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PUB. L. NO. 86-272 AND THE ANTI-COMMANDEERING DOCTRINE: IS THIS ANACHRONISM CONSTITUTIONALLY VULNERABLE AFTER *MURPHY V. NCAA*?

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INTRODUCTION

State taxing authority suffers from little of the structural impediments that the Constitution imposes on the federal government's taxing power but the states' power to tax is subject to the restrictions imposed on the exercise of any state action by the Constitution. The most significant obstacles to the states' assertion of their taxing authority have been the Due Process Clause and the Commerce Clause. The Due Process Clause concerns itself with fairness while the Commerce Clause concerns itself with a functioning national economy. Although the two restrictions have different objectives, for quite some time both restrictions shared one attribute—a taxpayer physical presence test.

Business practices evolved in response to technological developments and the ability of enterprises to avail themselves of a forum state's markets with little or no traditional physical presence in the state resulted in the elimination of the physical presence test for Due Process purposes almost thirty years ago.[1] The subsequent exponential growth of electronic commerce finally led to the demise of the physical presence test for Commerce Clause purposes as a result of the Court's recent decision in *South Dakota v. Wayfair*.[2] However, a six decades old statute remains an impediment to the states' ability to exercise in-

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1. *See* Quill Corp. v. North Dakota, 504 U.S. 298 (1992); *infra* notes 29–36.

2. 138 S. Ct. 2080 (2018).

come tax jurisdiction over the income earned by remote sellers of tangible personal property.

In a case unrelated to state taxing authority during the same term, the Court in *Murphy v. National Collegiate Athletic Association* struck down a federal law that prohibited states from authorizing sports gambling.[3] According to the Court, the federal law impermissibly commandeered state legislatures. A critical holding in that case was that a federal law that prohibits state action is subject to the anti-commandeering doctrine similar to federal laws that mandate state action. The federal statute that limits the states' ability to tax is very similar to the gambling statute that the Court struck down—it prohibits states from enacting otherwise permissible legislation without establishing a corresponding federal regulatory regime. In short, the statute commandeers the states similarly to the gambling statute. As a result, the statute is an impermissible encroachment of state sovereignty.

Part I of this Article discusses the Due Process and Commerce Clause limitations on states' taxing powers and the eventual demise of the physical presence test as a result of Court's holdings in *Quill Corp. v. North Dakota*[4] and, more recently, *South Dakota v. Wayfair*. This part also discusses Pub. L. No. 86-272, the longstanding prohibition imposed on states with regard to the taxation of income derived by remote sellers of tangible personal property. Part II discusses the anti-commandeering doctrine. This doctrine has surfaced as a significant bulwark for federalism over the past three decades and led to the demise of the federal sports gambling legislation as a result of the Court's recent decision in *Murphy*. This part concludes with an analysis of the case and its potential application to the tax statute.

I. STATE TAXING POWER

Two centuries ago Chief Justice Marshall acknowledged that the power to tax is a quintessential attribute of state sovereignty notwithstanding that such power is not exercisable against the federal government.

> [W]e must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.
>
> The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be lim-

3. 138 S. Ct. 1461 (2018).

4. 504 U.S. 298 (1992).

> ited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.
>
> It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.[5]

In contrast to the federal government's taxing power, there are few structural impediments to a state's ability to tax.[6] *McCulloch v. Maryland* prohibited the states from imposing taxes on the federal government.[7] The Constitution prohibits states, with certain exceptions, from imposing imposts and duties on

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5. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 428-29 (1819). *See also* Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, MICH. ST. L. REV. 41 (2012) (quoting THE FEDERALIST NO. 32 (Alexander Hamilton) (Clinton Rossiter ed. 1961) and THE FEDERALIST NO. 33. (Alexander Hamilton) (Clinton Rossiter ed. 1961)).

6. Congress's power to tax is expansive, but it is not unlimited. In addition to the constitutional limitations applicable to the exercise of any federal power, there are structural limitations specific to the taxing power. Certain taxes must be uniform. U.S. CONST. art. I, § 8, cl.1. The precise contours of the uniformity requirement was subject to some debate during the first century of the republic but it now refers simply to geographic uniformity—federal tax rates must be the same throughout the United States. Knowlton v. Moore, 178 U.S. 41, 83-106 (1900). The uniformity requirement rarely surfaces as a point of contention, perhaps due to the political difficulties that would be encountered in enacting a provision that overtly disfavored a particular geographic region, but on occasion the issue does arise. *See, e.g.*, United States v. Ptasynski, 462 U.S. 74, 86 (1983) (stating that an exemption from an oil profits tax for certain Alaskan oil did not provide Alaska with an undue preference over other states). Congress is prohibited from taxing exports. U.S. CONST. art. I, § 9, cl. 5. Direct taxes must be apportioned among the states according to population. U.S. CONST. art. I, § 9, cl. 4. Note that the Court, in *Pollock v. Farmers' Loan & Trust Co*., 157 U.S. 429, 580-83 (1895) and *Pollock v. Farmers' Loan & Trust Co*., 158 U.S. 601 (1895), held that a tax on income derived from real and personal property, respectively, was a direct tax that must be apportioned among the several states. The Sixteenth Amendment, ratified in 1913, authorized the imposition of a tax on income from all sources without apportionment. U.S. CONST. amend. XVI. Direct taxes are limited to capitation taxes, taxes on real property, and taxes on personal property. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012). The Court, in the controversial decision that upheld the constitutionality of the so-called individual mandate imposed by the Patient Protection and Affordable Care Act, held that Congress has the power to tax inaction despite its inability to regulate inaction. *See id.* at 555–57, 563–70.

7. *See* McCulloch v. Maryland., 17 U.S. (4 Wheat) at 427–36.

imports and exports or duties on ship tonnage.[8] Otherwise, a state's power to tax is limited by the federal constitutional limitations applicable to the exercise of any state government power and the limitations that a state has imposed on itself, whether by constitution or statute.

The most significant federal constitutional impediments to the exercise of a state's power to tax are the Due Process Clause of the Fourteenth Amendment and the Commerce Clause. The former concerns itself with fair notice and justice while the latter is primarily concerned with efficient and effective functioning of national markets. However, both limitations implicate nexus issues.

A. *Due Process*

Due Process limitations on a state's power to tax are rooted in concepts of fair notice and justice applicable to jurisdictional issues in general. The Court, in the seminal case of *International Shoe Co. v. Washington,* held that

> due process requires only that, in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'[9]

According to the Court

> to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[10]

Later cases emphasized that the establishment of minimum contacts by persons within a jurisdiction provides fair warning to such persons that their contacts may subject them to suit in that jurisdiction and provides them with a degree of predictability in which to conduct their affairs.[11] The Court also has made clear that modern commercial practices have obviated the need for a person to have maintained a physical presence in a jurisdiction in order to satisfy due process requirements.[12] However, the Court, in a relatively recent case, noted that the assertion of general jurisdiction by a state is subject to a different

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8. U.S. CONST. art.1, §10, cls. 2–3.

9. 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)).

10. *Id.* (citations omitted).

11. *See* Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring); World-Wide Volkwagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Fair warning is provided if the defendant has "purposefully directed" his activities at residents of the forum state and the litigation arises out of those activities. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U. S. 408, 414 (1984).

12. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. at 774–75. *See also* Calder v. Jones, 465 U.S. 783, 790 (1984). *See also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957).

analysis than the assertion of specific jurisdiction.[13] Specific jurisdiction requires a connection between the forum state and the underlying controversy.[14] General jurisdiction allows a suit against a defendant in the forum state regardless of the cause of action and the defendant's activities in the forum state.[15] With few exceptions general jurisdiction applies to individuals who are domiciled in the forum state or to corporations for which the forum state is fairly regarded as their home state.[16]

In 1967 the Court held that with respect to a state's exercise of its taxing power, the Due Process Clause of the Fourteenth Amendment precluded a state from requiring a business with no physical presence in the state to collect and pay state sales tax on sales made to persons within the state.[17] The petitioner, in this case, was a Delaware corporation whose principal place of business was in Missouri.[18] The petitioner's Illinois customers placed orders with the petitioner in response to semi-annual catalogues and occasional promotional materials mailed to customers.[19] Orders were fulfilled by shipment via common carrier or U.S. mail from a plant in Missouri.[20] These shipments and the aforementioned mailings were the only contacts that the petitioner had with the state of Illinois.[21] The Court noted the similarity between the due process requirements imposed by the Fourteenth Amendment that preclude states from asserting jurisdiction over persons with insufficient contact with the forum state and the prohibition imposed on states by the Commerce Clause that precludes states from unduly burdening interstate commerce.[22] According to the Court, neither the Fourteenth Amendment nor the Commerce Clause permitted a state to impose sales tax collection and payment responsibilities on a mail order seller with no physical presence in the state.[23]

National Bellas Hess dealt with a state's ability to impose sales tax responsibilities on remote sellers, and it did not speak to due process requirements as

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13. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

14. *Id.* at 919.

15. *Id.*

16. *Id.*

17. *See* Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753 (1967). The Court also held that the dormant Commerce Clause precludes a state from requiring a business with no physical presence from collecting and remitting sales tax to the state. The dormant Commerce Clause, a doctrine developed by the Court in the nineteenth century, precludes a state from interfering with interstate commerce and arises by implication from Congress's power to regulate interstate commerce. *See* Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall) 232 (1873). *See also infra* notes 55–59 and accompanying text.

18. Nat'l Bellas Hess v. Dep't of Rev., 386 U.S. at 753–54.

19. *Id.* at 753–54.

20. *Id.* at 754.

21. *Id.*

22. *Id.* at 756–58. *See infra* notes 50-81 and accompanying text for a discussion of the Commerce Clause.

23. *See* Nat'l Bellas Hess, 386 U.S. at 758–60 at 758–60.

they may apply to income taxes. However, less than a decade before the *National Bellas Hess* decision, the Court sanctioned the imposition of an income tax by Minnesota and Georgia on corporations whose primary activities within the two states were the solicitation of orders for products that were stored in and shipped from out of state.[24] However, both corporations maintained a very limited physical presence in the state—a small sales staff and office equipment.[25] Although the Court primarily concerned itself with Commerce Clause issues, it did address the corporations' assertions that the income tax imposed on them violated due process.

> It strains reality to say, in terms of our decisions, that each of the corporations here was not sufficiently involved in local events to forge 'some definite link, some minimum connection' sufficient to satisfy due process requirements. . . . The record is without conflict that both corporations engage in substantial income-income producing activity in the taxing States. In fact in No.12 almost half of the corporation's income is derived from the taxing state's sales which are shown to be promoted by vigorous and continuous sales campaigns run through a central office located in the State.[26]

It is not clear whether the existence of a sales office in the state was critical to the Court's holding or whether the sales office was just another factor that established sufficient nexus for the imposition of an income tax. Apparently, Congress believed that the Court sanctioned the imposition of an income tax on corporations whose activities in a state amounted to the shipping of products from out of state to customers in state because *Northwestern States Portland Cement* was the catalyst for the enactment of Pub. L. No. 86-272.[27]

The Court had occasion to revisit the physical presence requirement twenty-five years after *National Bellas Hess* in *Quill Corp. v. North Dakota.*[28] Petitioner was a catalogue retailer of office equipment and supplies whose only contact with North Dakota involved the mailing of catalogues and promotional materials and the fulfillment of orders from out of state by common carrier or U.S mail.[29] In that case the Court decoupled the Due Process Clause from the Commerce Clause with respect to a state's power to tax. Despite the close relation between the limitations imposed by these two constitutional provisions they "pose distinct limits on the taxing powers of the States."[30] The Due Process Clause is concerned with fundamental fairness and the extent that a person's connection with a state legitimizes the state's exercise of authority over such

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24. Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 453–56 (1959) (consolidating two cases—one involving Minnesota and the other involving Georgia).

25. *Id.* at 454–56.

26. *Id.* at 464–65 (citations omitted).

27. *See infra* notes 105–09 and accompanying text.

28. Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

29. *Id.* at 302–04.

30. *Id.* at 305.

person.[31] Its touchstone is notice and fair warning.[32] The Court resorted to its due process jurisprudence applicable for personal jurisdiction as set forth in *International Shoe* and *Burger King v. Rudzewicz*.[33] The Court noted that its Due Process jurisprudence had evolved in the years after its *National Bellas Hess* decision and that modern commercial life obviates the need for a physical presence within a state "'[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State . . . .'"[34] Accordingly, the widespread solicitation of business within the state by the petitioner created sufficient contacts for the state to impose tax responsibilities on the petitioner under the Fourteenth Amendment.[35]

Quill, like *National Bellas Hess*, dealt with a state's sales tax regime. However, the Court's rationale for scuttling a due process physical presence requirement in *Quill* appears equally applicable to state income tax regimes. In any event, the case law dealing with the taxation of intangible property or the income therefrom indicates that a physical presence is not a due process touchstone for the imposition of such taxes.

In 1936 the Court, in a case upholding a West Virginia property tax on a foreign corporation's accounts receivable and bank deposits, declared that a state could treat intangible assets as located at their owner's domicile.[36] The Court went on to acknowledge ". . . that choses in action may acquire a situs for taxation other than the domicile of their owner, if they have become integral parts of some local business."[37] One year later the Court upheld the constitutionality of a New York state income tax imposed on a Massachusetts resident on the gain from the sale of his seat on the New York Stock Exchange.[38] The petitioner never carried on any business in New York.[39] That same year the Court sanctioned the application of Minnesota's property tax to a Delaware corporation's stock holdings in banks chartered in Montana and North Dakota.[40] According to the Court, the petitioner, by the active exercise of its controlling interests in the banks, operated the business of protecting its investments in bank shares.[41] In rejecting the petitioner's assertion that subjecting the stock

31. *Id.* at 312.

32. *Id.*

33. *Id.* at 307.

34. Quill Corp. v. North Dakota, 504 U.S. 298, 308 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

35. *Id.* However, the Court refused to scuttle the physical presence test for Commerce Clause purposes. *See infra* notes 75–77 and accompanying text.

36. Wheeling Steel Corp. v. Fox, 298 U.S. 193, 209 (1936).

37. *Id.* at 210 (citations omitted).

38. New York *ex rel.* Whitney v. Graves, 299 U.S. 366 (1937).

39. *Id.* at 371.

40. First Bank Stock Corp. v. Minnesota, 301 U.S. 234 (1937).

41. *Id.* at 237.

holdings to tax in Minnesota as well as the banks' domiciliary states of Montana and North Dakota violates due process the Court stated

> The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax . . . . But we have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from responsibility for sharing the costs of its government, and that a tax measured by the value of rights protected is but an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. *See New York ex rel. Cohn v. Graves, 300 U.S. 308.* The economic advantages realized through the protection, at the place of domicil[sic], of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects . . . . Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership.[42]

A leading state court case applied *Quill's* due process analysis to a corporate income tax imposed on a foreign corporation.[43] Toys R Us, Inc. transferred certain intangible marketing assets to a second tier subsidiary, Geoffrey, Inc., a Delaware corporation.[44] The assets, which included trademarks and trade names, were licensed to Toys R Us for use in almost all states in exchange for a royalty of one percent of net sales by Toys R Us and related entities.[45] Toys R Us conducted business in South Carolina but Geoffrey conducted no business in the state.[46] Toys R Us deducted the royalty payment it made to Geoffrey.[47] The state initially disallowed the deduction but then reversed its position, allowed the deduction, and took the position that Geoffrey was liable for tax on the royalty income it earned from Toys R Us' sales in South Carolina.[48]

The South Carolina Supreme Court upheld the state's imposition of tax on Geoffrey. The court cited *Quill* and held that due process is satisfied if the corporation has purposefully directed its activity toward the state regardless of whether the corporation had a physical presence in the state.[49] Moreover, the court, citing to *Wheeling Steel* and other Court precedents, held that due process requirements were satisfied by the presence of Geoffrey's intangible assets in the state—in this case accounts receivable and a franchise.[50] The court went on to note the benefits conferred by the state on Geoffrey to which the challenged

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42. *Id.* at 240–41.
43. Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13 (S.C. 1993).
44. *Id.* at 15.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id*. at 16.
50. Geoffrey, 437 S.E.2d at 16–17.

tax was rationally related. "The real source of Geoffrey's income is not a paper agreement, but South Carolina's Toys R Us customers. By providing an orderly society in which Toys R Us conducts business, South Carolina has made it possible for Geoffrey to earn income pursuant to the royalty agreement."[51]

B. *Commerce Clause*

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[52] Read literally, the Commerce Clause is a grant of legislative power to Congress and nothing more. Its language does not impose restraints on state activities. The scope of Congress's legislative power conferred to it by the Commerce Clause has long been a subject of debate and the Court's jurisprudence in this area has produced some of its most famous—and consequential—decisions.

The federal government's role in the nation's economic affairs increased in response to the industrialization of the economy during the nineteenth century and the Progressive movement resulted in the insertion of the public sector in theretofore private matters despite the movement's famous setback in *Lochner*.[53] The creation of the Interstate Commerce Commission in 1887 was the genesis of the immense federal bureaucracy with which we are so familiar and the Progressive period resulted in the enactment of the Sherman Antitrust Act, the increased regulation of railroads, and the institution of occupational licensing.[54]

The Supreme Court's initial resistance to expansive federal powers over economic matters, manifested most dramatically in *Dagenhart*,[55] eventually succumbed to the onslaught of New Deal legislation. The Court's narrow interpretation of the commerce power came to an end with its decision in the seminal case of *N.L.R.B. v. Jones & Laughlin Steel Corp*.[56] Any doubts as to the

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51. *Id.* at 18 (citations omitted).

52. U.S. CONST. art.1, § 8, cl. 3.

53. *See* Lochner v. New York, 198 U.S. 45 (1905) (holding that a New York statute regulating the hours of bakers was an unconstitutional infringement on the right and liberty to contract). The *Lochner* era is considered to have closed with the Court's decision in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), a decision that upheld the constitutionality of Washington state's minimum wage law and overturned an earlier precedent to the contrary, Adkins v. Children's Hosp., 261 U.S. 525 (1923).

54. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 439–66 (2d. ed. 1985).

55. Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding that compliance with child-labor standards was beyond the reach of Congress's power to regulate interstate commerce).

56. 301 U.S. 1 (1937) (upholding the constitutionality of the National Labor Relations Act of 1935).

extent of the federal commerce power were laid to rest several years later in *Wickard v. Filburn.*[57]

Notwithstanding the text of the Commerce Clause, a second application of the Commerce Clause placed restraints on state power. The so-called dormant Commerce Clause, a doctrine developed by the Court in the nineteenth century, precludes a state from interfering with interstate commerce and arises by implication from Congress's power to regulate interstate commerce.[58] Economic protectionism was a particular concern of the framers as a result of their experiences with state behavior under the Articles of Confederation.[59] A law motivated by economic protectionism that facially discriminates against out-of-state interests or that favors in-state economic interests over out-of-state interests violates the Commerce Clause unless the state can show that the law in question is the only means by which it can advance a legitimate state purpose.[60]

> [N]o state, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to a local business." This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution.[61]

However, if a law is not motivated by economic protectionism but does affect interstate commerce incidentally, the Court has applied a balancing test to determine whether such law is permissible.[62]

For most of its history the Court applied the dormant Commerce Clause to direct burdens imposed by states on interstate commerce.[63] In general, states were free to regulate production, manufacturing, and mining activities but not economic activities that crossed state lines.[64] As the economy grew more complex and interconnected, the distinction between interstate and intrastate activities began to prove unworkable and the Court in two cases reined in the limitations imposed on the states by the dormant Commerce Clause.

As discussed earlier, in *Northwest States Portland Cement Co. v. Minnesota* the Court sanctioned, on due process grounds, a state income tax on income

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57. 317 U.S. 111 (1942) (holding that Congress's power to regulate interstate commerce includes the power to regulate activity that has an indirect effect on such commerce).

58. *See* Reading R.R. v. Pa., 82 U.S. (15 Wall) 232 (1873).

59. Michael T. Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, 55 SANTA CLARA L. REV. 565, 572–73 (2015).

60. *See, e.g.*, Maine v. Taylor, 477 U.S. 131 (1986); Hughes v. Oklahoma, 441 U.S. 322 (1979).

61. Maryland. v. Louisiana., 451 U.S. 725, 754 (1981) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450, 458 (1959), Boston Stock Exchange v. State Tax Comm'n, 429 U. S. 318, 329 (1977), Dean Milk Co. v. Madison, 340 U. S. 349, 356 (1951)).

62. *See generally* Brown-Forman Distillers v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); City of Phila. v. New Jersey, 437 U.S. 617 (1978); Hunt v. Wash. State Apple Advert. Comm., 432 U.S. 333 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

63. Fatale, *supra* note 59, at 574.

64. *Id.*

generated from the sale of tangible personal property to customers in Minnesota from inventory located outside the state.[65] The seller had minimal physical contact with Minnesota.[66] In that case, the Court made clear that "a net income tax on revenues derived from interstate commerce does not offend constitutional limitations upon state interference with such commerce."[67] According to the Court, the Minnesota tax was fairly apportioned to reflect the state's share of the company's income thereby precluding the possibility of multiple taxation and was non-discriminatory.[68] The tax, therefore, was not offensive to the Commerce Clause.

One year later, the Court, in *Scripto, Inc. v. Carson*, upheld the imposition of a use tax collection and remittance obligation imposed on a Georgia corporation by Florida.[69] The corporation's only connection to Florida was through the mails, common carriers, and independent sales agents.[70] The Court held that whether the sales agents were regular employees or independent contractors is "a fine distinction without constitutional significance."[71]

As previously discussed, the Court held in *National Bellas Hess* that both the Due Process Clause and the Commerce Clause preclude a state from requiring mail order sellers whose only connection with a state is by the U.S. mails or common carrier to collect sales taxes and remit such taxes to the state in question.[72] The Court distinguished a pure mail order operation from the seller's operation in *Scripto* on the grounds that the latter employed salespersons conducting solicitation activities in the taxing state.[73] Three dissenting Justices believed that the petitioner's large-scale, systematic, and continuous solicitation of the respondent state's consumer market and its reliance on the state's credit market facilities created sufficient nexus for the respondent to impose tax responsibilities on the petitioner.[74]

A decade later the Court obliterated the distinction that it long made between a tax imposed on the privilege of engaging in interstate commerce and a tax on net income derived from interstate commerce. A tax on the former was impermissible but not so with regard to the latter. The Court, after a lengthy discussion of the case law that created the distinction, rejected the *per se* unconstitutionality of a tax on the privilege of engaging in interstate commerce.[75] The Court believed that the distinction between a privilege tax and an income tax

65. *See supra* notes 21–23 and accompanying text.

66. *See supra* note 22 and accompanying text.

67. *See Northwestern States Portland Cement*, 358 U.S. at 454–56.

68. *Id.* at 462–64.

69. 362 U.S. 207 (1960).

70. *Id.* at 208–09.

71. *Id.* at 211.

72. 386 U.S. at 753.

73. *See* Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 754, 757–58 (1967).

74. *See id*. at 761–62 (Fortas, Black, Douglas, J.J., dissenting).

75. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278–87 (1977).

was a matter of semantics and failed to address the problems with which the Commerce Clause is concerned.[76] In that case the Court also set forth what became known as the *Complete Auto* test. A state tax will be upheld if it is applied to an activity with a substantial nexus with the taxing state; is fairly apportioned; does not discriminate against interstate commerce; and is fairly related to the services provided by the state.[77]

As discussed above in *Quill Corp. v. North Dakota*, the Court rejected, for due process purposes, the physical presence requirement it set forth in *National Bellas Hess*.[78] According to the Court, however, the Commerce Clause, in contrast to the Due Process Clause, is not concerned with fairness but with "structural concerns about the effects of state regulation on the national economy."[79] With respect to a state's taxing power, the Court applied the four part test it established in *Complete Auto Transit, Inc. v. Brady* and concluded that, for Commerce Clause purposes, a person must have a physical presence in the state in order for a state to impose tax burdens on that person.[80]

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76. *Id.* at 289.

77. *Id.* at 279. One scholar believes that the *Complete Auto* test shares many similarities with the balancing test used by the Court to evaluate the permissibility of non-tax state laws – so called *Pike* balancing. *See generally* Adam B. Thimmesch, *A Unifying Approach to Nexus Under the Dormant Commerce Clause,* 116 MICH. L. REV. ONLINE 101, 106–08 (2018). The Court recently struck down a Maryland tax that failed to provide, for county tax purposes, a credit for taxes paid to other states. The Court held that such a tax impermissibly burdened interstate commerce because it was not internally consistent—if all states imposed similar taxing schemes out of state businesses would bear a higher tax burden than local businesses. *See* Comptroller v. Wynne, 135 S.Ct. 1787 (2015). The Uniform Division of Income for Tax Purposes Act (UDITPA) is a model act drafted by the National Conference of Commissioners on Uniform State Laws. UDITPA's prefatory note explains its rationale.

> "The need for a uniform method of division of income for tax purposes among the several taxing jurisdictions has been recognized for many years and has long been recommended by the Council of State Governments. There is no other practical means of assuring that a taxpayer is not taxed on more than its net income. At present, the several states have various forumlae [sic] for determining the amount of income to be taxed, and the differences in the formulae produce inequitable results."

UNIF. DIVISION OF INCOME FOR TAX PURPOSES ACT, 3 (1957).

A detailed analysis of the model act is beyond the scope of this work but, in general, the act apportions income of multistate business among the states according to the sales, payroll, and property located in the states—the so-called three factor formula. The Multistate Tax Compact, an agreement developed by a group of state representatives to address multistate tax issues, adopted UDITPA and established the Multistate Tax Commission which issued advisory regulations regarding the allocation and apportionment of income. States that impose an income tax have adopted some form of apportionment modeled after UDITPA although there are quite a number of variations among the states in the methods they deploy to apportion income. *See Multistate Tax Compact*, MULTISTATE TAX COMM'N, http://www.mtc.gov/The-Commission/Multistate-Tax-Compact (last visited Feb. 21, 2020); *State Apportionment of Corporate Income*, FED'N OF TAX ADM'RS (Jan. 1, 2019), https://www.taxadmin.org/assets/docs/Research/Rates/apport.pdf.

78. Quill Corp., 504 U.S. at 298.

79. *Id*. at 312.

80. *Id.* at 312–18.

The Court acknowledged that such a bright-line rule may, in certain circumstances, be anachronistic but it believed that the benefits of a clear rule outweighed its drawbacks.[81] Moreover, the retention of a bright-line rule is made easier by the fact that Congress is free to overrule the physical presence test.[82] The elimination of the physical presence requirement for due process purposes opened the door for congressional action with respect to sales taxes on sales by remote sellers, whether mail order sellers or online merchants. As the Court pointedly noted, Congress can authorize states to undertake actions that would otherwise violate the dormant Commerce Clause but it has no such power with respect to the Due Process Clause.[83] Therefore, *Quill* gave Congress the ability to craft a national solution to a growing problem.

C. *South Dakota v. Wayfair*

At the time of the *Quill* decision in 1992 the disruptive effect of the internet on the economy was unforeseeable to all but the most prescient. The explosive growth of electronic commerce over the next several decades was sure to bring the physical presence test into question as an anachronism ill-suited for a modern economy. Surprisingly, it took over a quarter of a century for the Court to abandon the physical presence test. Justice Kennedy, in a concurring opinion in *Direct Marketing Association v. Brohl*, signaled that the end of the physical presence test was close at hand.[84] A few years later the *Wayfair* decision scuttled the physical presence test that insulated remote sellers from state sales tax responsibilities.

At issue in *Wayfair* was a South Dakota statute enacted in 2016 that required remote sellers to collect and remit sales taxes "as if the seller had a physical presence in the state."[85] The statute applied to remote sellers who "deliv-

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81. *Id.* at 315–16.

82. *See id.* at 318.

83. *Id.* at 305.

84. *See* Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 16–17 (2015) (Kennedy, J., concurring). The issue in this case was whether the Tax Injunction Act applied to bar a federal court from enjoining the state law provision in question. *Id*. at 4. The Tax Injunction Act precludes lower federal courts from interfering with the assessment, levy or collection of any tax under state law. *See* 28 U.S.C. § 1341 (2018). The Court held the Tax Injunction Act did not bar a federal court from enjoining the enforcement of a Colorado tax law requiring certain retailers to report customers of their responsibilities. Direct Mktg. Ass'n v. Brohl, 575 U.S. at 4. The Tax Injunction Act was modeled after the Anti-Injunction Act, which applies to federal taxes. *Id.* at 8 (citing Jefferson County v. Acker, 527 U.S. 423, 434–35 (1999)). The Anti-Injunction Act prohibits, subject to few exceptions, any "suit for the purpose of restraining the assessment or collection of any tax . . . in any court by any person, whether or not such person is the person against whom such tax was assessed." I.R.C. § 7421(a) (CCH 2019). In effect, this legislation requires that taxpayers resolve their tax disputes in a suit for refund and provides legislative notice of the "[g]overnment's need to assess and collect taxes expeditiously as possible with a minimum of preenforcement judicial interference." *See* Hibbs v. Winn, 542 U.S. 88, 103 (2004) (quoting Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974)) (internal quotation marks omitted).

85. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2088–89 (2018).

er[ed] more than $100,000 of goods or services into the [s]tate or engage[d] in 200 or more separate transactions for the delivery of goods or services into the [s]tate" on an annual basis.[86] South Dakota sought a declaratory judgment in state court against the respondents Wayfair, Inc.; Overstock.com, Inc.; and Newegg, none of which had any physical presence in the state.[87] The trial court's grant of summary judgment in favor of the respondents was affirmed by the South Dakota Supreme Court on the ground that *Quill* remained the controlling precedent.[88] On January 12, 2018, the Supreme Court of the United States granted certiorari.[89]

The Court noted that two principles determine the limits of a state's authority to regulate interstate commerce.[90] First, states may not enact measures that discriminate against interstate commerce and such measures will be subject to "a virtual *per se* rule of invalidity."[91] Second, states may not unduly burden interstate commerce.[92] Whether state measures unduly burden interstate commerce is determined by the burdens imposed by the measures in relation to the putative benefits generated by those measures.[93] The Court then proceeded to discuss the four-part test it set forth in *Complete Auto* for assessing the constitutionality of state taxes.[94]

The Court had little regard for *stare decisis* asserting that "Quill is flawed on its own terms" for three reasons.[95] First, physical presence is not necessary for a business to establish "a substantial nexus with [a] taxing state."[96] After taking note of modern commercial practices, the Court stated that the nexus requirements for due process and Commerce Clause purposes, albeit not identical, contain significant parallels and the reasons given by the *Quill* Court for rejecting the physical presence test for due process purposes apply equally for Commerce Clause purposes.[97] Moreover, the potential administrative burden created by the need to comply with rules of multiple taxing jurisdictions is mitigated by advances in software technology.[98]

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86. *Id.* at 2089.

87. *Id.*

88. *Id.*

89. Washington v. United States, 138 S. Ct. 735 (2018).

90. South Dakota v. Wayfair, Inc., 138 S. Ct. at 2090 (2018).

91. *Id.* at 2091(quoting Granholm v. Heald, 554 U.S. 460, 476 (2005)) (internal quotation marks omitted).

92. *Id.* at 2091.

93. *Id.*

94. *Id. See also supra* note 74 and accompanying text.

95. South Dakota v. Wayfair, Inc., 138 S. Ct. at 2092 (2018).

96. *See id.* (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)) (internal quotation marks omitted).

97. *Id.*

98. *Id.* at 2093.

Second, the physical presence test, rather than mitigate market distortions, in fact creates such distortions.[99] Remote sellers have a competitive advantage over brick and mortar retailers due to the fact that such remote sellers can offer lower prices because they do not charge sales taxes.[100] The physical presence requirement also creates a disincentive for businesses to establish a physical presence in a state.[101] Finally, the test is an arbitrary, formalistic distinction – the type of test that the Court has rejected in its recent Commerce Clause decisions.[102]

The importance of a state's taxing power also led the Court to express concerns that *Quill* undermined federalism principles.[103] S*tare decisis* should not be lightly discarded but when

> [I]t becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error. While it can be conceded that Congress has the authority to change the physical presence rule, Congress cannot change the constitutional default rule. It is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation.[104]

The respondents were found to have a substantial nexus with South Dakota by virtue of its economic and virtual contacts with the state. The Court also noted that the statutory safe harbors, the statute's lack of retroactivity, and the fact that South Dakota had adopted measures to reduce compliance burdens appeared to immunize the statute from other dormant Commerce Clause challenges despite the fact that any such challenges were not before the Court.[105] The

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99. *Id.* at 2092.

100. *Id.* at 2094. Many states have a use tax that requires consumers to pay an amount equal to the sales tax on taxable purchases for which the seller has not charged sales tax. However, consumer compliance with use tax rules is notoriously poor. *Id.* at 2088.

101. *Id*. at 2094.

102. *Id.* at 2092.

103. *Id.* at 2096.

104. *Id.* The Court noted the changes in the retail landscape that have occurred since it decided *Quill* and the difficulties encountered by states in implementing the physical presence test in the current environment. *See id.* at 2097–98. The dissenting Justices agreed that *National Bellas Hess* was wrongly decided but believed that the Court should not have overruled it or *Quill* and that Congress is the appropriate party to discard the physical presences text. *See id.* at 2101–05 (Roberts, J., dissenting).

105. Wayfair, 138 S. Ct. at 2099–2100. South Dakota adopted the Streamlined Sales and Use Tax Agreement, an agreement among member states the purpose of which is to reduce the burdens on business of sales tax compliance by, among other measures, requiring state level administration of such taxes; severely limiting the ability of states and localities to impose multiple tax rates on taxable items; mandating simplified rates, exemptions, and tax returns; and adopting uniform sourcing rules. *See* STREAMLINED SALES AND USE TAX AGREEMENT (Dec. 18, 2018) https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-2018-12-14.pdf?sfvrsn=8a83c020_6.

The agreement was adopted in 2002 and has been amended numerous times. *Id.* Twenty-four states are in full or substantial compliance with the agreement. *See State Info*, STREAMLINED SALES

physical presence test was limited to sales and use taxes but, despite abundant case law to the contrary, the test was available by inference to taxpayers to challenge the imposition of a state income tax.[106] *Wayfair* and its reasoning appears to preclude such challenges.[107]

The *Northwestern States Portland Cement* decision was the catalyst for the enactment of Pub. L. No. 86-272.[108] The statute, hastily enacted, was intended as a stop-gap measure to protect small companies from punishing state income tax compliance burdens.[109] Instead, the law benefited larger companies at the expense of smaller companies.[110] Despite its enactment as a temporary tax relief measure and decades of technologically driven economic change the statute is still in force, all the more an anachronism after *Wayfair*. The statute restricts states from exercising their taxing powers in certain circumstances. Specifically, the statute provides that

> [n]o 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 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

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TAX GOVERNING BD., INC., https://www.streamlinedsalestax.org/index.php?page=state-info (last visited Mar. 1, 2020) The South Dakota Supreme Court acknowledged the state's adoption of the agreement in its discussion of the compliance burdens faced by remote sellers subject to sales tax collection and remittance obligations. Wayfair, 138 S.Ct. at 2099–2100. Unfortunately, the Court did not signal which of the many provisions of the agreement were significant to the Court's decision. Consequently, in the absence of a state's adoption of the agreement, it is unclear what provisions designed to ease administrative burdens are necessary or sufficient. For a summary of the various state responses to the *Wayfair* decision See Richard D. Pomp, *Wayfair: It's Implications and Missed Opportunities*, 58 WASH. U. J.L. & POL'Y 1, 37–44 (2019). *See also* Editorial, *State Tax Collectors Want You*, WALL ST. J., Aug. 13, 2019, at A16 (reporting and opining on states' disparate reactions to the *Wayfair* decision). Not surprisingly, the states' exercise of their newfound taxing power over remote sellers is disproportionately burdening small business. *See* Ruth Simon, *Web Sales-Tax Ruling Jolts Small Business*, WALL ST. J., Dec. 30, 2019, at A1.

106. *See supra* notes 31–48 and accompanying text.

107. *See* Pomp, *supra* note 105, at 25–26 (noting that Wells Fargo recorded a state income tax expense as a result of the Court's decision).

108. Interstate Income Act of 1959, Pub. L. No. 86–272, 73 Stat. 555 (1959) (codified at 15 U.S.C. §§ 381–83 (2019)). *See* Michael T. Fatale, *Federalism and State Business Activity Nexus; Revisiting Public Law 86-272*, 21 VA. TAX REV. 435, 438–39 (2002). *See also supra* note 21–24 and accompanying text.

109. *See* Fatale, *supra* note 108, at 437–38.

110. *Id.* at 438.

> such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).[111]

The statute does not apply to prevent the imposition of state income tax by any state on any corporation which is incorporated in such state or to any individual who is domiciled in, or a resident of, such state.[112] Protected solicitation activities will not lose their protection because they are performed on behalf of the taxpayer by independent contractors.[113] The Court has interpreted solicitation for purposes of the statute to include activities that are entirely ancillary to requests for purchases and serve no independent purpose apart from their connection to the soliciting of orders, but activities that are routinely performed by salespersons are beyond the scope of the statute.[114] The statute's application to "digital goods" is not clear.[115] In *Stanislaus Food Prods. Co. v. Director, Div. of Taxation*, the Tax Court of New Jersey held that a New Jersey Alternative Minimum Assessment imposed on gross receipts and whose effect was to coerce taxpayers to forego the protection of Pub. L. No. 86-272 was preempted pursuant to the Supremacy Clause.[116]

In *Wayfair* the Court finally nodded to economic realities and discarded the physical presence test as the imprimatur for states to overcome commerce clause objections to their power to tax out of state taxpayers. The Court had discarded the physical presence over a quarter century ago for Due Process pur-

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111. 15 U.S.C. § 381(a) (2019). Moreover, no State, or political subdivision thereof, shall have power to assess, after September 14, 1959, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 381 of this title. 15 U.S.C. § 382(a) (2019).

112. 15 U.S.C. § 381(b) (1)–(2) (2019).

113. 15 U.S.C. § 381(c) (2019). An independent contractor is defined as a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities. 15 U.S.C. § 381(d)(1) (2019).

114. *See* Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 227–29 (1992). The variety of methods in which enterprises conduct business will inevitably raise questions as to what activities are or are not protected under the statute. Pennsylvania, for example, has listed nineteen activities that are not protected by Pub. L. No. 86-272. PA. DEP'T OF REVENUE, CORPORATION TAX BULLETIN 2004-01: APPLICATION OF P.L. 86-272 AND DE MINIMIS STANDARDS 2-5 (2004).

115. *See* Stanley R. Kaminski, *Public Law 86-272 and Digital Goods*, ST. TAX NOTES (NOV. 5, 2018), https://www.duanemorris.com/articles/public_law_86_272_and_digital_goods_1118.html. At least two commentators believe that the statute is applicable to software and cloud-based services. *See* Martin I. Eisenstein & Nathanial A. Bessey, *Public Law 86-272: Sunlight for a Cloud Service*, ST.TAX NOTES, May 21, 2018, at 769, https://www.brannlaw.com/wp-content/uploads/2018/05/STN-5-21-18-Eisenstein_Bessey.pdf. *But see* Richard L. Cram, *No Shade for Cloud Computing Under P.L. 86-272*, ST. TAX NOTES, Sept. 24, 2018, at 1237, http://www.mtc.gov/getattachment/Uniformity/Uniformity-Committee/2018/Agenda-11-2018/No-Shade-for-Cloud-Computing-P-L-86-272-Cram.pdf.aspx?lang=en-US.

116. No. 011050-2017, 2019 N.J. Tax Unpub. LEXIS 24 (N.J. Tax Ct. June 28, 2019). See *infra* notes 193–99 and accompanying text for a discussion of preemption.

poses.[117] In any event, the Court's limited income tax jurisprudence as well as state court decisions regarding the reach of a state's income taxing power long have recognized that economic nexus may be established in myriad ways and not all require that the taxpayer be physically present in the forum state. For six decades, however, Congress imposed a statutory limitation on the power of states to tax income from the sale of tangible personal property if the seller's activities in the forum state did not exceed a statutorily determined line of demarcation. Consequently, in many, if not most cases, any limitation on a state's power to tax remote businesses is statutory, not constitutional. As a result of a completely unrelated case, the enforceability of this statutory limitation may be in question. Shortly after its decision in *Wayfair*, the Court held the federal statutory prohibition on state authorization of sports gambling was unconstitutional on federalism grounds.[118] The gambling statute at issue in that cases resembles Pub. L. No. 86-272 in its regulatory approach. As a consequence, Pub. L. No. 86-272 also may violate the Constitution.

II. THE ANTI-COMMANDEERING PRINCIPLE AFTER *MURPHY*

In recent years the Court has resurrected the Tenth Amendment as a substantive limitation on federal power. One manifestation of this resurrection is the Court's use of the anti-commandeering principle to strike down federal laws. Most recently, the Court used this principle to strike down a federal statute enacted over a quarter century ago that prohibited states from sanctioning sports gambling. In the process the Court both brought clarity and sowed confusion into the future application of the principle.

A. *The Anti-Commandeering Principle – In General*

In *Hodel v. Virginia Surface Mining & Reclamation Association*, the Court held that any law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" exceeds Congress's constitutional power.[119] Congress, therefore, "lacks the power directly to compel the States to require or prohibit" acts which the federal government sees fit to require or prohibit.[120] This restriction on federal power, of recent vintage and the result of a shift in the Court's interpretation of the Tenth Amendment, is intended to preserve political accountability on federal officials

117. *See supra* notes 28–35.

118. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

119. 452 U.S. 264, 288 (1981).

120. New York v. United States, 505 U.S. 144, 166 (1992).

by preventing them from making policy choices and shifting responsibility for executing such policy choices to state officials.[121]

The Tenth Amendment 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."[122] Chief Justice John Marshall presciently opined that the issue of the proper allocation of power between the states and the federal government "will continue to arise as long as our system shall exist."[123] In *Martin v. Hunter's Lessee* the Court held that that state courts are bound by Supreme Court decisions and that the Constitution enables the federal government to act upon the states.[124] The Court restrained Congress's power over state legislatures in later decades, a restraint that continued during the Civil War and its immediate aftermath.[125]

From 1900 to 1937 the Tenth Amendment was a substantive and enforceable limitation on federal power in contrast to its nineteenth century interpretation as an admonition that the federal government may exercise only the limited powers enumerated in the Constitution.[126] The nineteenth century interpretation of the Tenth Amendment found favor with the Court after 1937 until the early 1990s and with one short-lived exception, the allocation of power among the federal government and the states was, for the most part, a political issue.[127]

The Court, holding that the Tenth Amendment prevented the federal government from regulating states in their exercise of traditional government functions, precluded the application of federal minimum wage and overtime pay requirements to state governments in *National League of Cities v. Usery*.[128] Less than a decade later the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority* and abandoned the traditional gov-

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121. *Id.* at 168. *See also* Printz v. United States, 521 U.S. 898, 930 (1997) (striking down provisions that required states to "absorb the financial burden of implementing a federal regulatory program" and "tak[e] the blame for its . . . defects.").

122. U.S. CONST. amend. X.

123. McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 405 (1819).

124. *See* 14 U.S. (1 Wheat.) 304, 325–28 (1816).

125. *See* Lane Cty. v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869); *see also* Kentucky v. Dennison, 65 U.S. 66 (24 How.), 107 (1860); Prigg v. Pennsylvania., 41 U.S. (16 Pet.) 539, 616 (1842).

126. *See* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1636 (2006).

127. *See id*. at 1636–37. *See also* United States v. Darby, 312 U.S. 100, 124 (1941) (terming the Tenth Amendment as merely a "truism"). For decades the Tenth Amendment rarely found its way into the Court's jurisprudence. *See* Ara B. Gershengorn, Note: *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065, 1068–69 (2000). There was one notable exception in the 1970s, National League of Cities v. Usery, 426 U.S. 833 (1976), whose effect proved short-lived. *See also* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 505–06 (1995); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

128. 426 U.S. 833 (1976).

ernment function test.[129] However, the effect of the *Garcia* decision was blunted by the Court several years later when it held that the Age Discrimination in Employment Act of 1967 did not apply to Missouri state judges.[130] According to the Court a federal statute would not intrude upon fundamental state government functions unless Congress clearly intended such intrusion.[131]

A federal statute that established standards for coal mining operations and required states that wanted to assume regulatory authority over such operations to enact laws that implemented the standards set forth in the federal statute was upheld in *Hodel v. Virginia Surface Mining & Reclamation Association*.[132] Regulatory responsibilities would be assumed by the federal government if a state declined to participate.[133] The statute did not violate the Constitution because it did not compel the states to adopt the federal standards, did not require them to expend state funds, and did not otherwise coerce them into participation in the federal program.[134] The Court later stated that Congress could have chosen to preempt the field entirely and that the legislation in question should not "become constitutionally suspect simply because Congress chose to allow the States a regulatory role."[135] In *F.E.R.C. v. Mississippi*, the Court upheld a federal law that required state utility commissions to consider the enactment of certain standards for energy efficiency.[136] Because the law did not require the implementation of such standards it was "only one step beyond *Hodel*."[137]

Federal prohibitions on state actions or federal mandates imposed on states to enact regulations have been upheld if such prohibitions or mandates merely subject a state to the same requirements applicable to private parties or if they do not implicate a state's ability to regulate private parties. Thus, federal laws prohibiting state motor vehicle departments from divulging private information about its citizens and prohibiting a state from issuing bonds in bearer form were upheld in *Reno v. Condon*[138] and *South Carolina v. Baker*, respectively.[139]

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129. *See generally* 469 U.S. 528 (1985). Justice Blackmun, writing for the Court, stated that the traditional government function test was not workable because a distinction between traditional and non-traditional government functions could not be made in a principled fashion. *See id.* at 531.

130. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991).

131. *Id.* at 460–61.

132. 452 U.S. 264, 271 (1981). The Court in this case reworked the traditional government function test it set forth in *National League of Cities* into a three-part test. A federal statute would be unconstitutional if it regulated the states as states, addressed indisputable attributes of state sovereignty, or impaired states from structuring integral operations in areas of traditional government functions. *Id.* at 287–88. Four years later the Court abandoned the traditional government function test. *See Garcia,* U.S. at 531.

133. *Hodel*, 452 U.S. at 272.

134. *Id.* at 288.

135. *Id.* at 290.

136. F.E.R.C. v. Mississippi, 456 U.S. 742, 746, 769–70 (1982).

137. *Id.* at 764.

138. 528 U.S. 141 (2000). In *Reno*, the Court stated that federal law violates that anti-commandeering principle if it seeks to control or influence the manner in which states regulate private parties. *Id.* at 142. The Third Circuit, in both National Collegiate Athletic Association v. Chris-

However, in *New York v. United States* the Court struck down a federal law designed to regulate and encourage the orderly disposal of low-level radioactive waste.[140] The law included a "take-title" provision that mandated a state take title to radioactive waste at the request of the waste generator if such state had not been able to arrange for the disposal of the waste by a certain time – a provision that the Court believed "crossed the line distinguishing encouragement from coercion."[141] "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[142] Unlike the Articles of Confederation, the Constitution's system of dual sovereignty required the federal government to act upon individuals and not the states. "The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States."[143]

Justice O'Connor, writing for the Court, reasoned that the federal government creates political accountability problems when it masks the source of the policy in question by commandeering state legislatures.

> If the citizens of New York . . . do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view . . . . But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.[144]

Justice O'Connor noted that the federal government can influence state policy in a number of ways such as the attachment of conditions to federal funds or by threats to preempt the states in a regulatory area if the states do not adhere to federal policy—which unlike commandeering, provide states with the choice to reject federal overtures.[145]

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tie, 61 F. Supp. 3d 488 (D. N.J. 2013) and National Collegiate Athletic Association v. Governor of New Jerse, 832 F.3d 389, 396–402 (3rd Cir. 2016)(en banc), interpreted *Reno* to limit the application of the anti-commandeering principle to federal laws that require affirmative action from a state. The Supreme Court reversed the Third Circuit and made clear that the principle applies equally to federal commands to states to refrain from action. *See infra* notes 172, 177, 188–89 and accompanying text.

139. South Carolina v. Baker, 485 U.S. 505 (1988).

140. New York v. United States, 505 U.S. 144, 149–54 (1992).

141. *Id*. at 153–54, 167, 175 (citing 42 U.S.C. § 2021e(d)(2)(C)).

142. *Id*. at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288.

143. *Id.* at 162 (citing Lane Cty. v. Oregon, 74 U.S. 71, 76).

144. *Id.* at 168–69. For a thoughtful discussion of executive agency preemption and whether the courts should afford any deference to agency preemption of state law, see Nina A. Mendelson, *A Presumption Against Agency Preemption,* 102 NW. U. L. REV. 695 (2008).

145. New York v. United States, 505 U.S. at 167–68. *Hodel* and *Dole* provide examples of conditional preemption and conditional spending. *See supra* text accompanying notes 132–35; *infra* text accompanying note 155. Another example of conditional preemption is the requirement im-

Half a decade later, in *Printz v. United States*,[146] the Court invalidated a federal gun control law that imposed requirements on state executive branch officials. The Court held that the statute's requirement that local authorities of certain states run background checks on gun purchasers was unconstitutional because Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program."[147] Writing for the majority, Justice Scalia rejected the argument that *New York* limited the application of the anti-commandeering doctrine to federal commandeering of state legislatures asserting that the distinction between policy-making and policy implementation is often opaque and that attempts to distinguish between the two would likely prove unmanageable.[148] Justice Scalia echoed Justice O'Connor's concerns regarding political accountability that she set forth in *New York* and noted that robust state governments help to prevent tyranny.[149]

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posed on the states by the Patient Protection and Affordable Care Act to establish insurance marketplaces. The Patient Protection and Affordable Care Act established the American Health Benefit Exchanges [hereinafter Exchanges], governmental or non-profit entities that, among other functions, serve as insurance marketplaces in which individuals have the ability to comparison shop for insurance products. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 124 Stat. 119, 173-81 (codified as amended at 42 U.S.C. § 18031 (2010)). Each state must create and operate an Exchange that offers insurance for purchase by individuals and employees of small employers. *Id.* § 1311(b). A state may opt out of creating and operating an Exchange in which case the Exchange will be established by the federal government. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1321(c), 124 Stat. 119, 186 (codified as amended at 42 U.S.C. § 18041 (2010)). A significant issue with respect to the Exchanges was whether federal income tax credits were available to low-income purchasers of health insurance on federal Exchanges. The statutory language appeared to limit the tax credits to purchasers on state Exchanges, but regulations were issued that allowed the credits for purchasers on federal Exchanges. *See* I.R.C. § 36B (2018); Treas. Reg. § 1.36B-1(k) (2012) (defining Exchange by reference to 45 C.F.R. § 155.20); Treas. Reg. § 1.36B-2(a) (2012) (providing eligibility for credit by enrollment in an Exchange); 45 C.F.R. § 155.20 (2019) (stating that the term Exchange refers to State Exchanges, regional Exchanges, subsidiary Exchanges, *and a Federally-facilitated Exchange*) (emphasis added). The limitation of the tax credits to purchasers of insurance on state Exchanges would have had a coercive effect on the states because failure to establish a state Exchange would have eliminated the possibility that the residents of such states could qualify for federal tax credits. King v. Burwell, 135 S. Ct. 2480, 2493 (2015). The Court upheld the regulations in *King v. Burwell*. *Id.* at 2496.

146. 521 U.S. 898 (1997).

147. *Id.* at 935.

148. *Id.* at 927–28. Justice Scalia relied on early federal legislation and the Federalist Papers to support the Court's belief that the Constitution was not understood to empower Congress to conscript state executive branch officials. *Id.* at 905–11.

149. *Id*. at 921, 930 (noting that federal commandeering of state officials shifts the cost of enforcement to the states). *See id*. at 930 (recognizing that the shifting of the costs of an activity to others—a negative externality—will result in more than an optimal amount of the activity because the cost of such an activity is not borne entirely by the person conducting the activity). *See generally* JEFFREY M. PERLOFF, MICROECONOMICS: THEORY AND APPLICATIONS WITH CALCULUS 598–603 (2d ed. 2011). It is not clear whether the anti-commandeering principle applies to obligations imposed on states by treaties. *See generally* Craig Jackson, *The Anti-Commandeering Doctrine and Foreign Policy Federalism – The Missing Issue in Medellín v. Texas*, 31 SUFFOLK TRANSNAT'L L. REV. 335 (2008); Janet R. Carter, Note, *Commandeering Under the Treaty Power*, 76 N.Y.U. L.

The Court, in both *New York* and *Printz*, distinguished between Congress's power to commandeer state judges and its power, or lack thereof, to commandeer legislative and executive branch officials. According to the Court, Congress's power to commandeer state judges is rooted in the Supremacy Clause.[150] The notion that the commandeering of state judicial functions is constitutionally acceptable was articulated in *Testa v. Katt*, a case in which the Court held that a Rhode Island court was required to adjudicate a claim that arose under federal law.[151] The contrast in federal power over state judiciaries and such power over the other branches of state government had drawn criticism.[152]

Congress cannot compel state cooperation but, through its spending power, it can obtain such cooperation.[153] A variety of federal programs dispense an enormous amount of funds to the states, often with strings attached.[154] However, the dangling of federal funds in order to obtain state cooperation has its own limits, both constitutional and political. The conditions under which such an exercise of the spending power is constitutionally permissible were set forth by the Court in *South Dakota v. Dole*.[155] The federal spending in question must advance the general welfare, the conditions imposed upon the receipt of funds must be stated unambiguously and relate to the federal interests sought to be advanced, and such conditional spending cannot be prohibited by another constitutional provision.[156] Moreover, financial inducements that are so coercive

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REV. 598 (2001). The court suggesting that some sort of *de minimis* test may be warranted in determining whether the imposition by the federal government on the states of minor ministerial duties is permissible. Justice Scalia stated that the "incidental application to the States of a federal law of general applicability" would be constitutionally permissible if such law did not interfere excessively with the functioning of the state's government. *Printz,* 521 U.S. at 932.

150. *See* New York v. United States, 505 U.S. at 178–79; *Printz*, 521 U.S. at 907.

151. 330 U.S. 386 (1947). The scope of Congress's power to require state courts to adjudicate federal claims is not clear. *See, e.g.,* Howlett v. Rose, 496 U.S. 356, 372 (stating that the Supremacy Clause does not necessarily require that a state create a court competent to hear a federal claim); *see also* Peter Jeremy Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 675–78 (1999) (discussing various cases and asserting that state courts, in the absence of express Congressional direction to the contrary, can invoke neutral rules of jurisdiction to refuse to hear a federal claim).

152. Among the criticisms is that there is no textual basis for making such a distinction among the branches of state government. *See* Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism,* 31 IND. L. REV. 71, 78–90 (1998) (criticizing Justice Scalia's textual argument set forth in *Printz* and asserting that Article I is the proper source of Congress's commandeering authority); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law*, 95 COLUM. L. REV. 1001, 1030–1042 (1995) (asserting that the treatment of a state's judiciary as *sui generis* is not supported by the text of the Constitution).

153. *See supra* note 141 and accompanying text.

154. *See* Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 12 (2015).

155. South Dakota v. Dole, 483 U.S. 203 (1987).

156. *Id.* at 207–08.

that they compel states to accept them are impermissible.[157] In that case the Court upheld the constitutionality of the National Minimum Drinking Age Act which caused a state that did not adopt a legal drinking age of at least twenty-one to lose five percent of federal highway funds. According to the Court the financial inducement in this case was a form of "relatively minor encouragement" but not coercive.[158]

In *National Federation of Independent Business v. Sebelius,* the Court upheld the constitutionality of the Patient Protection and Affordable Care Act's individual health insurance mandate pursuant to Congress's taxing power.[159] However, the Court ruled against the government on two issues in that case. First, it held that the individual health insurance mandate was beyond Congress's power to regulate interstate commerce.[160] Second, it held that the expansion of Medicaid under the statute impermissibly compelled the states to enact or administer a federal program.[161] The Court recognized that the federal government may offer states inducements to enact or administer programs but such inducements become impermissible when "'pressure turns into compulsion"' and a state is left with no practical choice but to comply with federal dictates.[162] Under the statute, a state that refused to expand its Medicaid program faced a loss of all federal Medicaid funding.[163] Although in theory a state had the option to refuse to expand its Medicaid program as a practical matter, given the amount of money at stake, a state had no choice but to expand its Medicaid program.

The Court recently had occasion to determine whether Congress has the power to prohibit state action in an area in which the federal government has chosen not to regulate directly. The Court's attempt to distinguish between permissible federal preemption of state regulation and the impermissible com-

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157. *Id.* at 211. Precedent is scarce on whether states may accept conditional funding if such acceptance would result in the violation of state law. *See* D. Cody Huffaker, Comment: *A New Type of Commandeering: The Bypass Clause of the American Recovery and Reinvestment Act of 2009 (Stimulus Package)*, 42 ARIZ. ST. L.J. 1055, 1082 (2010).

158. South Dakota v. Dole, 483 U.S. at 211.

159. 567 U.S. 519 (2012). This was the first case in a trilogy of cases before the Court that concerned the Patient Protection and Affordable Care Act, commonly referred to as "Obamacare". In 2014, the Court held that, pursuant to the Religious Freedom Restoration Act (RFRA) 42 U.S.C. §§ 2000bb-2000bb-4 (2018), the statute's requirement that employer provided health insurance include coverage for certain contraceptives could not be enforced against three closely held corporations. *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014). In 2015, the issue before the Court was whether federal tax credits established by the statute were available to qualified individuals who purchase health insurance on either federal or state exchanges or whether such credits were limited to qualified individuals who purchase health insurance only on state exchanges. The Court held that the Act makes available tax credits to qualified individuals who purchase health insurance on federal exchanges as well as state exchanges. *See supra* note 141.

160. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. at 555–58.

161. *Id.* at 581–85.

162. *Id.* at 576–80 (citations omitted).

163. *Id.* at 581.

mandeering of state institutions was not entirely satisfying. However, the Court made clear that the anti-commandeering principle is as applicable to federal prohibitions on state action as it is to federal orders for states to take some affirmative action. The statute in question, an anti-gambling measure, operated very similarly to Pub. L. No. 86-272.

B. *Murphy v. National Collegiate Athletic Association*

The Professional and Amateur Sports Protection Act (PASPA) prohibited states from sanctioning the wagering on professional and amateur sports. PASPA was enacted in 1992 in response to Congress's concern about the growth of state-sponsored sports gambling, the concomitant erosion of public confidence in the integrity of professional and amateur sports contests, and skepticism about the assertion that the legalization of sports gambling would have a chilling effect on illegal sports gambling.[164] The legislation exempted Nevada and other states that already had legalized some form of sports gambling.[165]

PASPA made it unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games."[166] Similarly, it was unlawful for a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity the aforementioned activities.[167] Civil actions to enjoin violations of the statute could be brought by the Attorney General of the United

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164. S. REP. NO. 102-248, at 5, 7 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3555, 3558. Congress also believed that state-sanctioned games would increase the incidence of illegal gambling. *Id.* Finally, the statute manifested Congress's belief that "[t]he moral erosion [sports gambling] produces cannot be limited geographically" due to the fact that once sports gambling is legalized in a state a race to the bottom would ensue among other states. *Id.* at 5, *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3556.

165. *Id.* at 8, *as reprinted in* 1992 U.S.C.C.A.N. at 3559. [This citation cannot support the statement that "Legislation exempted Nevada . . . ." The Senate Report is not legislation/law.]

166. 28 U.S.C. § 3702 (2018). A government entity is a state, including territories or possessions of the United States, or political subdivisions thereof, and entities or organizations that have governmental authority over territories of the United States, including certain Native American entities or organizations. 28 U.S.C. §§ 3701(2), 3701(5) (2018).

167. 28 U.S.C. § 3702(2) (2018). The legislation also exempted certain casino activities. An activity otherwise prohibited by the statute was permitted if such activity was not a lottery and was conducted exclusively in a casino located in a municipality and such activity or similar activity was authorized to be operated in the municipality not later than one year after the effective date of the statute. 28 U.S.C. § 3704(a)(3)(A) (2018). Moreover, any commercial casino gaming scheme operated by a casino located in a municipality, other than a lottery, was permissible if such scheme was in operation in the municipality throughout the ten year period preceding the effective date of the statute and is subject to comprehensive state regulation applicable solely to such municipality. 28 U.S.C. § 3704(a)(3)(B) (2018).

States or by any amateur or professional sports organization whose competitive game is the basis of the statutory violation.[168]

Two general grandfather rules were provided in the statute. First, lotteries, sweepstakes, and betting, gambling and wagering schemes operated in a state or other governmental entity at any time between January 1, 1976 and August 31, 1990 were permitted.[169] Second, lotteries, sweepstakes, and other betting, gambling and wagering schemes operated in a state or other governmental entity were permitted if such schemes were authorized by statute in effect on October 2, 1991 and such scheme was actually conducted in the state or other governmental entity at any time between September 1, 1989 and October 2, 1991.[170]

New Jersey twice challenged the constitutionality of PASPA. The first challenge culminated with the Third Circuit holding that PASPA was constitutional.[171] The voters of New Jersey approved, by referendum, an amendment to the state's constitution that permitted the enactment of legislation authorizing sports gambling but the legislature failed to meet the deadline set forth in the PASPA grandfather provision.[172] The National Collegiate Athletic Association and various professional sports leagues brought suit to enjoin the state from licensing sports betting.[173] The state raised three constitutional claims.

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168. 28 U.S.C. § 3703 (2018). An amateur sports organization is any person or governmental entity, or league or association of such persons or governmental entities, that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate. 28 U.S.C. § 3701(1) (2018). A professional sports organization is similarly defined except that such organization sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate. 28 U.S.C. § 3701(3) (2018).

169. 28 U.S.C. § 3704(a)(1) (2018). The Third Circuit interpreted this grandfather rule narrowly in a case involving Delaware's plan to institute a sports betting scheme in 2009. *See* Office of the Comm'r of Baseball v. Markell, 579 F.3d 293 (3d Cir. 2009), *rev'g* 2009 U.S. District LEXIS 69816 (D. Del. 2009). In 2009, Delaware intended to allow single game wagers in professional and amateur sports except for sporting events that involved a Delaware college or university or a Delaware amateur or professional sports team. *Id.* at 296. During the 1976 National Football League season, Delaware operated a betting scheme known as "Scoreboard" which required the selection of at least three winners in National Football League games. *Id.* The court held that Delaware's scheme violated PASPA. *Id.* at 300. The court refused to apply the grandfather rule broadly and held that it applied only to schemes that the state had actually conducted in 1976. *Id.* The schemes did not have to be identical in every respect to the games offered in the past but the differences between the present and past games must be *de minimis* and not substantial. *Id.* at 301–04.

170. 28 U.S.C. § 3704(a)(2) (2018).

171. *See* Nat'l Collegiate Athletic Ass'n v. Christie, 730 F.3d 208, 217 (3d Cir. 2013), *aff'g* 926 F. Supp. 2d 551 (D. N.J. 2013), *cert. denied*, 134 S. Ct. 2866 (2014).

172. *See id.*

173. *Id.* at 214–15. The Third Circuit affirmed the district court's rejection of the state's claims that the plaintiffs lacked standing to assert a claim and that PASPA was unconstitutional. *Id.* at 214–15, 218–24. The requirement of standing is rooted in Article III of the Constitution which provides 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 . . . to Controversies to which the United States shall be party . . . ." U.S. CONST. art. III, § 2. The standing requirement also has a prudential dimension.

> The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A feder-

First, the state asserted that PASPA was beyond Congress's power to regulate interstate commerce. Because both wagering and national sports are economic activities and substantially affect interstate commerce, the court dismissed this argument.[174] Citing *United States v. Lopez*, the court held that "Congress may regulate an activity that 'substantially affects interstate commerce' if it 'arise[s] out of or [is] connected with a commercial transaction."'[175]

Second, according to the state PASPA impermissibly commandeered the states to enforce a federal regulatory program. The court rejected this argument on the ground that the anti-commandeering principle is inapplicable to federal laws that merely prohibit a state from acting in a manner that would violate federal law.[176] PASPA did not require a state to do anything but instead prevented a state from doing what the statute prohibits it from doing under the authority of the Supremacy Clause.[177] A state, for example, could repeal an anti-gambling

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al court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . . " Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction . . . . Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties . . . . Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual right. . . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. Warth v. Seldin, 422 U.S. 490, 499–501 (1975).

A discussion of standing jurisprudence, oftentimes bewildering and subject to criticism, is beyond the scope of this work. For a cogent analysis and critique of the Supreme Court's holdings in this respect, *see* Richard E. Epstein, *Standing or Spending – The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1 (2001). *See also* Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries", and Article III*, 91 MICH. L. REV. 163 (1992); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Louis L. Jaffe, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895 (1960).

174. Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d at 224–25. Moreover, assuming *arguendo* that PASPA also reaches purely local activities, such as casual bets among family members, Congress had a rational basis for concluding that purely intrastate activity, when combined with like conduct by other similarly situated people, affects interstate commerce. *Id.* at 225–26 (citing Wickard v. Filburn, 317 U.S. 111 (1942) (other internal citations omitted)). The court, in a footnote, did acknowledge Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922), the case that granted professional baseball an exemption from the Sherman Antitrust Act on the ground that professional baseball is not in interstate commerce. *See id.* at 225 n.7.

175. *Christie*, 730 F.3d at 224 (quoting United States v. Lopez, 514 U.S. 549, 559 (1995)).

176. *See id.* at 229–30.

177. *Id.* at 230–31.

law so long as the state does not affirmatively authorize or license sports gambling.[178] Finally, the court rejected the state's assertion that PASPA violated the equal sovereignty of the states because it singled out Nevada for favorable treatment.[179]

New Jersey's second challenge was the result of legislation enacted by the state in 2014 that repealed certain existing prohibitions the effect of which was to permit casinos and racetracks to engage in sports wagering without an express state authorization. The Third Circuit held that the law in question violated PASPA because it channeled sports gambling to particular venues and that the allowance of casino sports gambling in the midst of myriad prohibitions of sports gambling amounted to state authorization of such gambling.[180] For the reasons it set forth in the earlier case the court held that the anti-commandeering principle was not violated.[181]

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178. *Id.* at 232.

179. *Id.* at 237–40. The equal sovereignty doctrine is rooted in Article IV, section 3 of the U.S. Constitution and the Tenth Amendment thereto. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2623 (2013); Coyle v. Smith, 221 U.S. 559, 566–67 (1911). In the Court's opinion, the state had misplaced its reliance on two Supreme Court cases that dealt with the Voting Rights Act of 1965. *Christie*, 730 F.3d at 237–40 (internal citations omitted). The scope of the equal sovereignty principle is not clear. On the one hand, the Court has held that the principle is applicable to the terms upon which states are admitted to the United States. *See* S.C. v. Katzenbach, 383 U.S. 301, 328–29 (1966). On the other hand, the Court has signaled that the doctrine may, in fact, have broader application. In a 2009 decision involving the Voting Rights Act of 1965, the Court stated that "'[t]he doctrine of the equality of States . . . does not bar . . . remedies for local evils which have subsequently appeared.' But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem it targets." Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) (quoting *Katzenbach*, 383 U.S. at 328–29). More recently, in another case involving the Voting Rights Act of 1965, the Court noted that "*Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a bar on differential treatment outside that context. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States." *Holder*, 133 S. Ct. at 2623–24. According to the Third Circuit, the equal sovereignty principle does not prohibit Congress from differentiating among states in the exercise of its commerce power. *Christie*, 730 F.3d at 238–39. Moreover, assuming that the disparate treatment of a state or states has to be justified by unique conditions or facts present in the disfavored state or states, PASPA's grandfather rule still passed constitutional muster, because the objective of PASPA was not to eliminate sports gambling but to prevent its spread. *Christie*, 730 F.3d at 239. Finally, if Congress, in fact, was prohibited from favoring Nevada, then the invalidation of the grandfather rule that favors Nevada is the appropriate corrective measure rather than the invalidation of the entire statute. *Christie*, 730 F.3d at 239. Unfortunately, the scope of the equal sovereignty principle remains unclear because this issue was not addressed by the Supreme Court in Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

180. Nat'l Collegiate Athletic Ass'n v. Governor of State of N.J., 832 F.3d 389, 396–402 (3d Cir. 2016) (en banc), *aff'g* Nat'l Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 3d 488 (D.N.J. 2014).

181. *Id.* The dissenting judges believed that the repeal of a pre-existing prohibition was not tantamount to state authorization and took exception to the majority's assertion that partial repeal of prohibitions may, in some cases, amount to authorization while, in other cases, it may not. *Id.* at 402–06 (Fuentes, Restrepo, J.J., dissenting); *id.* at 406–08 (Vanaskie, J., dissenting).

On May 14, 2018, the Supreme Court, in a 6-3 decision, held that PASPA was unconstitutional because it violated the anti-commandeering principle.[182] According to the Court, no constitutional distinction should be made between federal legislation that commands a state to act and federal legislation that prohibits a state from taking action.[183] The Court distinguished federal preemption of state law pursuant to the Supremacy Clause and the impermissible commandeering of state authorities.[184]

The anti-commandeering principle is "the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States."[185] Although states wield sovereign powers their sovereignty is limited in several

182. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018). Governor Christie's name was replaced with that of his successor, Philip D. Murphy. Justices Ginsburg and Sotomayor dissented, and Justice Breyer dissented in part. *Id.* at 1488. The Court held that New Jersey's legislative action fell within the confines of PASPA, because the repeal, in whole or in part, of an existing statutory prohibition amounts to state authorization of the activity that, prior to repeal, had been prohibited. *Id.* at 1474. The Court held that PASPA was unconstitutional in its entirety because it believed that the statutory provision at issue in the case was not severable from the other operative provisions of the statute. *Id.* at 1484–85. The issue before the Court was whether a state may be prohibited from authorizing or licensing sports gambling. *Id.* at 1478. The statute also prohibited a state from operating, sponsoring, or promoting sports gambling and the Court held that the prohibitions on these state activities were not severable from the provision at issue in the case and, accordingly, were also constitutionally infirm. *Id.* at 1482–83. In order for these provisions to fail "it must be 'evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not.'" *Id.* at 1482 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)). With respect to the prohibition on state sponsorship and promotion activities, the Court believed that the distinction between these activities and state authorization, licensing, and operation was too uncertain, and that Congress would not have sought to bar such an ill-defined category of conduct. *Id.* at 1483. As a result, the entire operative provision that prohibited various types of state action with respect to sports gambling was struck down. In addition to the prohibitions the statute imposed on the states, a second operative provision in the statute made it unlawful for a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity the aforementioned activities. *Id.* at 1470. This provision was not at issue in the case, but the Court proceeded to examine whether this provision was severable from the provision at issue and held it was not severable. *Id.* at 1483–84. The Court also struck down the statute's prohibitions on both states and private actors from advertising sports gambling operations. *Id.* at 1484. The Court relied heavily of First Amendment principles as set forth in several of its precedents with respect to the advertisement of legal activities. *See id.* Justice Thomas' concurrence invited the Court to revisit its jurisprudence with respect to severability asserting that severability analysis has devolved into the advancement of judicial policy preferences and that parties often lack standing to challenge the provisions to which severability analysis is applied thereby inviting the courts to issue advisory opinions. *See id.* at 1485–87 (Thomas, J., concurring). Justices Ginsburg and Sotomayor dissented because they believed that the statute's various prohibitions on states, other than those that prohibited states from authorizing and licensing sports gambling, were severable from the prohibitions in question as were the statute's prohibitions on private actors. *Id.* at 1489–90 (Ginsburg, Sotomayor, J.J., dissenting). Justice Breyer also believed that the provisions applicable to private parties were severable from those operative on the states. *Id.* at 1488 (Breyer, J., concurring in part, dissenting in part).

183. *See infra* notes 188–89 and accompanying text.

184. *See infra* notes 191–99 and accompanying text.

185. *Murphy*, 138 S. Ct. at 1475.

ways. For example, certain grants of power to the federal government impose implicit restrictions on state governments and the Supremacy Clause preempts state law when such law conflicts with federal law that is within the scope of the authority granted to Congress by the Constitution.[186] The federal government may act only within the enumerated powers conferred upon it and all other legislative power is reserved to the states.[187] The anti-commandeering principle "simply represents the recognition of this limit on congressional authority."[188]

Citing to *New York v. United States*, Justice Alito stated that the Constitution, in contrast to the Articles of Confederation, grants Congress legislative authority over individuals and not the states and that "'even a particularly strong federal interest'" would not enable Congress to command a state to enact regulation.[189] "Where a federal interest is sufficiently strong to cause Congress to legislate it must do so directly; it may not conscript state governments as its agents."[190] The anti-commandeering principle serves several important purposes, including the promotion of political accountability, the reduction of the risk of tyranny by maintenance of a balance of power between the states and the federal government, and prevention of enforcement cost shifting to the states.[191]

According to the Court, the prohibition on states from authorizing sports gambling, dictates to a state legislature what it may or may not do and, in effect, puts such legislature under the direct control of Congress.[192] The Court proceeded to dispel the notion that a distinction should be made between a congressional command to act and command to refrain from action.

> This distinction is empty. It was a matter of happenstance that the laws challenged in New York and Printz commanded "affirmative" action as opposed to imposing a prohibition. The basic principle – that Congress cannot issue direct orders to state legislatures – applies in either event. . . . Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.[193]

The Court then proceeded to distinguish the statute in question from congressional actions that the Court had previously upheld. In those cases, Congress either exerted pressure on states to act in accordance with congressional objectives, regulated states similarly to private actors in an activity in which

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186. *Id.* at 1475–76 (citing Dep't of Revenue of Ky. v. Davis, 553 U.S. 328 (2008); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)).

187. *Id.*

188. *Id.*

189. *Id.* (citing New York v. United States, 505 U.S. 144, 178 (1992)).

190. *Id.* at 1477 (citing New York v. United States, 505 U.S. 144, 178 (1992)).

191. *Id.* (citing New York v. United States, 505 U.S. 144, 168–69, 181–82 (1992); Printz v. United States, 521 U.S. 898, 929–30 (1997)).

192. *Id.* at 1478.

193. *Id.*

both engage, provided states with a choice to act or not act, or merely required states to consider, but not necessarily adopt, a federal regulatory scheme.[194]

The Court's holding that the federal government can no more order a state to do nothing than it can order a state to do something calls into question how the anti-commandeering principle is distinct from preemption.

The Court noted that federal preemption of state law is warranted when federal law confers rights or imposes restrictions on private actors and state law confers conflicting rights or imposes conflicting restrictions. According to the Court, *Mutual Pharmaceutical Co. v. Bartlett* provided an example of conflict preemption, the preemption of a state law that imposes a duty or confers a right that is conflict with federal law.[195] In that case, the Court struck down a state law that required a generic drug manufacturer to provide information on a generic drug label in addition to the information required by the F.D.A.[196] The state law in question conflicted with federal law because federal law prohibited generic drug manufacturers from altering the composition of an F.D.A. approved drug or the F.D.A. approved label.[197]

Federal laws that preclude state action—laws that appear strikingly similar to PASPA—implicate "express preemption." States or their political subdivisions are prohibited from enacting or enforcing any law, rule, regulation, standard, or provision having the force and effect of law related to air carriers rates, routes, or services by a provision of the Airline Deregulation Act of 1978.[198] According to the Court, the Airline Deregulation Act of 1978 conferred on private actors, in this case airlines, a federal right to engage in certain conduct free of state law constraints and this right distinguished this provision from the PASPA provision at issue despite the fact that this provision operated directly on the states.

The federal law that governs the registration of aliens offers an example of "field" preemption—when federal law occupies an area of regulation "'so comprehensively that it has left no room for supplementary state legislation.'"[199] Federal law provides aliens with a right to be free of any registration obligation other than those required by federal law.[200] Consequently, field preemption,

194. *Id.* at 1478–79 (discussing South Carolina v. Baker, 485 U.S. 505 (1988), Reno v. Condon, 528 U.S. 141 (2000), Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), and FERC v. Mississippi, 456 U.S. 752 (1982)). For a discussion of several of these cases see *supra* notes 129–35 and accompanying text. Note that federal laws that incentivize states to act in a certain manner are susceptible to challenge if the incentive structure embedded in the legislation is coercive. *See supra* notes 151–54 and accompanying text.

195. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. at 1480.

196. Mut. Pharm. Co. v. Bartlett, 570 U.S. 472 (2013).

197. *Id.* at 480–86.

198. *Id.* at 1481 (first citing Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) then citing 49 U.S.C. App. § 1305(a)(1)(1988)).

199. *Id.* at 1490–81 (citing Arizona v. United States, 567 U.S. 387 (2012); R.J. Reynolds Tobacco Co. v. Durham Cty., 479 U.S. 130, (1986)).

200. Arizona v. United States, 567 U.S. 387, 401 (2012).

notwithstanding that it directly precludes state governments from acting, is predicated, like conflict and express preemption, on federal law that regulated private actors and not states.[201]

According to the Court, PASPA cannot be interpreted as regulating private actors and, consequently, is not a preemption provision.[202] PASPA's operative provision at issue neither conferred federal rights on anyone who desired to conduct sports gambling operations nor imposed any restrictions on private actors and, therefore, it can only be interpreted as a direct command to the states in violation of the anti-commandeering doctrine.[203]

C. *Analysis of* Murphy *and its Potential Impact on Pub. L. No. 86-272*

A variety of criticisms have been directed toward the anti-commandeering principle.[204] However, unless and until the Court is swayed by its critics the anti-commandeering principle is a judicial tool available in the enforcement of the Tenth Amendment.

Two significant principles emerged from the Court's decision in *Murphy*. First, the distinction between permissible preemption of state action and impermissible commandeering of state authorities is premised on whether the federal law at issue confers rights or imposes restrictions on private actors.[205] If such rights are conferred or such restrictions imposed then state action may be preempted by federal law. Otherwise, preemption will not provide constitutional cover against state claims of impermissible commandeering by the federal government. In the Court's opinion, PASPA directly regulated states.[206] The Court's reasoning is unpersuasive for several reasons.

First, private parties indisputably are regulated by a second operative provision of PASPA, a provision that makes it unlawful for a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental

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201. Arizona v. United States, 567 U.S. 387 (2012).

202. *Id.*

203. *Id.* The Court rejected the respondents' argument that the prohibition on licensing sports gambling should be upheld. The federal government's power to restrict a state from licensing an operation is subject to the same constraints as its power to restrict a state from authorizing an activity. *Id.* at 1481–82.

204. Some critics of the principle assert that political accountability, a value that the principle supports, has no textual support in the Constitution. *See* Siegel, *supra* note 126, at 1632; Coan, *supra* note 154, at 13. Moreover, the notion that cooperative federalism supports political accountability is devoid of empirical support and is premised on Panglosian notions of voter competence. *See* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L. J. 1104, 1112–71 (2013). Critics have also posited that the framers intended the federal government to enlist state officials in carrying out federal policies, that conditional spending and preemption either function similarly to commandeering or are more damaging to federalism principles because they eliminate any role for states in policy making. *See* Siegel, *supra* note 126, at 1646–57; Caminker, *supra* note 152, at 1084–85; Coan, *supra* note 154, at 15–16.

205. *See supra* notes 191–97 and accompanying text.

206. *See supra* notes 198–99 and accompanying text.

entity certain sports gambling activities.[207] Second, the Court contrasted *Murphy* with cases in which it held federal legislation preempted states from regulating airline fares and immigration documentation.[208] In those cases the Court believed that the preemptive effect of federal law was justified despite the fact that the states were told what they could not do because the laws in question provided rights to private actors However, it is difficult to ascertain why the PASPA provision in question did not confer on the professional sports leagues and the National Collegiate Athletic Association the right to conduct their affairs free of any state sanctioned activity to which they are opposed and why such a right is not as cognizable as the right to set airfares free of state interference or the right to register one's immigration status with a single government agency.

PASPA did not create an independent federal legal framework for the activity it sought to regulate and an argument can be made that, absent a separate and distinct federal legal framework, preemption is inapt because there is no federal legal framework for state action to disturb and thereby support federal preemption claims. The Court did not draw this distinction between PASPA and the other statutes. Consequently, the line between commandeering and preemption is not so clear.

Second, the Court held that the anti-commandeering principle is applicable to federal commands that prohibit state action in addition to commands that compel state action.[209] Thus *Murphy* calls into question whether the federal government can compel states to refrain from enacting measures that they otherwise are entitled to enact.

Pub. L. No. 86-272 has several attributes in common with PASPA. PASPA did not provide a federal regulatory regime to govern sports gambling. Instead, it merely prohibited the states from taking action that they otherwise were permitted to take.[210] The Court's explanation of why PASPA did not preempt state law was unsatisfactory.[211] The fact that the federal law in question did not provide the federal government with any direct regulatory role in the subject area may have swung the Court against preemption and toward the anti-commandeering doctrine—the Court did not say. However, common sense indicates that a state law whose provisions do not conflict with federal law but for the fact that federal law prohibited the state from enacting the law is not susceptible to preemption. Public Law No. 86-272, like PASPA, contains no substantive regulatory provisions. Instead, it operates similarly to PASPA—it simply

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207. *See supra* note 163 and accompanying text. Although the Court did note the existence of this provision it did not discuss it in the context of preemption but instead it discussed this provision only in the context of its severability from the operative provision at issue. *See supra* note 176 and accompanying text.

208. *See supra* notes 194–97 and accompanying text.

209. *See supra* notes 188–89 and accompanying text.

210. *See supra* notes 162–63 and accompanying text.

211. *See supra* note 203 and accompanying text.

prohibits states from enacting certain legislation that is otherwise within their power to enact.

When Pub. L. No. 86-272 was enacted, there may have been some doubt about the extent of a state's power to tax income derived by out of state sellers whose physical contacts with the forum state were minimal. The physical presence test survived for Due Process purposes until 1992 and the Court finally put the test to rest for Commerce Clause purposes in *Wayfair*.[212] Arguably, based on the case law prior to *Wayfair*, states had the power to tax income derived by out of state sellers whose contacts with the forum state involved availing themselves of the market in question, whether electronically or through mass media.[213] *Wayfair* is confirmation that modern commercial practices have given constitutional imprimatur to the states to expand the reach of their taxing powers to businesses that at one time enjoyed the protection of the physical presence test. Given that states have the sovereign power to impose taxes on income derived from sales subject to Pub. L. No. 86-272, the statute is nothing more than a command to the states to scale back the reach of their income taxes.

CONCLUSION

As the Court made clear in *Murphy* a federal command that prohibits state action is subject to anti-commandeering scrutiny no less so than a federal command for a state to act.[214] Moreover, Pub. L. No. 86-272 implicates a state's power to tax, a central attribute of state sovereignty.[215] It would be inconceivable that the federal government can mandate that states eliminate their corporate income tax because corporate compliance with myriad state tax codes is inefficient and, thus, burdens interstate commerce. Pub. L. No. 86-272 prevents a state from the legitimate exercise of its taxing power to avoid impediments to interstate commerce. The law is anachronistic, enacted at a time when commercial practices little resemble those of today. Moreover, its application only to the sale of tangible personal property further evidences its agedness. The extent of its application to digital goods is not clear and it does not apply to the rendering of services by remote out of state service providers. The notion that the measure is needed to allow for the efficient functioning of the interstate market is belied by the fact service activities have not appeared to suffer without a federally imposed tax exemption. Regardless of the statute's policy pros and cons *Murphy* has provided the legal grounds for eliminating a six-decade old federal encroachment on states' taxing powers.

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212. *See supra* notes 25–32, 82–99 and accompanying text.

213. *See supra* notes 21–48 and accompanying text.

214. *See supra* notes 188–89 and accompanying text.

215. *See supra* note 2 and accompanying text.