Common Sense:
Implicit Constitutional Limitations on Congressional Preemptions of State Tax

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“Common Sense”

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• Today’s presentation:
  – Overview: a call to action
  – Legal analysis (in summary form...)
Overview/call to action

• “Perhaps the sentiments contained in the following pages, are not YET sufficiently fashionable to procure them general favor; a long habit of not thinking a thing WRONG, gives it a superficial appearance of being RIGHT, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides.” Thomas Paine, Common Sense.
General Congressional preemptions of state taxes date back to Public Law 86-272, in 1959.
Also, there are more recent Congressional Acts preempting state taxes, and lots of recent, similar legislative activity, BUT...
No U.S. Supreme Court cases directly address Congress’ authority to generally preempt state taxes

Congressional practice does not dictate the Constitutional analysis; see, e.g., *INS v. Chadha*, 462 U.S. 919 (1983)
Overview/call to action

• Long-term history, dating back to the ratification of the U.S. Constitution reveals nearly two centuries when there were no general Congressional preemptions of state tax

• Alexander Hamilton: “the individual states would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may need, and by every kind of taxation, except duties on imports and exports.” The Federalist No. 33.
Overview/call to action

• Recent trend in the Supreme Court’s “new federalism” cases is pro-state, guarding against federal overreaching vis-à-vis state sovereignty; protecting the federal-state “constitutional balance”

• The unbridled prospect of Congressional preemption of state taxes poses a potential death threat to the state’s core ability to function as separate sovereigns
Overview/call to action

• If Congress has the ability to regulate under the Commerce Clause in the manner suggested, “it is difficult to perceive of any limitation on federal power, even in areas...where the States have historically been sovereign.” *Morrison v. United States*, 529 U.S. 598, 613 (2000).

Legal analysis


• “The power to tax is basic to the power of the State to exist.”  *Arkansas v. Farm Credit Servs. Of Cent. Ark.*, 520 U.S. 821, 826 (1997).
Legal analysis

• Alexander Hamilton: “a law for abrogating or preventing the collection of a tax laid by the authority of the States (unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power not granted by the Constitution.” The Federalist, No. 33.
Legal analysis


• The Court’s “responsibility” is “to declare unconstitutional those laws that undermine the structure of government established by the Constitution.” Id.
Legal analysis

• Commerce Clause is set forth at Article I, Section 8, Clause 3 of the U.S. Constitution
• Clause provides: “Congress shall have the power ... to regulate commerce ... among the several states”
Legal analysis

• Professor Lawrence Tribe: “The function of the [Commerce] Clause is to ensure national solidarity, not necessarily economic efficiency.”

• Professor Donald Regan: “We know ... that the main reason for giving Congress the power to regulate interstate commerce was to allow Congress to override state protectionist measures.”
Legal analysis

• “The modern law of what has come to be called the dormant Commerce Clause is driven primarily by concerns about ‘economic protectionism’ – i.e., regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Dep’t of Revenue of Ky. v Davis*, 553 U.S. 328, 337-38 (2008).

• “The point is to effectuat[e] the Framers’ purpose to prevent a State from retreating into [the] economic isolation ... that had plagued relations among the Colonies and later among the States under the Articles of Confederation.” *Id.* at 338.
Legal analysis

• The Commerce Clause, Art. I, § 8, cl. 3 of U.S. Constitution: “Congress shall have the power ... to regulate *commerce* ... among the several states.”

• The tenth amendment to the U.S. Constitution: “The 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.”
Legal analysis

• *Gonzalez v. Raich*, 545 U.S. 1 (2005): Congress can reach private activity that is not “commerce” within the meaning of the Commerce Clause by reason of the Necessary and Proper Clause, U.S. Const. Art I., § 8, cl. 18 (stating “Congress shall have [the] power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”).
Legal analysis

• *Gonzalez v. Raich*, 545 U.S. at 17, 25-26:
  
  • Non-commercial activities that are “purely local” can be made subject to Commerce Clause regulation when they are “part of an economic class of activities that in the aggregate have a substantial effect on interstate commerce.”

• “Economic” activities consist of the “the production, distribution, and consumption of commodities.”
Legal analysis

• ...but, Alexander Hamilton: *despite the Necessary and Proper Clause*, “the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports.” The Federalist, No. 33.
Legal analysis


• “It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary & Proper Clause.” Id.
Legal analysis

• *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 198-200 (1924):

  • “the power to lay and collect *taxes* [...] and the power to *regulate* commerce [...] are not...”

  • “similar in their terms and nature.”

• “The power of *taxation* is indispensible to [the States’] existence, and is a power, which in its own nature, is capable of residing in, and being exercised by, different authorities[,] [e.g., the state and federal government,] at the same time.”
Legal analysis

• ...In contrast, “when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do ... [t]here is no analogy, then, between the power of taxation and the power of regulating commerce.”
Legal analysis

• *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992)(dicta): “Congress is now free to decide *whether*, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect taxes.”