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Constitutional Authorities Under Which Congress Regulates State Taxation

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January 2, 2015

Congressional Research Service
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www.crs.gov
R43842

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

A variety of clauses in the U.S. Constitution provide direct and implicit authority for Congress to enact legislation affecting the ability of states to impose taxes, and Congress has acted under several of them. In some situations, Congress has restricted the states' taxing power, such as by prohibiting them from taxing certain activities. In others, it has expanded the states' ability to tax, such as by waiving federal immunity to state taxation in specific circumstances.

Chief among these authorities is the Commerce Clause, which provides Congress with the authority to regulate interstate and foreign commerce. It has long been interpreted by the courts to contain an implicit restriction on state regulation and taxation that unduly burden interstate commerce—this is known as the dormant Commerce Clause. Under its commerce power, Congress can enact laws affecting state taxation of interstate commerce. In general, Congress has used this authority to limit state taxation, but it can also use it to expand the states' taxing power by authorizing state taxation that would otherwise violate the dormant Commerce Clause.

Other provisions in the Constitution that appear to contain an implicit authority for Congress to enact laws affecting state taxation include the Supremacy Clause and similar provisions in the Seat of Government Clause and the authority to erect forts, magazines, and arsenals. These provisions implicitly prohibit states from taxing federal entities. Congress has acted under them to waive the federal immunity and permit state taxation in certain circumstances, as well as to restrict states from taxing entities and activities that fall within the federal immunity. Similarly, Congress's War Powers could provide authority for legislation affecting state taxation of members of the Armed Forces.

Importantly, even if Congress has the constitutional authority to exercise legislative power over the states, other provisions of the Constitution may limit those powers. Two examples of the limitations that can be discussed in this context are the Tenth Amendment and the Spending Clause. In general, however, the Tenth Amendment, which prevents commandeering of state legislatures or executive branch officials to implement federal programs, has not been interpreted by the courts to represent a significant limit on Congress's ability to regulate state taxing authority. Nor have courts found there to be significant limits to Congress's power under the Spending Clause to encourage state behavior by conditioning the provision of federal money to the states. Most instances of grant conditioning by Congress appear to be constitutionally uncontroversial, so long as the grant conditions are related to the underlying grant and the amount of grant money conditioned is not so large as to be coercive.

Finally, two relatively obscure provisions of the Constitution—the Import-Export Clause and the Tonnage Clause—are also relevant. These prohibit states from enacting taxes on imports or exports and taxes based on tonnage, respectively. Both clauses expressly permit Congress to authorize what would otherwise be unconstitutional state taxation. However, it does not appear Congress has ever acted under these authorities.

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While the power of taxation is considered a hallmark of sovereign status, the states' taxing powers are not absolute. This is because Congress has the power under the U.S. Constitution to restrict state taxation in certain circumstances. On the other hand, Congress also has the power in some instances to permit state taxation that would otherwise be unconstitutional. Importantly, even when Congress has the authority to exercise legislative power over the states, other provisions of the Constitution may limit those powers.

This report discusses these authorities and several of the possible limitations. It also provides examples of where Congress has appeared to act under each authority. The grouping of the examples by authority is for illustrative purposes—the authority is assumed in many cases based on the context of the statute since Congress often did not specify the power under which it acted, and it is possible an action by Congress might be supported by more than one authority.

Commerce Clause

The Commerce Clause grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1] Congress's authority to regulate commerce has been described as plenary and limited only by other constitutional provisions.[2] Additionally, the Supreme Court has long held that the Commerce Clause, by granting Congress the sole authority to regulate commerce, implicitly prohibits states from unduly burdening such commerce, even in the absence of federal regulation.[3] This restriction is known as the dormant Commerce Clause. State tax laws are subject to the dormant Commerce Clause and are therefore unconstitutional if found by the courts to impermissibly burden interstate or foreign commerce.[4]

Under its authority to regulate commerce, Congress can regulate state taxation.[5] This means Congress can determine which types of state taxation impermissibly burden interstate or foreign commerce. Congress can also authorize state taxation that would otherwise be an unconstitutional burden, so long as it is consistent with other provisions in the Constitution—for example, Congress could not use this authority to pass a law that violates taxpayers' due process rights.[6]

People sometimes struggle with the idea that Congress can authorize state taxation that the Supreme Court and other courts have held to be unconstitutional. However, this is clearly the case with the dormant Commerce Clause.[7] For example, in a 1992 case holding that the dormant

[1] U.S. CONST. Art. I, §8, cl. 3.

[2] *See, e.g.*, Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 434 (1946).

[3] *See, e.g.,* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299 (1851).

[4] *See, e.g.,* Quill v. North Dakota, 504 U.S. 298 (1992) (striking state use tax collection obligations imposed on sellers without a physical presence in the state); Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984) (striking state corporate tax credit that lowered the effective tax rate on a company's income as its subsidiary's exports from the state increased relative to those from other states.).

[5] *See, e.g., Quill*, 504 U.S. at 318.

[6] *See id.*

[7] *See* Northeast Bancorp v. Board of Governors of Fed. Reserve Sys., 472 U.S. 159, 174 (1985) ("state actions [that burden interstate commerce] which [Congress] plainly authorizes are invulnerable to constitutional attack under the Commerce Clause [citations omitted]").

Commerce Clause requires a seller's physical presence in a state before the state can require the seller to collect use taxes, the Supreme Court expressly stated,

> Our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions ... Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.[8]

Since Congress can authorize state taxation that would otherwise violate the dormant Commerce Clause, it is helpful to know the circumstances under which a court will determine that a state tax is impermissible under such clause. In 1977, the Supreme Court articulated a four-prong test for determining when a state tax runs afoul of the dormant Commerce Clause: (1) the activity taxed has a substantial nexus with the state; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the state; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the state.[9] There are two additional criteria for state taxation of instrumentalities of foreign commerce: the tax cannot create a "substantial risk" of international multiple taxation, and it cannot prevent the federal government from "speaking with one voice when regulating" foreign commerce.[10]

Examples of Congressional Action

Below are examples of where it appears Congress has acted under the Commerce Clause to pass legislation affecting state taxation. In these examples, Congress has generally limited or clarified state taxation in some way.

- 4 U.S.C. §114 prohibits states from imposing an income tax on the retirement income of nonresidents.
- 4 U.S.C. §§116-126 provide rules affecting certain state taxes, charges, and fees imposed on mobile telecommunications services. 4 U.S.C. §117 provides that states may impose a tax, charge, or fee on services provided by the customer's home service provider so long as the customer's place of primary use is within the state, regardless of where the mobile telecommunication services originate, terminate, or pass through, and that no other taxing jurisdiction may impose taxes, charges, or fees on those services.
- 15 U.S.C. §78bb(d) prohibits state taxation on changes in beneficial or record ownership of securities based only on the location of clearing agencies or registered transfer agents.
- The Prevent All Cigarette Trafficking Act of 2009 (PACT Act), 15 U.S.C. §§ 375 et seq., imposes requirements on sales of cigarettes and smokeless tobacco

[8] *Quill*, 504 U.S. at 318. Legislation has been introduced to overturn *Quill* and permit qualifying states to impose the tax collection obligations on sellers without a physical presence in the state. In the 113th Congress, these bills are the Marketplace Fairness Act of 2013 (S. 743, which was passed by the Senate; S. 336; and H.R. 684) and the Marketplace and Internet Tax Fairness Act (S. 2609).

[9] Complete Auto Transit, Inc. v. Brady 430 U.S. 274, 279 (1977).

[10] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979).

products when the sale or delivery do not occur face-to-face (i.e., the buyer is not in the physical presence of the seller). Among other things, the act requires that sellers comply with state and local taxes on such sales, pay or remit the taxes in advance, and report sales information to state tax agencies.

- 15 U.S.C. §§381-384 establish minimum jurisdictional requirements that must be met before a state can impose net income taxes on income derived from interstate sales of tangible personal property.
- 15 U.S.C. §391 prohibits states from imposing or assessing taxes on electricity generation or transmission in a way that discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers.
- 45 U.S.C. §231m prohibits state taxation of railroad retirement annuities.
- 49 U.S.C. §11501 prohibits states from assessing and taxing railroad property more heavily than other industrial and commercial property.
- 49 U.S.C. §11502 prohibits states from taxing the compensation of rail carrier employees unless the employee is a resident of the state. Additionally, the carrier can be required to file employee income tax returns and reports only with the state where the employee is a resident.
- 49 U.S.C. §14502 prohibits states from assessing and taxing motor carrier property more heavily than other industrial and commercial property.
- 49 U.S.C. §14503 prohibits states from taxing the compensation of motor carrier employees unless the employee is a resident of the state. Additionally, the carrier can be required to file employee income tax returns and reports only with the state where the employee is a resident.
- 49 U.S.C. §40116 prohibits states from levying or collecting tax on an individual traveling in air commerce; the transportation of an individual traveling in air commerce; the sale of air transportation; or the gross receipts from that air commerce or transportation. Additionally, the section prohibits states from assessing and taxing air carrier transportation property more heavily than other commercial and industrial property. It also prohibits states from taxing the compensation of air carrier employees unless the employee is a resident of the state or earns at least 50% of the compensation in the state.
- The Internet Tax Freedom Act[11] temporarily prohibits states from imposing new taxes on Internet access and multiple or discriminatory taxes on electronic commerce.[12]

Supremacy Clause and Similar Provisions

The Supremacy Clause provides that the Constitution, federal laws, and treaties are "the supreme Law of the Land."[13] It implicitly prevents states from taxing federal entities and property.[14]

[11] P.L. 105-277, Div. C, Title XI, §§1101-1104, found at 47 U.S.C. §151 *note*.

[12] For more information on the act, see CRS Report R43772, *The Internet Tax Freedom Act: In Brief* , by (name redac ted); CRS Report R43800, *Taxation of Internet Sales and Access: Legal Issues*, by (name redacted).

Several other constitutional provisions—the Seat of Government Clause and the authority to erect forts, magazines, and arsenals[15]—are similar in that they give Congress exclusive control over certain places and thus prohibit state taxation. Congress may use these authorities to clarify the scope of the federal tax immunity or to waive the immunity in specific instances. Finally, Congress's power to declare war and to raise and maintain the Armed Forces[16] can also provide authority for legislation affecting state taxation of the Armed Forces.[17]

Examples of Congressional Action

The following are examples of Congress apparently acting under the Supremacy Clause or similar provisions to enact laws affecting state taxation. In general, these laws either waive federal immunity to permit state taxation of certain federal entities or clarify the immunity's scope.

- 4 U.S.C. §104 permits states to collect sales taxes on purchases of gasoline and other motor fuels made on U.S. military and other reservations so long as the fuel is not for the exclusive use of the United States.
- 4 U.S.C. §§105 and 106 permit states to impose sales and use taxes and income taxes in federal areas, although not on the United States or its instrumentalities or with respect to tangible personal property sold by the United States to certain purchasers. Federal areas are defined in 4 U.S.C. §110(e) as lands or premises held or acquired by or for the use of the United States.
- 4 U.S.C. §111 permits states to tax the compensation of federal employees so long as the taxation is not discriminatory. The provision also applies to employees of the U.S. possessions and the District of Columbia. It further provides that federal employees at the hydroelectric facilities on the Columbia River that straddle Oregon and Washington and the Missouri River that straddle South Dakota and Nebraska may only be taxed in the state where the employee is a resident.
- 4 U.S.C. §113 prohibits Maryland, Virginia, and the District of Columbia from treating Members of Congress who have a home there for purposes of attending congressional sessions as residents for income tax purposes or from treating their

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[13] U.S. CONST. Art. VI, cl. 2.

[14] *See* McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819).

[15] U.S. CONST. Art. I, §8, cl. 17 ("Congress shall have power ... To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.").

[16] U.S. CONST. Art. I, §8, cl. 11-14 ("The Congress shall have power ... To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years. To provide and maintain a Navy. To make Rules for the Government and Regulation of the land and naval Forces.").

[17] *See, e.g.,* United States v. Onslow County Bd. of Education, 728 F.2d 628 (4th Cir. 1984) (finding that the Soldiers' and Sailors' Civil Relief Act of 1940, now known as the Servicemembers Civil Relief Act, was an example of Congress acting under its War Powers, and upholding the act against a Tenth Amendment challenge).

congressional compensation as income sourced to that state, unless the Member represents the area.

- 4 U.S.C. §115 provides that compensation for performing services at Fort Campbell, Kentucky, may only be taxed by the state where the employee is a resident.
- 38 U.S.C. §5301 prohibits state taxation of veterans' benefits.
- P.L. 99-190, §101(c), as amended by P.L. 100-202, §106, prohibits Maryland, Virginia, and the District of Columbia from imposing personal property taxes on motor vehicles owned by Members of Congress and their spouses unless the Member represents the area.
- There are numerous examples of federally mandated state tax exemptions for federal instrumentalities, including the Federal Home Loan Banks (12 U.S.C. §1433), Federal National Mortgage Association (12 U.S.C. §1723a), Farm Credit Banks (12 U.S.C. §2023), Federal Financing Bank (12 U.S.C. §2290), National Consumer Cooperative Bank (12 U.S.C. §3019), and Farm Credit System Insurance Corporation (12 U.S.C. §2277a-12).
- Congress has prohibited state income taxation of certain financial instruments, including federal securities (31 U.S.C. §3124), Federal Home Loan Bank obligations (12 U.S.C. §1433), banks for cooperatives obligations (12 U.S.C. §2134), and Tennessee Valley Authority Bonds (16 U.S.C. §831n-4).
- The Servicemembers Civil Relief Act, 50 U.S.C. Appx. §§501-596, contains several provisions that provide temporary tax relief for servicemembers while they are on active duty.[18] 50 U.S.C. Appx. §561 prohibits states from selling property to enforce collection for real or personal property taxes without a court order during the period of military service plus six months. The section contains special rules allowing for stays of sales proceedings or enforcement during the period of military service plus 180 days and for redemption rights during that period. The section also requires the interest rate on unpaid tax debts be 6% and prohibits any penalties. 50 U.S.C. Appx. §570 defers collection of any income tax during the period of military service plus six months. No interest or other penalties may be imposed on the unpaid amounts, and the statute of limitations for paying the tax is tolled for the period of military service plus nine months. 50 U.S.C. Appx. §571 provides that servicemembers do not lose or acquire residence for tax purposes when they serve at a duty station outside their home state and prohibits state taxation of military service compensation and personal property of nonresident servicemembers.

Tenth Amendment

Even if Congress has the constitutional authority to exercise legislative power over states, other provisions of the Constitution may, in certain instances, limit those powers.[19] One of the

[18] For more information on the act, see CRS Report RL34575, *The Servicemembers Civil Relief Act (SCRA): An Explanation*, by (name redacted).

[19] *See* New York v. United States, 505 U.S. 144, 156 (1992) ("Thus, for example, under the Commerce Clause (continued...)

limitations often considered in the context of regulation of state authority is the Tenth Amendment. The Tenth Amendment provides that "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." As a state's taxing authority is an important state power, it might be argued that a federal law that preempts such power violates the Tenth Amendment. In general, however, under the Supreme Court's current interpretation of the Tenth Amendment, the Amendment does not represent a significant limit on Congress's ability to regulate state taxing authority.

It should be noted that, for a number of years, the Supreme Court did interpret the Tenth Amendment to have such a limiting effect, finding that certain "core" state functions were beyond the authority of the federal government to regulate. For instance, in the 1976 case *National League of Cities v. Usery*,[20] the Court struck down federal wage and price controls on state employees as involving the regulation of core state functions.[21] Nine years later, however, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority.*[22] In sum, the Court in *Garcia* seems to have said that most disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions, and that the states should look for relief from federal regulation through the political process.[23] Thus, it would not appear that mere federal regulation of the state's taxing authority would represent an inherently Tenth Amendment concern.

A different Tenth Amendment question arises as to whether the federal government may direct states to tax persons or entities who they are not currently taxing. The Court has found that the Tenth Amendment does limit the federal government from directing states to engage in regulation of matters within the state's jurisdiction. For instance, in the 1992 case *New York v. United States*,[24] the Court addressed Congress's attempt to regulate in the area of low-level radioactive waste. The statute at issue required that states either develop legislation on how to dispose of all low-level radioactive waste generated within the state or the state would be forced to take title to such waste, which would mean that it became the state's responsibility. The Court found that although Congress had the authority under the Commerce Clause to regulate low-level radioactive waste, it only had the power to regulate the waste directly. Here, Congress had attempted to require the states to perform the regulation, and decreed that the failure to do so would require the state to deal with the financial consequences of owning large quantities of radioactive waste. In effect, Congress sought to "commandeer" the legislative process of the states to implement a federal program. In *New York*, the Court determined that this power was not

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Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.")

[20] 426 U.S. 833 (1976).

[21] In *National League of Cities v. Usery*, the Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local governmental employees, was undoubtedly within the scope of the Commerce Clause. However, it cautioned that there are attributes of sovereignty attaching to every state government function which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

[22] 469 U.S. 528 (1985). Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations" in areas of traditional governmental functions had proven impractical, and that the Court in 1976 had "tried to repair what did not need repair."

[23] *See also* South Carolina v. Baker, 485 U.S. 505 (1988).

[24] 505 U.S. 144 (1992).

found in the text or structure of the Constitution, and it was thus a violation of the Tenth Amendment.[25]

The Court has, however, distinguished between unconstitutional "commandeering" of states and "substantive regulation" of ongoing state activities in which the states are voluntarily engaged. If a state chooses to engage in regulation over which Congress has concurrent jurisdiction, then the federal government may regulate how a state regime in that area is implemented. For instance, the Court held in *Reno v. Condon*[26] that the Driver's Privacy Protection Act of 1994,[27] which regulates the sale of personal information gathered from persons seeking driver's licenses, was substantive regulation, not commandeering. In that case, the Court found that the state was not being directed on how to regulate its citizens, but rather on how to treat information that the state had voluntarily chosen to elicit from its own citizens. Similarly, arguably, as long as states voluntarily choose to impose a state tax, then the federal government, operating under an appropriate constitutional authority, may regulate how that taxation is to occur.

Court-Imposed Requirements Affecting State Taxation

It should also be noted that, in an apparent exception to the limits on commandeering, the Court has found that states and localities may be required to raise taxes to meet certain legal obligations. For instance, until 1954, the State of Missouri mandated segregated school facilities for black and white children in violation of the Equal Protection Clause of the Fourteenth Amendment.[28] The federal courts, in order to eliminate vestiges of this system, ordered an implementation of a remedial plan that included a requirement for local revenue increases. In *Missouri v. Jenkins*,[29] the Supreme Court approved the power of the federal courts to authorize the imposition of a local tax and then give effect to that increase by enjoining the operation of a state law which would have limited such tax.[30] The Court rejected the argument that the funding order invaded the state's domain of reserved non-delegated powers in violation of the Tenth Amendment.[31] In this case, the

[25] A later case presented the question of the extent to which Congress could regulate through a state's executive branch officers. This case, *Printz v. United States*, 521 U.S. 898 (1997), involved the Brady Handgun Act. The act required state and local law enforcement officers to conduct background checks on prospective handgun purchasers within five business days of an attempted purchase. This portion of the act was challenged under the Tenth Amendment, on the theory that Congress was without authority to "commandeer" state executive branch officials. After a historical study of federal commandeering of state officials, the Court concluded that commandeering of state executive branch officials was, like commandeering of the legislature, outside of Congress's power, and consequently a violation of the Tenth Amendment.

[26] 528 U.S. 141 (2000).

[27] 18 U.S.C. §§2712-2725.

[28] Brown v. Board of Education, 347 U.S. 483, 486 n.1 (1954).

[29] Missouri v. Jenkins, 495 U.S. 33 (1990).

[30] *See id.* at 52-58. *See also* Griffin v. Prince Edward County School Bd., 377 U.S. 218 (1964) (a district court could "require the [County] Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system.... "). *Griffin* followed a line of cases holding that federal courts could issue a writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations. *See, e.g.,* Louisiana *ex rel.* Hubert v. Mayor and Council of New Orleans, 215 U.S. 170 (1909); Graham v. Folsom, 200 U.S. 248 (1906); Wolff v. New Orleans, 103 U.S. 358 (1881); United States v. New Orleans, 98 U.S. 381 (1879); Heine v. Levee Comm'rs, 19 Wall. 655, 657 (1874); City of Galena v. Amy, 5 Wall. 705 (1867); Von Hoffman v. City of Quincy, 4 Wall. 535 (1867); Board of Comm'rs of Knox County v. Aspinwall, 24 How. 376 (1861).

[31] *But see* John Choon Yoo, *Recognizing the Limits of Judicial Remedies: Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121 (1996) (arguing that the *Jenkins* decision is (continued...)

Court found that the Fourteenth Amendment was specifically intended to "permit[] a federal court to disestablish local government institutions that interfere with its commands."[32]

Spending Clause

The Spending Clause grants Congress the authority "to pay the debts and provide for the common defense and general welfare of the United States.... "[33] One of the more significant ways that the federal government can encourage state behavior is to provide federal money to states and then impose conditions on that federal money. Considering the number of federal programs and the amount of federal funds provided to the states, this represents a significant power for Congress to exercise. Further, as the voluntary receipt of grants containing these conditions implicitly involves waiver by the states of their Tenth Amendment rights, these grant conditions may allow Congress to indirectly achieve compliance by a state in a way that could not be achieved directly.

There are several examples of where Congress has apparently acted under the Spending Clause to affect state taxation. In these cases, it appears the theory is that the state is voluntarily agreeing to the federal limitation on its taxing power in return for federal funds.

- 7 U.S.C. §2013 requires states to exempt food purchased with food stamps from state sales taxes.
- 42 U.S.C. §1786(m) contains a similar provision for food purchased with coupons under the nutrition program for women, infants, and children.

Although these examples, like most instances of grant conditioning by Congress, are constitutionally uncontroversial, the Supreme Court has suggested that there are limits on the Spending Clause authority. In S*outh Dakota v. Dole*,[34] Congress enacted the National Minimum Drinking Age Amendment of 1984,[35] which directed the Secretary of Transportation to withhold a percentage of federal highway funds from states in which the age for purchase of alcohol was below 21 years. South Dakota, which permitted 19-year-olds to purchase beer, brought suit arguing that the law was an invalid exercise of Congress's power under the Spending Clause to provide for the "general welfare."[36] The Supreme Court held that, as the indirect imposition of such a standard was directed toward the general welfare of the country, it was a valid exercise of Congress's spending power.

The Court noted that the grant condition did not implicate an independent constitutional bar (i.e., the grant condition did not require the state to engage in an unconstitutional activity). Further, the court noted that the grant condition was not a violation of the Tenth Amendment, which generally prevents Congress from "commandeering" state legislatures[37] and executive branch officials[38] to

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inconsistent with *United States v. New York*, discussed *supra*, which was decided two years later).

[32] *Jenkins*, 495 U.S. at 55.

[33] U.S. CONST. Art. 1, §8, cl. 1.

[34] 483 U.S. 203 (1987).

[35] 23 U.S.C. §158.

[36] U.S. Const., Art I, 8, cl 1 (Congress has the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States").

[37] New York v. United States, 505 U.S. 144 (1992), discussed *supra*.

implement federal programs.[39] The Tenth Amendment would not apply here, the Court held, because the state officials were voluntarily cooperating in order to receive federal grants, and thus were not being directed to comply with federal mandates.

The Court did suggest, however, that there were limits to Congress's power under the Spending Clause. First, a grant condition must be related to the particular national projects or programs to which the money was being directed.[40] In *Dole*, the congressional condition imposing a specific drinking age was found to be related to the national concern of safe interstate travel, which was one of the main purposes for highway funds being expended. Second, the Court suggested that, in some circumstances, the financial inducements offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion,"[41] which would suggest a violation of the Tenth Amendment. In *Dole*, however, the percentage of highway funds that were to be withheld from a state with a drinking age below 21 was relatively small, so that Congress's program did not coerce the states to enact higher minimum drinking ages than they would otherwise choose.

The 2012 case of *National Federation of Independent Business (NFIB) v. Sebelius*,[42] however, seemed to suggest that an alternative line of analysis might apply in some grant condition cases. In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA).[43] The ACA, among other things, required states to expand Medicaid eligibility or lose Medicaid funding. Following the enactment of the ACA, state attorneys general and others brought several lawsuits challenging various provisions of the act on constitutional grounds. The Supreme Court, in a controlling opinion by Chief Justice Roberts,[44] found that the enforcement mechanism for the ACA Medicaid expansion, withdrawal of all Medicaid funds, was a violation of the Tenth Amendment.[45]

As noted in *Dole*, the loss of federal funds associated with a grant condition cannot be so large that the withholding of such funds is coercive. Justice Roberts's opinion in *NFIB*, however, addressed the slightly different question of whether a grant condition attached to a "new and

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[38] Printz v. United States, 521 U.S. 898 (1997), discussed *supra*.

[39] It would seem that sovereign immunity is a core state power, and that requiring its waiver would raise Tenth Amendment concerns. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976) (striking down federal wage and price controls on state employees as involving the regulation of traditional state functions). As discussed previously, however, the Court has, for the time being, abandoned this line of cases. *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (concluding that the test to identify traditional governmental functions had proven impractical, and that such disputes should be resolved through the political process).

[40] 483 U.S. at 207.

[41] *Id*. at 211.

[42] 132 S. Ct. 2566 (2012).

[43] P.L. 111-148.

[44] In *NFIB*, seven Justices held that the requirement that states either comply with the requirements of the Medicaid expansion under the ACA or lose all Medicaid funds violated the Tenth Amendment. However, these seven Justices either wrote or joined one of two separate opinions on this issue, and did not join in either the reasoning or judgment of the other opinion. The opinion of Chief Justice Roberts, which was joined by Justices Breyer and Kagan, appears to be significantly narrower than the dissenting opinion authored by Justices Scalia, Kennedy, Thomas, and Alito, and is thus controlling. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'") (citation omitted).

[45] The Court went on to hold, however, that the remedy was to sever that enforcement mechanism, effectively making state participation in the Medicaid expansion voluntary. *NFIB*, 132 S. Ct. at 2607.

independent" program (here, the Medicaid expansion) that threatened the funding of an existing program (here, Medicaid) violated the Tenth Amendment. It is unclear, therefore, whether the *NFIB* decision was an application of the *Dole* analysis, or whether the combination of factors presented in *NFIB* suggests an alternate line of reasoning.[46]

Justice Roberts's opinion in *NFIB* held that, in the case of existing program funding being conditioned on the adoption of a "new and independent" program, the amount of federal funds at issue cannot represent a significant portion of a state's budget or its withdrawal will be found to be unconstitutionally coercive under the Tenth Amendment. Justice Roberts did not identify a standard to determine what level of withholding funds would be coercive, or specify what kind of distinguishing factors were necessary to such analysis. He did conclude, however, that withdrawal of federal program funds which made up 10% of an average state's budget represented a "gun to the head" and was a form of "economic dragooning."[47]

It is not clear, however, whether the confluence of factors at issue in the *NFIB* case is likely to be present in future cases. Few federal programs, for instance, even approach the level of state funding as does Medicaid; nor do there appear to be significant examples of grant conditions requiring creation of "new and independent" programs in order to retain funding for a separate program. Neither of the examples noted above (state sales tax exemptions for food stamps or supplemental nutrition purchases) appear to involve either the creation of "new and independent" programs or the threatened withdrawal of a significant portion of a state's budget. Consequently, the *NFIB* case may have minimal effect on the validity of existing or future federal grant conditions involving state taxation.[48]

Import-Export Clause

The Import-Export Clause generally prohibits states from taxing imports and exports. It provides that

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.[49]

The Clause expressly grants Congress the power to authorize state taxation that would otherwise be constitutionally impermissible (and is therefore similar to the implicit authority provided by the Commerce Clause, as discussed above). It does not appear that Congress has ever authorized states to tax under the Import-Export Clause.

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[46] For an analysis of the relationship between the *Dole* and *NFIB* cases, see CRS Report R42367, *Medicaid and Federal Grant Conditions After NFIB v. Sebelius: Constitutional Issues and Analysis*, by (name redacted).

[47] *NFIB*, 132 S. Ct. at 2604-05.

[48] For further discussion, see CRS Report R42367, *Medicaid and Federal Grant Conditions After NFIB v. Sebelius: Constitutional Issues and Analysis*, by (name redacted).

[49] U.S. CONST. Art. I, §10, cl. 2. The Import-Export Clause is sometimes confused with the Export Clause, found in Article I, section 9, clause 5. The Export Clause prohibits the *federal* government from taxing exports. For more information, see CRS Report R42780, *Export Clause: Limitation on Congress's Taxing Power*, by (name redacted).

Since the Import-Export Clause expressly gives Congress the power to authorize state taxation that would otherwise be impermissible under the clause, it might be helpful to understand what types of state taxation would run afoul of the clause. Historically, the Supreme Court held that the clause flatly prohibited any state tax, imposed without congressional consent or for inspection purposes, on imports and exports, as well as on the importing and exporting processes.[50] Under its modern jurisprudence, the Court, rather than assuming that all such taxes were unconstitutional, has instead examined whether a tax is an "impost" or "duty" by looking at whether it offends any of the policies the Framers intended the clause to address: (1) ensuring the federal government speaks with one voice when regulating foreign commerce; (2) avoiding the diversion of revenue from the federal government to the states; and (3) preventing the disharmony among the states that could arise if coastal states taxed goods that traveled through their ports.[51] This analysis based on the Framers' intent applies to imposts and duties on both imports and exports.[52] There may, nonetheless, be some question as to whether all state taxes are subject to this policy-based approach, or whether some (e.g., those imposed on goods that are in transit) might automatically be treated as an "impost" or "duty" regardless of whether they offend the policies behind the clause.[53]

If Congress were to authorize state taxation under the Import-Export Clause, one question that might arise is whether the Clause's requirement that "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States ... " would apply to such taxes. It does not appear this language has been substantively examined by any court or that the Framers' debates provide useful interpretative assistance. At least one pair of commentators has argued that the "Use of the Treasury" language applies only to amounts collected by the states that exceed the amounts needed to fund their inspection laws—and not to any amounts collected under congressionally authorized imposts or duties—because "otherwise, the consent procedure, as a practical matter, would become a dead letter."[54] On the other hand, as even the commentators note, this matter is not entirely free from doubt.[55] Arguably, the clause's language—"net Produce of *all Duties and Imposts*, laid by any State on Imports or Exports ... " (emphasis added)—could suggest the "use" restriction applies to *all* state-imposed duties and imposts, whether congressionally authorized or for state inspections.

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[50] *See* Dep't of Revenue v. Ass'n of Washington Stevedoring Cos., 435 U.S. 734, 752 (1978). The prohibition applied to goods still in their original import packages and those that had entered the export stream. *See id*.

[51] *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 285-86 (1976); *Washington Stevedoring,* 435 U.S. at 752-53. In *Washington Stevedoring*, for example, the Court held that a state business and occupation tax violated none of the three policies when (1) it was a general business tax that applied to almost all businesses and therefore was not a "special protective tariff" that could interfere with U.S. foreign relations; (2) it would only indirectly affect the demand for imported goods since it was not imposed on the goods themselves and "merely compensates" the state for services it provides to the stevedoring industry; and (3) it was imposed on taxpayers with a nexus to the state, was fairly apportioned, did not discriminate, and was fairly related to services provided by the state. *See Washington Stevedoring,* 435 U.S. at 754-55.

[52] *See Washington Stevedoring,* 435 U.S. at 758.

[53] *See id.* at 757, fn. 23 ("We do not reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit.").

[54] Boris I. Bittker & Brannon P. Denning, *Constitutional Law and Civil Rights Symposium, Part II: The Import-Export Clause*, 68 MISS. L.J. 521, 563 (1998).

[55] *See id.* (going on to note that "[i]n any event, doubts about this conclusion [regarding the inapplicability of the "use" restriction to congressionally authorized imposts and duties] could be dispelled by including a release of any federal claim to the resulting state revenue in the consent itself.").

Tonnage Clause

Like the Import-Export Clause, the Tonnage Clause also expressly limits state taxation unless authorized by Congress. It provides that "No State shall, without the Consent of Congress, lay any Duty of Tonnage.... "[56] It does not appear Congress has ever authorized state taxation under the Tonnage Clause.

Nonetheless, since the Tonnage Clause expressly gives Congress the power to authorize state taxation that would otherwise be unconstitutional under the clause, it might be useful to look at what types of state taxation violate the Tonnage Clause. The Clause's purpose is "to restrai[n] the states themselves from the exercise of the taxing power injuriously to the interests of each other," and it reflects the Framers' recognition that "if the states had been left free to tax the privilege of access by vessels to their harbors," then the Import-Export Clause's prohibitions "could have been nullified by taxing the vessels transporting the merchandise."[57] As such, the prohibition against tonnage duties includes all taxes and duties, whether or not measured by the vessel's tonnage, that impose "a charge for the privilege of entering, trading in, or lying in a port."[58] It does not, however, apply to charges for services rendered to a vessel (e.g., pilotage, wharfage, medical inspections, or charges for use of locks), even if graduated according to tonnage.[59]

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[56] CONST. Art. I, §10, cl. 3.

[57] *See* Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. 1, 7 (2009).

[58] *Id*. at 9.

[59] *See, e.g.,* Clyde Mallory Lines v. Alabama, 296 U.S. 261, 266 (1935).