratories, Inc. v. Department of Revenue*<sup>99</sup> the taxpayer was a pharmaceutical manufacturer that had a distribution warehouse in Oregon and made substantial sales to customers in Washington.<sup>100</sup> Although Washington did not tax the company’s income (because it has no state income tax), the company sought to apportion a percentage of its income to Washington, and thus reduce its income tax liability to Oregon.<sup>101</sup> The question presented, then, was whether the taxpayer’s activities in Washington (which included employing twelve salespeople, providing them with product samples, and allowing them to replace customers’ damaged goods) exceeded the threshold level permitted by Public Law 86–272.<sup>102</sup> The taxpayer argued that it was *not* entitled to the statutory immunity in Washington, while Oregon argued that it was.<sup>103</sup>

A comparison of these two sets of cases potentially allows us to evaluate the performance of state courts in the protection of taxpayers’ federal rights. If state courts are just as likely to find that the taxpayer falls within the immunity provided by Public Law 86–272 in Type A cases as Type B cases, this would suggest that state courts are impartial. But, if state courts have systematically favored state tax authorities, construing the same statutory immunity more narrowly in Type A cases than in Type B cases, this would indicate state court bias against taxpayers.

#### IV. RESULTS AND CONCLUSIONS

In surveying all reported state court decisions handed down since the enactment of Public Law 86-272 in 1959, there are a total of fifty-six decisions construing the breadth of the immunity provided by the

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98. *Id.* at 613.

99. 546 P.2d 1081 (Or. 1976).

100. *Id.* at 1082.

101. *Id.* at 1081–82.

102. *Id.* at 1082–83.

103. *Id.* at 1082.

Statute.<sup>104</sup> Forty-six of these are Type A cases, where an out-of-state taxpayer argued for immunity from income taxation in the litigating state.<sup>105</sup> The remaining ten are Type B cases, where the taxpayer contended that its activities in another, non-litigating state exceeded the threshold for retaining the statutory immunity.<sup>106</sup> Unfortunately, due to the small sample size (particularly with respect to Type B cases), rigorous or robust statistical conclusions concerning the existence of state court bias are impossible. Nonetheless, the results tend to undermine at least any prima facie case that State courts have been biased against taxpayers in decisions construing Public Law 86-272.

TABLE I  
REPORTED STATE APPELLATE DECISIONS INTERPRETING PUBLIC  
LAW 86-272  
(n = 56)

	State in Question has Jurisdiction ("narrow construction")	State in Question Does Not Have Jurisdiction ("broad construction")
Type A cases (n=46)	30 (65%)	16 (35%)
Type B cases (n=10)	6 (60%)	4 (40%)

104. Several decisions that *involved* Public Law 86-272, but which did not *interpret* the breadth of the statutory immunity, were excluded from the study. For example, in *Hoffmann-LaRoche, Inc. v. Franchise Tax Board*, 161 Cal. Rptr. 838 (Cal. Ct. App. 1980), the taxpayer asserted that California's apportionment formula, by "throwing back" sales from states in which the taxpayer was not taxable under Public Law 86-272 to the state of shipment, resulted in unconstitutional, extraterritorial taxation. *Id.* at 842. In *International Shoe Co. v. Cocreham*, 164 So. 2d 314 (La. 1964), the state tax collector argued that Public Law 86-272 exceeded Congress's legislative authority under the Commerce Clause. *Id.* at 321. These types of cases were excluded because they did not present instances in which the legal issue, the breadth of the immunity provided by Public Law 86-272, could be kept roughly constant. Without this constant in the two sets of cases, no basis would exist for evaluating whether the decisions exhibit bias against taxpayers. The study also included no more than one decision from the same litigated action, fearing distortion the representativeness of the cases. For example, it includes the Wisconsin Supreme Court's decision in *William Wrigley, Jr. Co. v. Wisconsin Dep't of Revenue*, 465 N.W.2d 800 (Wis. 1991), but excludes the prior holding of the Wisconsin Court of Appeals in the *same action*, 451 N.W.2d 444 (Wis. Ct. App. 1989).

105. See Appendix A.

106. See Appendix B.

Overall, the outcomes reveal a reasonably consistent interpretation of the statute. In both Type A and Type B cases, state courts have more frequently held that the taxpayer was subject to the jurisdiction of the state in question to impose an income tax. Moreover, the rate at which state courts have held in favor of taxability is quite similar in Type A (65%) and Type B (60%) cases. The slight discrepancy indicates that, to the extent state courts have favored one side, it has indeed been that of the states. But, the degree of this favoritism is relatively small, particularly given the sample size.

It is important to bear in mind that, in addition to the problem of a small sample size, there are some potentially confounding variables that make the drawing of conclusions from these results problematic. First, there may be a significant selection bias in those cases that are litigated to the point that they result in reported decisions. If the state and local tax community widely assumes that state courts are biased in favor of state tax authorities, then taxpayers will tend to litigate only those cases in which they have the strongest arguments for relief. Consequently, the cases that result in reported decisions might represent a skewed range of the potential legal disputes between taxpayers and state governments over the meaning of Public Law 86-272. Such a selection bias would tend to mask or understate the actual level of state court bias against taxpayers.

Second, Type A and Type B cases may not be truly comparable. The two categories are dissimilar in at least one important respect: in Type A cases, the state whose jurisdiction is at issue has already attempted to impose a tax on the taxpayer; in Type B cases, this has not occurred.<sup>107</sup> As a result, one might expect it to be more difficult to establish the state's jurisdiction to tax in Type B cases than in Type A cases, as the state in question presumably would have imposed a tax on the company already if it had believed that it had the jurisdiction to do so. We would therefore expect unbiased courts to find in favor

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107. States generally accept that a multistate company is taxable in another state if that other state has, in fact, taxed the company, thus rendering the question of the other state's jurisdiction moot. Section 3 of UDITPA states that "for purposes of allocation and apportionment of income under this Act, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax." UNIF. DIV. OF INCOME FOR TAX PURPOSES ACT § 3, 7A U.L.A. 160 (2002).

of the state's jurisdiction to tax less frequently in Type B cases than in Type A cases, thus skewing the study's results in the opposite direction of the selection bias described above.

Finally, a study limited to reported opinions may miss much of what is being decided by state tribunals. It is conceivable, for instance, that rulings unfavorable to taxpayers at the trial level here systematically foreclosed successful appeals, such that many disputes are resolved without any reported decision. If this were the case, state courts could exhibit significant bias against taxpayers with little or no evidence of that bias appearing in reported judicial opinions.

In short, more sophisticated analyses, surveying a larger number of cases and compensating for these confounding variables, will be necessary to provide a statistically robust evaluation of whether state courts are biased against taxpayers raising federal claims in state and local tax cases. This study is merely a preliminary step in that direction. Yet, the study's results at least suggest that the common "wisdom" concerning state courts is *not* obviously true, at least with respect to litigation arising under Public Law 86-272. Reported state court decisions interpreting the statute do not, on their face, show any evident bias against taxpayers. We will therefore need a fair bit more investigation before we can confidently separate myth from reality with respect to the performance of state courts in state and local tax cases.

## APPENDIX A: TYPE A CASES EXAMINED

Sjong v. State, 622 P.2d 967 (Alaska 1981).

United States Tobacco Co. v. Martin, 801 S.W.2d 256 (Ark. 1990).

Hervey v. AMF Beard, Inc., 464 S.W.2d 557 (Ark. 1971).

Reader’s Digest Ass’n, Inc. v. Franchise Tax Bd., 115 Cal. Rptr. 2d 53 (Cal. Ct. App. 2001).

Brown Group Retail, Inc. v. Franchise Tax Bd., 52 Cal. Rptr. 2d 202 (Cal. Ct. App. 1996).

Consolidated Accessories Corp. v. Franchise Tax Bd., 208 Cal. Rptr. 2d 74 (Cal. Ct. App. 1984).

Kelly Springfield Tire Co. v. Bajorski, 635 A.2d 771 (Conn. 1993).

Muro Pharmaceutical, Inc. v. Crystal, No. 524693, 1994 WL 395266 (Conn. Super. Ct. July 28, 1994).

Jantzen, Inc. v. District of Columbia, 395 A.2d 29 (D.C. 1978).

Chattanooga Glass Co. v. Strickland, 261 S.E.2d 599 (Ga. 1979).

Tyson Foods, Inc. v. Department of Revenue, 726 N.E.2d 12 (Ill. Ct. App. 1999).

Indiana Dep’t of Revenue v. Kimberly-Clark Corp., 416 N.E.2d 1264 (Ind. 1981).

Wabash, Inc. v. Department of State Revenue, 729 N.E.2d 620 (Ind. Tax Ct. 2000).



West Publishing Co. v. Indiana Dep't of Revenue, 524 N.E.2d 1329 (Ind. Tax Ct. 1988).

Peterson v. State Tax Assessor, 724 A.2d 610 (Me. 1999).

Matthew Bender & Co. v. Comptroller of Treasury, 509 A.2d 702 (Md. Ct. Spec. App. 1986).

Comptroller of Treasury v. World Book Childcraft Intl., Inc., 508 A.2d 148 (Md. Ct. Spec. App. 1985).

Amgen, Inc., v. Commissioner of Revenue, 693 N.E. 2d 175 (Mass. 1998).

National Private Truck Council v. Commissioner of Revenue, 688 N.E.2d 936 (Mass. 1997).

Kennametal, Inc. v. Commissioner of Revenue, 686 N.E.2d 436 (Mass. 1997).

Commissioner of Revenue v. Kelley Springfield Tire Co., 643 N.E.2d 458 (Mass. 1994).

Gillette Co. v. Department of Treasury, 497 N.W.2d 595 (Mich. Ct. App. 1993).

Amway Corp. v. Director of Revenue, 794 S.W.2d 666 (Mo. 1990).

State ex rel. CIBA Pharm. Prods., Inc. v. State Tax Comm'n, 382 S.W.2d 645 (Mo. 1964).

Clairol, Inc. v. Kingsley, 262 A.2d 213 (N.J. Super. Ct. App. Div. 1970), *aff'd*, 270 A.2d 702 (N.J. 1970).

Pomco Graphics, Inc. v. Director, Div. of Taxation, 13 N.J. Tax 578 (N.J. Tax 1993).

Mark Andy, Inc. v. Taxation Div. Director, 8 N.J. Tax 593 (N.J. Tax 1986).

Ringgold Coal Min. Co. v. Taxation Div. Director, 4 N.J. Tax 321 (N.J. Tax 1982).

Glick Studios, Inc. v. Director, Div. of Taxation, 2 N.J. Tax 365 (N.J. Tax 1981).

Gillette Co. v. State Tax Comm’n, 382 N.E.2d 764 (N.Y. 1978).

Attea v. Tax Appeals Tribunal, 732 N.Y.S.2d. 722 (N.Y. App. Div. 2001).

Drackett Prods. Co. v. Conrad, 370 N.W.2d 723 (N.D. 1985).

Agley v. Tracy, 719 N.E.2d 951 (Ohio 1999).

National Tires, Inc. v. Lindley, 426 N.E.2d 793 (Ohio Ct. App. 1980).

Oklahoma Tax Comm’n v. Brown-Forman Distillers Corp., 420 P.2d 894 (Okla. 1996).

Olympia Brewing Co. v. Department of Revenue, 511 P.2d 837 (Or. 1973).

Herff Jones Co. v. State Tax Comm’n, 430 P.2d 998 (Or. 1967).

Smith Kline & French Labs. V. State Tax Comm’n, 403 P.2d 375 (Or. 1965).

Basic American Foods, Inc. v. Department of Revenue, 10 Or. Tax 526 (Or. T.C. 1987).

Briggs & Stratton Corp. v. Commission, 3 Or. Tax 174 (Or. T.C. 1968).

United States Tobacco Co. v. Commonwealth, 386 A.2d 471 (Pa. 1978).

Schering-Plough Healthcare Products Sales Corp. v. Commonwealth, 805 A.2d 1284 (Pa. Commw. Ct. 2002).

Heublein, Inc. v. South Carolina Tax Comm'n, 183 S.E.2d 710 (S.C. 1971), *aff'd*, 409 U.S. 275 (1972).

Department of Taxation v. National Private Truck Council, 480 S.E.2d 500 (Va. 1997).

Tyler Pipe Indus., Inc. v. State Dep't of Revenue, 715 P.2d 123 (Wash. 1986), *vacated*, 483 U.S. 232 (1987).

William Wrigley, Jr. Co. v. Wisconsin Dep't of Revenue, 465 N.W.2d 800 (Wis. 1991), *rev'd*, 505 U.S. 214 (1992).

## APPENDIX B: TYPE B CASES EXAMINED

Indiana Dep’t of Revenue v. Continental Steel Corp., 399 N.E.2d 754 (Ind. Ct. App. 1980).

Tonka Corp. v. Commissioner of Taxation, 169 N.W.2d 589 (Minn. 1969).

Goldberg v. State Tax Comm’n, 618 S.W.2d 635 (Mo. 1981).

A.W. Chesterton v. Commissioner of Revenue, 641 N.E.2d 1353 (Mass. Ct. App. 1994).

Miles Labs., Inc. v. Department of Revenue, 546 P.2d 1081 (Or. 1976).

Iron Fireman Mfg. v. State Tax Comm’n, 445 P.2d 126 (Or. 1968).

Cal-Roof Wholesale, Inc. v. State Tax Comm’n, 410 P.2d 233 (Or. 1966).

John Ownbey Co. v. Butler, 365 S.W.2d 33 (Tenn. 1963).

Desert Pharm. Co. v. State Tax Comm’n, 579 P.2d 1322 (Utah 1978).

Department of Taxation v. Westmoreland Coal Co., 366 S.E.2d 78 (Va. 1988).

