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The Federal Government's Power to Restrict State Taxation

David Gamage
Indiana University Maurer School of Law, dgamage@indiana.edu

Darien Shanske
University of California, Davis

state tax notes™

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by David Gamage and Darien Shanske

David Gamage

Darien Shanske

David Gamage is a visiting professor at Duke Law School from the University of California Berkeley School of Law (Boalt Hall), and Darien Shanske is a professor at the University of California Davis School of Law (King Hall).

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In this essay, an edition of Academic Perspectives on SALT, the authors consider Congress's authority to restrict states' taxing powers, using *National Federation of Independent Business v. Sebelius* as an analytic frame for their discussion.

Over a decade ago, *State Tax Notes* featured a lively discussion concerning Congress's power to restrict the taxing power of the states. That debate revolved around two questions. First, could Congress prohibit the use of the state corporate income tax altogether? Second, assuming that Congress could not prohibit the use of the corporate income tax, could it impose lesser restrictions, such as P.L. 86-272? There was no clear guidance from the U.S. Supreme Court on those issues then, and that mostly remains the case today.[1]

To foreshadow our conclusions: Our take on that debate is that while Congress probably lacks the power to abolish state-level corporate income taxes,[2] the federal government almost certainly does have the power to prevent the states from taxing much else — such as the retirement income of nonresidents,[3] internet access,[4] or interstate businesses with limited nexus.[5] Indeed, there seems to have been a general consensus on that latter conclusion, both among scholars[6] and in congressional statements and analysis.[7] Moreover, the federal government limits state taxing authority in just

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[1]Michael T. Fatale, "Common Sense: Implicit Constitutional Limitations On Congressional Preemptions Of State Tax," 2012 *Mich. St. L. Rev.* 41, 45 ("The Court has not yet posited any rules to protect the states from federal preemptions in the state tax area").

[2]*See, e.g.*, Fatale, *id*. at 42 ("It cannot be the case that the U.S. Congress has unfettered authority to preempt state taxes pursuant to the U.S. Constitution's Commerce Clause"). Fatale cites Alexander Hamilton for the general proposition that "a law for abrogating or preventing the collection of a tax laid by the authority of the States

(Footnote continued in next column.)

(unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power not granted by the Constitution." *Id.* at 44 (citing *Federalist* 33).

[3]4 U.S.C. section 114.

[4]Internet Tax Freedom Act, 47 U.S.C. section 151 note.

[5]P.L. 86-272.

[6]The relevant section in the authoritative Hellerstein treatise is short and it essentially concludes that there is little question that Congress can do the small amount it has done, such as P.L. 86-272 and the other statutes discussed *infra* in the text accompanying notes 39-48, and the incremental changes that have also been proposed that it do, such as pass the Mainstreet Fairness Act. The question of broader reforms, such as forbidding use of the corporate income tax, is not addressed. Jerome R. Hellerstein, Walter Hellerstein, and John Swain, *State Taxation* para. 4.24 ("Some of the Court's more recent decisions construing Congress's affirmative power under the Commerce Clause have taken a narrower view of that power than the Court articulated during the New Deal era, when it sustained the broad exercise of congressional power to regulate even local activities that may affect interstate commerce. But those decisions do not seriously inhibit the broad powers that Congress plainly possesses to deal with virtually any of the significant contemporary problems raised by state taxation of interstate commerce, such as prescribing uniform division of income tax rules, empowering the states to collect use taxes on mail-order sales, limiting the states' power to tax transactions over the Internet, or establishing tax-free trade zones") (citing in particular *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 434 (1946)); *see also* State Taxation of Nonresidents' Pension Income: Hearings on H.R. 371, H.R. 394, and H.R. 744 Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 104th Cong. 24 (1995) (statement of professor James C. Smith); and Tracey A. Kaye, "Show Me the Money: Congressional Limitations On State Tax Sovereignty," 35 *Harv. J. on Legis*. 149, 174 (1998) ("As the Court today would most likely interpret the Commerce Clause as constitutionally permitting Congress to preempt the states' tax sovereignty, the debate is properly shifted to whether the federal government should exercise its authority to do so").

[7]*See, e.g.*, H. Rep. 104-89 at 5 ("Congress has the clear authority under the commerce clause of the Constitution to prohibit State taxation of nonresidents' pension income").

those ways.[8] Some of those limitations have been upheld by the U.S. Supreme Court from other challenges.[9]

Yet there are a few reasons why it is now critical to revisit that debate, the task we take for ourselves in this essay. First, in our recent scholarship, we have explained how the state corporate income tax is problematic for reasons not previously understood — namely, the damage that existing state-level corporate income taxes do to the federal fisc through "tax cannibalization." We therefore will consider whether that new reason tilts the constitutional balance such that prohibiting state corporate income taxes might now be permitted. Even if banning state corporate income taxation would still be prohibited, our analysis points to a wide range of additional limitations on the states' use of corporate income taxation that could be desirable from the perspective of the federal government. We therefore consider whether these other policy expedients might pass constitutional muster.

There are two other reasons to reconsider that debate. First, Michael Fatale, the primary — and formidable — proponent of the argument that even P.L. 86-272 might be unconstitutional, in 2012 published a law review article reprising and refining his argument. Second, the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*[10] has the potential to change the relevant landscape. At least some prominent commentators have suggested that that opinion could augur a gestalt change in federal-state relations.[11] We will consider whether such a shift might affect federal power over state taxation.

I. The 2002 Debate

The contours of the debate can be stated relatively briefly. In an important 2002 article in *State Tax Notes*, Kirk Stark laid out the policy argument that the state corporate income tax is a poor tax and should be reassigned to the federal government.[12] The core of Stark's argument was that the corporate income tax is a tax on a mobile factor — namely, capital — and subnational jurisdictions are not well situated to impose a tax on mobile factors. Put prosaically, it is too easy for corporations to play states against each other so as to whittle away the state corporate income tax base. Of course, underlying Stark's argument was the assumption that the federal government *could* abolish the state corporate income tax base.[13] Stark held up P.L. 86-272 as a small step in that direction.[14]

Independently, in 2000, Walter Hellerstein published an article in the *National Tax Journal* addressing the extent of federal power over state tax bases.[15] Hellerstein's particular concern was whether Congress had the power to regulate electronic commerce — specifically whether to overturn *Quill* and impose some national solution on the states, as the Supreme Court in *Quill* suggested that Congress could do. Hellerstein said that recent Court decisions that imposed limitations on Congress's power under the commerce clause[16] could be read as limiting its power to impose limitations of that sort. Hellerstein concluded that the Court's "new federalism" decisions of the 1990s did not limit Congress's power to impose a uniform solution on the states concerning electronic commerce. Among other reasons, that was because the new federalism decisions clipped congressional power regarding regulations of activity not clearly "commercial," such as guns near schools, but the congressional limitation of state regulation of electronic commerce was not similarly infirm because electronic commerce is clearly commerce.[17]

Taking the other side, and forcefully, was Michael Fatale.[18] Fatale argued that the Court, especially after the new federalism cases, would apply a balancing test to evaluate federal intrusions onto the state taxing power.[19] Fatale thought the Court would be especially skeptical of congressional regulations that regulated a sovereign activity of the states, such as taxation. But Fatale also observed the many well-known limitations of P.L. 86-272, which was not surprising given its provenance as a temporary expedient. For instance, Fatale said, P.L. 86-272 favors large businesses relative to small businesses, just the opposite of what Congress ostensibly wanted. Thus, Fatale says we have, on the

[8] *See* discussion *infra*.

[9] *See, e.g., Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983).

[10] *NFIB v. Sebelius*, 132 S. Ct. 2566, 2595-2597 (2012).

[11] *See, e.g.*, Lawrence B. Solum, "How *NFIB v. Sebelius* Affects the Constitutional Gestalt," 91 *Wash. U. L. Rev*. 1 (2013).

[12] Kirk J. Stark, "The Quiet Revolution in U.S. Subnational Corporate Income Taxation," *State Tax Notes*, Mar. 4, 2002, p. 775.

[13] *Id*. at 783.

[14] *Id*.

[15] Hellerstein, "Federal Constitutional Limitations on Congressional Power to Legislate Regarding State Taxation of Electronic Commerce," 53 *Nat'l Tax J.* 1307 (2000).

[16] U.S. Const., Art. I, section 8, cl. 3.

[17] *Id*. at 1314. Thus, for instance, the problem in *United States v. Morrison*, 529 U.S. 598, 613 (2000), was that the federal law struck down targeted "gender-motivated" crimes, which are not "economic activity." At the same time, the Court reemphasized its broad sense of "commerce" for purposes of commerce clause analysis. *See id.* at 608-09 (2000) ("As we observed in *Lopez*, modern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce") (internal quotations and citations omitted).

[18] Fatale, "Federalism and State Business Activity Tax Nexus: Revisiting Public Law 86-272," *State Tax Notes*, June 3, 2002, p. 925, published in revised and expanded form in 21 *Va. Tax Rev*. 435-506 (2002).

[19] Fatale, 21 *Va. Tax Rev.*, *id*. at 465-67.

one side, a substantial federal intrusion into state sovereignty being weighed against a law that does not make much sense.[20] Thus, P.L. 86-272 is not constitutional and neither, in all likelihood, would other intrusions on state taxing power be.

Fatale's articles brought many responses that pushed for the constitutionality of P.L. 86-272.[21] The reasons are ultimately similar to Hellerstein's and argue that P.L. 86-272 is directly designed to facilitate interstate commerce and thus is categorically safe, even if there were consensus that it is ill-conceived.

But what about the question posed by Stark's analysis: Could Congress ban use of the corporate income tax altogether? Michael McIntryre said no, but not on the basis of the Court's new federalism decisions. According to McIntyre, the problem with banning a general tax base is that such a ban is insufficiently connected with Congress's underlying power to regulate commerce.[22] McIntyre appears to have had the last word on that question, as scholarly debate moved on to other topics.

II. Some New(ish) Developments

A. Introducing the Tax Cannibalization Problem

What we have called the "tax cannibalization problem" could arise within any federal system in which the central government shares a tax base with subnational governments.[23] We will now illustrate the problem with the example of the corporate income tax.[24] As readers of *State Tax Notes* know well, state-level corporate income taxes are vulnerable to a variety of distortionary responses that shrink the states' corporate income tax bases. Those distortionary responses include various forms of tax avoidance and tax gaming. It is useful to divide those distortionary responses into two conceptual categories.

The first conceptual category consists of distortionary responses that involve taxable activity relocating to other states. We label this category "horizontal distortions." Because horizontal distortions involve taxable activity relocating across state lines but remaining within the United States, they do not necessarily shrink the federal government's corporate income tax base. Important examples of horizontal distortionary responses to state-level corporate income tax rates include corporate taxpayers shifting their physical presence and sales activities from states that levy higher-rate corporate income taxes to states that levy lower-rate corporate income taxes. It is because of the prevalence of horizontal distortions that Stark argued that the state corporate income tax ought to be jettisoned.

The second conceptual category consists of the remaining distortionary responses that do not involve taxable activity relocating to other states. We label this category "vertical distortions." In contrast to horizontal distortions, vertical distortions do typically shrink the federal government's corporate income tax base. Important examples of vertical distortionary responses to state-level corporate income tax rates include corporate taxpayers shifting real investment activities abroad, corporate taxpayers shifting reported profits to subsidiaries in foreign jurisdictions, corporate taxpayers shifting from equity financing to debt financing, and business taxpayers shifting from the use of corporate forms to the use of partnership forms.

Vertical distortionary responses are the primary source of the tax cannibalization problem. Because vertical distortionary responses shrink both the state government's corporate income tax base and the federal government's corporate income tax base, vertical distortionary responses to state-level corporate income tax rates deprive the federal government of tax revenue.

Moreover, the federal government levies much higher tax rates on the bases of corporate income, ordinary income, and capital gains than do any state governments. Consequently, the federal government suffers much greater harm from vertical distortionary responses to state-level tax rates on those bases than do the state governments setting those tax rates.

Here is a very simple example.[25] Suppose a corporation engages in vertically distortionary responses — say profit shifting — because of the additional 8.84 percent corporate tax imposed by California. Suppose the corporation shields $1 million in additional profits and California thus loses $88,400 of tax revenue as a consequence. Note that the federal fisc potentially loses $350,000, because the rate at the federal level is 35 percent.

When vertical distortionary responses to a state government's tax rate deprive both the federal government and other states' governments of revenue, in the aggregate, we refer to that as tax cannibalization. As we argue at length in

[20] *Id*. at 479-92.

[21] Scott M. Zimmerman and Richard P. Schweitzer, "Public Law 86-272 Is Constitutional," *State Tax Notes*, June 24, 2002, p. 1207; and Diann L. Smith, "Supreme Court Would Uphold P.L. 86-272," *State Tax Notes*, July 8, 2002, p. 135.

[22] Michael J. McIntyre, "Thoughts on the Future of the State Corporate Income Tax," *State Tax Notes*, Sept. 23, 2002, p. 931. McIntyre's argument does not rely on the ghost of the intergovernmental tax immunity doctrine, though it would be possible to find that that much reduced doctrine would prevent Congress from taxing the state taxing power directly. *South Carolina v. Baker*, 485 U.S. 505, 520-523, nn. 11-13 (1988) (outlining continued limited role of doctrine in protecting states); and *State of New York v. United States*, 326 U.S. 572, 582 (1946) (classic cite standing for proposition that federal government could not tax state as a state).

[23] *See* Gamage and Shanske, "Tax Cannibalization and Fiscal Federalism in the United States," *Nw. U. L. Rev.*, Forthcoming. A draft of the paper is *available at* http://ssrn.com/abstract=2750933.

[24] Our explanation above closely follows the introductory explanation in our longer article, *id.* at 1-5.

[25] We go through much more detail in the complete paper.

our forthcoming article, there is reason to believe that the scale of that tax cannibalization is substantial.

In the context of our system of fiscal federalism, the tax cannibalization problem indicates that the federal government should encourage states to use tax bases that the federal government does not use, which could mean major bases, such as the retail sales tax or the property tax, or perhaps shifting to other forms of taxation, such as value added taxes, including unusual or hybrid ones like New Hampshire's business enterprise tax.[26] To that end, the federal government could use a carrot-and-stick approach, with those carrots or sticks small or large. Banning the use of state corporate income taxes would be a very big stick, while expanding P.L. 86-272 would be a relatively small one. Large direct subsidies would be a big carrot, while enabling easier collection of other kinds of taxes, say by overturning *Quill*, would be a little one.

Mitigating the tax cannibalization problem could also involve federal discouragement of state tax incentives. We will develop this argument in a subsequent article, but the gist is that if a state is to share a tax base with the federal government, the lower the state's tax rates, the less cannibalization is likely to occur. States have the incentive to keep rates low in order to attract businesses, but that incentive is dulled by the availability of tax incentives. Thanks to special tax breaks for mobile businesses, states can keep their rates high while in effect reducing the rates for specific businesses. Could Congress ban the use of tax incentives? Could Congress discourage the use of tax incentives by, in effect, taxing them through the federal income tax?

Given the clear federal interest in using such policy expedients to influence state tax structures, the question becomes, Just what can Congress do? The previous discussion assumed that federal intervention would explicitly aim to enable interstate commerce. Does the analysis change if Congress is seeking to protect its own revenue?

B. *NFIB v. Sebelius*

In the earlier rounds of the debate, one question was how and whether the Court's anti-commandeering doctrine would affect the limits of federal power over state taxation. As we discussed, the consensus, with which we agree, was that those earlier opinions on the limits of commerce would not have much impact in the area of state taxation. However, in *NFIB v. Sebelius*, the first big Obamacare decision, the Supreme Court expanded the reach of the commandeering doctrine, which has its roots in limiting Congress's power under the commerce clause.[27] *NFIB v. Sebelius* extends the reach of that doctrine to the spending power and suggests similar limits to the taxing power.[28] The Court held that Congress could not tie continued federal support for Medicaid to states' agreeing to expand Medicaid.

It is important not just that the commandeering doctrine was applied to the spending power, but how. In *NFIB v. Sebelius*, the Court did not forbid Congress from using the power of the purse to cajole states to follow a federal lead, but it did forbid Congress from using that power too much.[29]

Does *NFIB v. Sebelius* have any impact on our question? The decision is recent and Delphic at points.[30] There are readings that suggest that *NFIB v. Sebelius* might have a major impact on the shape of constitutional law.[31] That is because in its analysis of congressional power under the commerce clause, the Court sketched out limits on congressional power that suggest discomfort with the court's post-New Deal expansion of the commerce power.[32] Viewed from that perspective, the first-ever application of the commandeering principle to the spending clause implies that the Court might take a more jaundiced view of congressional restriction of the state taxing power. Note that this section of Chief Justice John G. Roberts Jr.'s opinion was joined by Justices Stephen G. Breyer and Elena Kagan.

C. Fatale's Newest Entry Into the Fray

Moreover, we do not necessarily even need to try to read Supreme Court tea leaves in order to imagine what a more

[26] We discuss the business enterprise tax briefly *supra* note 23, at 46-47.

[27] *See, e.g.*, *New York v. United States*, 505 U.S. 144, 161-66 (1992).

[28] 132 S. Ct. at 2599-2600 ("There comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. . . . Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. . . . [I]mposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice") (internal citations and quotation marks omitted).

[29] *NFIB v. Sebelius*, 132 S. Ct. at 2607 ("Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding").

[30] *Cf.* Lynn A. Baker, "The Spending Power After *NFIB v. Sebelius*," 37 *Harv. J.L. & Pub. Pol'y* 71, 81(2014) ("In conclusion, until the Court takes up my final two questions in future cases, we cannot fully understand the effect of the NFIB decision on spending power doctrine. The Court's 1987 five-pronged Dole test seems no longer to be the governing doctrine, but it is far from clear what has replaced it").

[31] *See generally* Solum *supra* note 11; *see also* Ernest A. Young, "Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law," 75 *Law & Contemp. Probs.* 157, 201 (2012) ("The Supreme Court's current doctrine underenforces constitutional norms of federalism and economic liberty, and if that doctrine remains intact, then it is hard to see how the ACA will not ultimately survive the current challenges to its constitutionality. I have tried to show, however, that underenforcement is a historically contingent phenomenon, and doctrine that has shifted once can shift again").

[32] *NFIB v. Sebelius*, 132 S. Ct. at 2585-2593.

restrictive approach to federal regulation of state taxation might look like, thanks to Fatale, who has refined and elaborated on his argument.[33] In a nutshell, his argument has two steps. First, he argues that state taxes are not commerce and hence cannot be regulated by the federal government under the commerce power. Second, he argues that the federal government can preempt state taxing power only when the state tax is itself discriminatory against other states, but not otherwise.[34] Fatale acknowledges that his argument is novel and would upend much of the little Congress has already done in that area.

III. Where We Think We Stand Now

A. Impact of *NFIB v. Sebelius*

We think that the biggest impact of *NFIB v. Sebelius* is that it provides a foundation for at least one pole of what we take to be the consensus view — that Congress probably cannot completely ban the use of a broad tax base by states. A lot of the reason for that view seems to have been gut feelings, based on shared intuitions, reinforced by the Court's repeated concern, in many contexts, for the fiscal integrity of states.[35] McIntryre attempted to give that sense some analytical teeth by maintaining that such a ban would not amount to regulating commerce at all. However, that was not a satisfying hook, since so many of the reasons for Congress to prohibit the use of the corporate income tax are tied to its impact on the behavior of interstate businesses.[36]

Accordingly, *NFIB v. Sebelius* provides a better analytic frame for thinking through the question. The following is what we take to be a relatively minimalist reading of the decision from a prominent commentator:

> The Chief Justice's pivotal opinion renders a spending condition coercive only in very narrow circumstances: Where Congress takes a (1) very large (2) preexisting conditional spending program, and (3) tells the state that if it wants to continue participating in the program, it must also agree to participate in an entirely separate and distinct program. In those circumstances, there is coercion.[37]

From that perspective, the issue with banning the state corporate income tax has nothing to do with the unsatisfying conceptual question about whether it is "commerce" but with the pragmatic question of what such a ban would do to the states. Taking away a major tax base — and one in use — would arguably affect the states too much.

However, note that unlike the Medicaid expansion, the federal government could argue that such a ban would not be designed to advance a distinct program but to improve the overall system of interstate taxation. That is certainly a relevant distinction, but we would not count on it being convincingly dispositive, especially because the tax cannibalization problem is particularly severe in the U.S. federal system partly because of choices made by the federal government. For instance, if the federal government imposed lower tax rates on broader bases, the tax cannibalization problem would be far less severe.[38]

B. Fatale's Argument as a Limit Case

We see Fatale's argument as a demonstration for how a new constitutional gestalt certainly could affect current and contemplated federal limitations on the state taxing powers. We also think Fatale's argument is useful in that it demonstrates how difficult it is to conceive of a principled limit on the commerce power that restricts some, but not all, existing federal limitations on state taxing power.

Before evaluating Fatale's argument further, we should provide some context. P.L. 86-272 is surely the broadest intervention into state taxing power, but it is by no means the only such intervention.[39] Congress restricts the states from taxing the internet directly,[40] from taxing individuals "traveling in air commerce"[41] or interstate travel by motor

[33]There are traces in original. *See, for instance*, Fatale, 21 *Va. Tax Rev.*, *supra* note 19 at 467.

[34]Fatale, 2012 *Mich. St. L. Rev.* at 66, 73, *supra* note 1.

[35]For instance, the Court has interpreted the 11th Amendment in a (controversially) state-protective manner partially out of concern with state revenue. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 714-16 (1999) (recounting history). The Court's (also controversial) broad interpretation of the Anti-Injunction Act betrays a similar concern. *National Private Truck Council Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 586 (1995). *See* similar concerns in connection with the permissible scope of the federal bankruptcy power in connection with municipalities, *Ashton v. Cameron County Water Improvement District. No. 1*, 298 U.S. 513, 532 (1936); the due process clause in connection with state revenue collection, *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18, 37 (1990); and the ability to order a tax increase as a remedy for a civil rights violation, *Missouri v. Jenkins*, 495 U.S. 33, 50 (1990).

[36]*See*, for instance, our discussion *supra* of the various costly tax mitigation strategies undertaken by interstate businesses.

[37]Samuel R. Bagenstos, "Viva Conditional Federal Spending!" 37 *Harv. J.L. & Pub. Pol'y* 93, 95 (2014).

[38]*See* Gamage and Shanske, *supra* note 23, at 48-50.

[39]*See generally* Hellerstein, Hellerstein, and Swain para. 4.25; and James R. Eads, "Federal Preemption of Revenue Autonomy," in *The Oxford Handbook of State and Local Government Finance* (Robert D. Ebel and John E. Petersen eds. 2012) (listing those and other examples).

[40]Internet Tax Freedom Act, 47 U.S.C. section 151 note, last amended P.L. 113-235, Div. E, Title VI, section 624, Dec. 16, 2014, 128 Stat. 2377, section 1101(a) ("No State or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending 3 years after the date of the enactment of this Act — (1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and (2) multiple or discriminatory taxes on electronic commerce").

[41]49 U.S.C. section 40116(b). There are exceptions for the state in which a plane takes off and lands, but such taxes may not impose an "unreasonable burden." 49 U.S.C. section 40116(d).

carrier,[42] and from imposing any tax that discriminates against railroads.[43] Moreover, Congress permits the states to tax interstate motor fuels only if they are members of the International Fuel Tax Agreement.[44] Similarly, states are permitted to tax mobile phones only if they follow Congress's sourcing rules.[45] Further, state taxes are broadly preempted by ERISA,[46] and the federal government has capped the amount of franchise fees that a cable company can be required to pay a state or local government.[47] Congress has forbidden the states from taxing the retirement income of nonresidents[48] or taxing the purchase of food with Supplemental Nutrition Assistance Program benefits.[49]

One way of interpreting that profusion might be to argue, as Fatale has, that the federal government has nibbled its way into imposing large limitations on the states.[50] That is why it is presumably not a problem for Fatale that his analysis would seemingly sweep away both narrow and broad federal limitations.

Yet we think the sweep of Fatale's argument weakens his position. Disruption matters.[51] The pragmatic Court that thought the Medicaid expansion went too far presumably will not be eager to cast doubt on so many existing federal laws. Further, these examples indicate how odd it is to withdraw taxation from the realm of "commerce." Many of these provisions relate to interstate commerce directly.[52] That is, these provisions regulate instrumentalities of interstate commerce (for example, railroads); emerging interstate commerce problems (for example, mobile telephones); problems uniquely affecting interstate business (for example, nexus); new interstate bases (for example, the internet); and taxpayer mobility (for example, pensions). In short, it is a burden on interstate commerce for each state to tax mobile phones differently. It would also be a burden — and to some extent it already is — if every state were to tax remote sellers using different nexus rules.

Or, as Congress put matters when it restricted the ability of states to tax interstate pensions:

> Congress has the clear authority under the commerce clause of the Constitution to prohibit State taxation of nonresidents' pension income. The activity that is being regulated under H.R. 394 is the economic relationship between a State and its former resident. The transactions at issue are both within the stream of interstate commerce. Both the person who has retired and the pension payments have crossed State lines.[53]

If those hooks were to be insufficient to ground an exertion of congressional power under the commerce clause, it seems that many other federal laws would be in jeopardy and solutions to national problems made much more difficult.

C. Other Clauses and Other Expedients

NFIB v. Sebelius is well known because the Court decided that the Affordable Care Act's individual mandate was a valid exercise of congressional power under the taxing power. The commerce clause[54] is thus not the only enumerated power (even if it sometimes seems that way). Thus, in thinking through the constitutionality of other policy expedients meant to mitigate the tax cannibalization problem, other clauses should be considered. We should emphasize that the commerce clause probably is sufficient to ground most of the other expedients we have outlined to address the tax cannibalization problem, such as narrowing the reach of the state corporate income tax by expanding P.L. 86-272.

First, most obviously, there is the spending power as undergirding Congress's ability to bribe the states not to use the corporate income tax.[55] That power was limited by *NFIB v. Sebelius*, but only in the extremes.[56] Congress retains the power to place conditions on funds in order to achieve policy goals that it could not achieve directly under Article I of the Constitution. Thus, even if the outright ban of the state corporate income tax would not pass muster as an exercise of the commerce power, Congress could bribe the states to reduce use of the tax by using the spending power so long as the pressure that Congress brings to bear is not comparable to the deprivation of Medicaid funding. Congress could use its spending power just because it is

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[42] 49 U.S.C. section 14505 ("A State or political subdivision thereof may not collect or levy a tax, fee, head charge, or other charge on — (1) a passenger traveling in interstate commerce by motor carrier").

[43] 49 U.S.C. section 11501.

[44] 49 U.S.C. section 31705(a) ("Reporting requirements. — After September 30, 1996, a State may establish, maintain, or enforce a law or regulation that has a fuel use tax reporting requirement (including any tax reporting form) only if the requirement conforms with the International Fuel Tax Agreement").

[45] 4 U.S.C. section 117(b).

[46] 29 U.S.C. section 1144(a) (general preemption provision); and 29 U.S.C. section 1144(b)(5)(B)(i) (specifically not excluding state taxes from scope of preemption).

[47] 47 U.S.C.A. section 542(b) ("For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services").

[48] 4 U.S.C. section 114.

[49] 7 U.S.C. section 2013(a).

[50] Fatale, 2012 *Mich. St. L. Rev.*, *supra* note 1, at 50-51.

[51] As Solum might put it, even those critical of the post-New Deal expansion of federal power often advocate for the second best option of a "Frozen New Deal Settlement." Solum, *supra* note 11, at 54.

[52] *See* the core of the commerce power as elucidated by the Court in *Morrison*, *supra* note 17.

[53] Report 104-89 at 5.

[54] Along with the necessary and proper clause and supremacy clause.

[55] U.S. Const., Art. I, section 8, cl. 1.

[56] *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601 ("We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' taking certain actions that Congress could not require them to take") (internal quotation marks and citation omitted).

seeking to mitigate the tax cannibalization problem, no interstate commerce hook required.

And then there is the taxing power, which could also undergird federal efforts to limit use of the state corporate income tax.[57] As *NFIB v. Sebelius* made clear, the taxing power is in some ways also broader than the commerce power. Thus, the federal government cannot regulate inactivity, but it can tax it.[58] The federal government could perhaps not ban the use of the corporate income tax, but it could make that tax much less appealing by limiting — or even eliminating — its deductibility from federal taxes. Likewise, the federal government could limit the appeal of state tax incentives by taxing their value, perhaps even at a special high rate. Such forms of federal action would also likely be supported by the 16th Amendment (and the supremacy clause). It is up to the federal government how it wishes to structure its income tax, including its deductions.[59] This line of argument suggests that the federal government might seek to protect its tax base by banning overlapping bases altogether. Our elucidation of the tax cannibalization problem indicates that there is a big problem here, and simple federal preemption would be justified, underwritten by the supremacy clause. Yet the pragmatic reasoning of *NFIB v. Sebelius* suggests that an otherwise unobjectionable exercise of an enumerated power can go too far if it overly undermines the current operation of states, especially their revenue function.

IV. Conclusion

We have revisited questions about the extent of federal power over state taxation and, in the end, must conclude that the question remains open. Nevertheless, we think the crucial point is that what we take to be the consensus view is still the best answer based on current doctrine. The federal government almost certainly can impose significant restrictions on state taxing power, though within limits.

But is that the right answer? We think so. There is clearly a tension between respecting the states' substantial autonomy and granting the federal government sufficient power to address national problems. There is no perfect formula, but we think the current consensus, uncertain around the edges as it may be, is reasonable and perhaps the best that can be done. ■

[57]U.S. Const., Art. I, section 8, cl. 1.

[58]*NFIB v. Sebelius*, 132 S. Ct. at 2599.

[59]*New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934) ("The power to tax income like that of the new corporation is plain and extends to the gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefore can any particular deduction be allowed").