The Saga of State 'Amazon' Laws: Reflections on the Colorado Decision

by David Gamage and Darien Shanske

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Introduction

The battle over states' attempts to tax remote e-commerce vendors is evolving too rapidly for academic scholarship to keep pace. At any moment, Congress could pass a version of the Marketplace Fairness Act[1] and upend the entire discussion. In the meantime, Amazon.com itself is making a separate peace with many individual states.[2] Nevertheless, this story is far from over. In this column, we comment on an important recent development: the opinion of the Colorado district court in *Direct Marketing Association v. Huber*, a decision that is now being appealed to the Tenth Circuit.[3]

As a quick refresher, the Colorado statute at issue (along with its implementing regulations) would require that notice be given by retailers with each transaction that the use tax is due,[4] require that purchasers who purchase more than $500 from a retailer be sent an annual report,[5] and require that the retailers provide the state with a record of all Colorado purchases.[6] There are penalties for failing to provide the required notices; for instance, there is a $5 penalty for each failure to notify a taxpayer that use tax is due.[7]

The district court permanently enjoined the Colorado Act and Regulations,[8] granting a permanent injunction on the basis of two separate arguments made by the plaintiffs based on the U.S. Constitution's dormant commerce clause. In so doing, the district court cleverly avoided opining on some tricky doctrinal questions. But the questions remain. We discuss some of those questions below. We do not attempt to fully answer them here, though we do suggest why they might matter a great deal.

Attention, Tenth Circuit

Below are the doctrinal twists that we would urge the Tenth Circuit to consider.

An Injunctive Catch-22?

In both its original preliminary injunction[9] and its later grant of summary judgment,[10] the district court in *Huber* analyzed the Colorado Act and Regulations, using case law on the constitutionality of taxes under the dormant commerce clause. In particular, the district court focused on *Quill*, which

[1] S. 1832, 112th Cong. (2011-2012).

[2] *See, e.g.*, John Buhl, "Amazon Reaches Tax Deal With Nevada, Negotiating With Texas," *State Tax Notes*, Apr. 30, 2012, p. 273, *Doc 2012-8704*, or *2012 STT 80-1*.

[3] Amy Hamilton, "Colorado DOR Appealing Federal Ruling in 'Amazon' Case," *State Tax Notes*, May 7, 2012, p. 352, *Doc 2012-9182*, or *2012 STT 84-2*.

[4] Colo. Rev. Stat. section 39-21-112(3.5)(c)(I). Note that retailers with less than $100,000 in gross sales in Colorado are not required to give those notifications. 1 Colo. Code Regs. section 201-1:39-21-112.3.5 (3)(c)(i).

(Footnote continued in next column.)

[5] Colo. Rev. Stat. section 39-21-112 (3.5)(d)(I)(a); 1 Colo. Code Regs. section 201-1:39-21-112.3.5 (1)(a)(iii).

[6] Colo. Rev. Stat. section 39-21-112 (3.5)(d)(II)(a).

[7] Colo. Rev. Stat. section 39-21-112 (3.5)(c)(II).

[8] This is how the district court phrases the combination of the statute passed by the Colorado General Assembly and the regulations promulgated by the Colorado Department of Revenue.

[9] *Direct Marketing Association v. Huber*, No. 10-cv-01546-REB-CBS, 2011 WL 250556 (D. Colo. Jan. 26, 2011). *Doc 2011-2004* or *2011 STT 2011-2012*.

[10] *Direct Marketing Association v. Huber*, No. 10-cv-01546-REB-CBS, 2012 WL 1079175 (D. Colo. Mar. 30, 2012). *Doc 2012-6911* or *2012 STT 64-4*.

was an application of the first prong of the *Complete Auto* test, a test that is supposed to apply to the imposition of *taxes*.[11]

However, the federal Tax (Anti-)Injunction Act (TIA) in relevant part states that "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[12] In other words, federal courts do not have jurisdiction to enjoin the assessment of taxes; instead, taxpayers must wait until they have already paid the tax and are filing a suit for refund before they can challenge a tax.[13]

> ***If the Colorado Act and Regulations constitute a tax, the court should not have jurisdiction until the tax is actually collected.***

And so the Catch-22 is this: If the Colorado Act and Regulations were properly analyzed under *Complete Auto* (and *Quill*), why did the district court have the jurisdiction to enjoin them? If the Colorado Act and Regulations constitute a tax, the court should not have jurisdiction until the tax is actually collected.[14] Conversely, if the Colorado Act and Regulations are not a tax, the district court presumably should not have analyzed them using the *Quill* and *Complete Auto* frameworks; instead, as we will discuss below, the district court should have used a different framework that is potentially more favorable to upholding the Colorado Act and Regulations.

To be sure, what constitutes a tax for purposes of the TIA and for purposes of the dormant commerce clause may well be different,[15] but we do not know of any precedents or existing arguments explaining why a statute should be considered a tax for only one of these and not the other.[16] The litigants in *Huber* discussed the TIA in footnotes,[17] but the district court did not address it. Especially considering that the Supreme Court decision on the Patient Protection and Affordable Care Act is likely to involve a significant discussion of the Anti-Injunction Act (AIA), on which the TIA is based, this issue is worth revisiting.[18]

Taxation vs. Regulation?

Let us suppose that the district court did have jurisdiction because the Colorado Act and Regulations do not constitute a tax for the purposes of the TIA. If so, what test should be used to analyze the Colorado Act and Regulations under the dormant commerce clause, assuming that a nontax under the TIA is also a nontax under the dormant commerce clause? That question of nomenclature matters because there is consensus in the secondary literature that taxes and nontaxes are to be subjected to different tests.

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[11] *Id*. at *15.

[12] 28 U.S.C. section 1341. The TIA is itself based on the Anti-Injunction Act (AIA) of 26 U.S.C. section 7421(a), which is the subject of the Patient Protection and Affordable Care Act litigation. *Hibbs v. Winn*, 542 U.S. 88 (2004). ("Just as the AIA shields federal tax collections from federal-court injunctions, so the TIA shields state tax collections from federal-court restraints.")

[13] Or they must proceed in state court if the laws of the state allow it.

[14] Remember that failure to comply with the act and regulations can lead to retailers bearing heavy penalties in the aggregate. Do those penalties make the act and regulations into a tax for purposes of the TIA? That is a tough question. We observe that the reasonable test for the limits of the TIA applied by the Tenth Circuit (and many others) is to focus on whether the purpose of the statute is regulatory (not barred by the TIA) or the collection of revenue (barred by the TIA). *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 760-764 (10th Cir. 2010). It seems straightforward that as for the Act and Regulations, the state is primarily trying to regulate behavior with those regulations, and yet that regulatory purpose is aimed at a greater purpose, namely, the collection of (use) tax revenue.

[15] *Cf.* Bryan Camp and Jordan Barry, "Explanation of the Anti-Injunction Act Issue in *HHS v. Florida* (Affordable Care Act Litigation)," American Bar Association Preview of United States Supreme Court Cases, Vol. 39, Issue 6-SE, 15, 19 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018285 (explaining that it is quite possible that a tax for purposes of the AIA might be different from a tax for purposes of the federal government's taxing power); Steve R. Johnson, "Obamacare and the 'What Is a Tax?' Question — Part II," *State Tax Notes*, Mar. 26, 2012, p. 1037, *Doc 2012-3067*, or *2012 STT 58-3* (also noting that the two questions are different, following *Bailey v. Drexel Furniture Co*., 259 U.S. 20 (1922)); *but see* Brian Galle, "Conditional Taxation and the Constitutionality of Health Care Reform," 120 *Yale L.J. Online* 27, 29-30 (2010) (reliance on the vitality of the holding in *Bailey v. Drexel Furniture* is misplaced). Of course, even if the definitions are actually different (versus theoretically, as is the case now), that does not necessarily decide anything: A "tax" for purposes of the TIA may be the broader category that includes "taxes" for purposes of the dormant commerce clause. Indeed, it would make sense for the TIA, as a matter of statutory interpretation, to ultimately shield even unconstitutional taxes because this furthers Congress's intent to secure tax revenue before permitting litigation. *Cf. Seven-Sky v. Holder*, 661 F.3d 1, 43-44 (D.C. Cir. 2011) (Kavanaugh J., dissenting) (arguing that this is the state of the law regarding taxes under the taxing power and AIA).

[16] This changed with the Supreme Court's recent ACA decision. This column was written before the release of this decision. We register our initial response to the decision in the Addendum to this column.

[17] *See, e.g.*, Plaintiff's Motion for Summary Judgment, at n.1 (explaining that the TIA was not meant to shield all laws related to taxes and citing, for example *Wells v. Malloy*, 510 F.2d 74, 77 (2nd Cir. 1975) (Friendly, J.); Defendant's Motion for Partial Summary Judgment, at 6 n.3 (mention of TIA).

[18] *See* Camp and Barry and Johnson, *supra* note 15, for a summary of the issues.

As for nontaxes, the standard test is well known from Constitutional Law I. First, a court asks if a regulation is discriminatory.[19] If it is, the regulation is subject to heightened scrutiny, a "virtually per se rule of invalidity."[20] Invalidity is only "*virtually* per se" — a government can still triumph if it can "show that it[s] [regulation] advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[21]

Even if a regulation is nondiscriminatory, it is still subject to so-called *Pike* balancing, which is reserved for laws "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental. Under the *Pike* test, [courts] will uphold a nondiscriminatory statute . . . unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[22]

> ***If the Colorado Act and Regulations are not a tax, the district court presumably should not have analyzed them using the* Quill *and* Complete Auto *frameworks.***

As we discussed previously, for taxes, there is a different test, the *Complete Auto* test, and the consensus opinion is that this test, in relevant part, asks only whether the tax constitutes discrimination.[23] There is not even the question whether there are alternatives or whether the tax is necessary to further a legitimate local purpose.

There is much that is bewildering about this distinction in tests, which is at best implicit in Supreme Court decisions.[24] First, given that they are so often substitutes,[25] why distinguish taxes and regulations at all? Second, why make the test for taxes more stringent? If anything, the TIA suggests that the courts give the states more leeway in raising revenue. Third, does the distinction make any practical difference, as the amorphous category of discrimination could incorporate balancing-type considerations?[26]

> ***It might matter a great deal whether a given state action can ultimately be saved by considering whether the state had no alternatives.***

Yet despite this theoretical incoherence and doctrinal vagueness, it might matter a great deal whether a given state action can ultimately be saved by considering whether the state had no alternatives. Note that the district court evaded that question by implicitly analyzing the Colorado Act and Regulations as a regulation under Count I (discrimination), and hence considering alternatives, and then analyzing the act and regulations as a tax under Count II (undue burden).

Quill *Was About a Regulation!*

One peculiar twist is that *Quill* itself did not involve an actual tax liability but rather a requirement to collect the use tax owed by others. So if *Quill* was properly analyzed as a tax, it might seem that the Colorado Act and Regulations should also be analyzed as a tax. The implicit argument justifying the analysis of the *Quill* regulations as a tax was presumably that those regulations were close enough to actually imposing a tax liability. Academic research has confirmed the common-sense notion that consumers do respond to taxes collected at the moment of a purchase.[27] Yet recent academic research also suggests that consumers may respond

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[19]*United Haulers*, 550 U.S. at 338.

[20]*Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

[21]*Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Oregon*, 511 U.S. 93, 100-101 (1994) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278, 108 S.Ct. 1803, 1810, 100 L.Ed.2d 302 (1988)).

[22]*United Haulers*, 550 U.S. at 346 (internal citations and quotation marks omitted, but citing *Philadelphia*, 437 U.S. at 624 and *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

[23]Dan T. Coenen, "Where *United Haulers* Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule," 95 *Iowa L. Rev.* 541, 599 (2010) (construing the absence of any balancing test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1979)); Edward A. Zelinsky, "The False Modesty of *Department of Revenue v. Davis*: Disrupting the Dormant Commerce Clause Through the Traditional Public Function Doctrine," 29 *Va. Tax Rev.* 407, 441 (2010) ("In the wake of *Complete Auto*, the Court has generally invalidated discriminatory state taxes without affording the taxing states the opportunity to defend their respective tax laws as necessary to further legitimate public purposes").

[24]For example, tax cases (sometimes) give states the opportunities to defend a discriminatory statute by demonstrating a lack of alternatives. *See, e.g.*, *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 274, 278-279 (1988) (The Court entertains the possibility that there are no legitimate alternatives in a tax credit case).

[25]David Gamage and Darien Shanske, "On Tax Increase Limitations: Part I — A Costly Incoherence," *State Tax Notes*, Dec. 19, 2011, p. 813, *Doc 2011-25440*, or *2011 STT 243-3.*

[26]*Cf.* Zelinsky, *supra*, note 23 at 442 (In *Kentucky v. Davis*, the "Court avoided [finding discrimination] by deciding that Kentucky's tax law should not be scrutinized as a tax provision subject to *Complete Auto* and its rigorous discrimination test").

[27]Traditional economic models typically predict that incidence is split between purchasers and retailers based on

(Footnote continued on next page.)

less to a tax that is not collected at the time of purchase.[28] Therefore, the Colorado Act and Regulations might arguably be less of a tax in this sense than the regulations at issue in *Quill* because the Colorado scheme does not require retailers to collect the use tax at the time of purchase.

Discrimination Under the 'New' Dormant Commerce Clause?

We have not discussed the core of the district court's analysis — namely, that the Colorado Act and Regulations constitute discrimination for purposes of the dormant commerce clause — and we will not do so here at any length.[29] Nevertheless, we want to point out that recent Supreme Court jurisprudence has not taken an expansive view of discrimination under the dormant commerce clause. Most interestingly, in 2007 in *United Haulers*, the Court essentially overruled a recent decision in order to bless the creation of an in-state monopoly in waste processing created by New York state (and its subdivisions).[30] In 2008 in *Kentucky v. Davis*, the Court also blessed the tax exemption that each state grants to the interest earned on its own municipal bonds — and not to those of any other state.[31] We will not dwell on the details of those cases here or on what they imply for review of the Colorado Act and Regulations. For the present, we simply note that those cases might suggest some interesting arguments that Colorado (and other states) should perhaps consider.

First, Colorado can argue that it did not have any other alternatives for taxing all consumption in the state, much like New York seemed to have no option other than to establish a local monopoly in *United Haulers*.[32] Furthermore, along these lines, we think that the Colorado Act and Regulations could properly be interpreted not as an attack on out-of-state merchants, but rather as part of a comprehensive scheme to maximize fairness and to minimize distortions in Colorado's attempts to implement a broad-based sales tax. Establishing an equitable tax system seems to be as traditional a government function as building infrastructure.[33] Thus, Colorado's legislature seemed to have no protectionist intent — another (sometimes) touchstone of dormant commerce clause analysis.[34] Finally, if one believes that the essence of what the dormant commerce clause is meant to police is discrimination that will lead to rounds of tit-for-tat retaliation — thus undermining the national marketplace — it is hard to see why Colorado's statute offends the dormant commerce clause.[35]

Alternatives?

Under the regulation analysis, even a regulation found to be discriminatory is not doomed if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." As for this question in connection with the Colorado Act and Regulations, what the district court labels "Second Tier" analysis, we will be curious to see what the Tenth Circuit makes of the following passage from the district court opinion discussing whether Colorado had legitimate nondiscriminatory alternatives:

> According to the defendant, Colorado has not previously included a line on its income tax returns for reporting use tax. However, between 1966 and 1974, the DOR included a consumer use tax return with income tax return forms. That practice was discontinued because the amount of tax collected did not justify the printing expense.
>
> The record contains essentially no evidence to show that the legitimate interests advanced by the defendant cannot be served adequately by reasonable nondiscriminatory alternatives.[36]

It would seem to us that abandoning an initiative not worth the paper it was printed on is pretty good evidence, especially in the context of ruling against a party on summary judgment. We are also unclear why a line on an income tax form would be superior to a separate form. To the contrary, a separate form seems at least as likely to get the attention of taxpayers as a mere line. Further, coming from a state (California) that has attempted with great

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supply and demand, at least in the short term, with the incidence not significantly depending on whether the legal obligation to remit the tax is imposed on the purchaser or the retailer. In contrast, more recent research on tax salience suggests that it may matter whether the legal obligation to remit is imposed on purchasers or retailers. David Gamage and Darien Shanske, "Three Essays on Tax Salience: Market Salience and Political Salience," 65 *Tax L. Rev.* 19, 27-30 and 61-65 (2011).

[28]*Id.*

[29]For additional important arguments, see Alex Meleney, "*Direct Marketing Association v. Huber*, Federal District Court Finds Colorado Use Tax Reporting Requirements Unconstitutional," *Tax Management Weekly State Tax Report*, Vol. 2012, Issue 17, Apr. 4, 2012; Andrew Haile, "Defending Colorado's Use Tax Reporting Requirement," *State Tax Notes*, Sept. 20, 2010, p. 761, *Doc 2010-16462*, or *2010 STT 181-1*.

[30]*United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

[31]*Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008).

[32]*United Haulers*, 550 U.S. 330, at 334-336.

[33]*United Haulers*, 550 U.S. 330, at 344-345; *see also generally* Darien Shanske, "The Supreme Court and the New Old Public Finance: A New Old Defense of the Court's Recent Dormant Commerce Clause Jurisprudence," 43 *The Urban Lawyer* 659, 701-05 (2011).

[34]Shanske, *id.* at 700.

[35]Shanske, *id*. at 663-665.

[36]*DMA v. Huber*, *supra*, at *6 (citations omitted).

vigor — and so far with little success — to get taxpayers to pay their use tax on their income tax forms,[37] we are unsure how dubious an alternative has to be before it is no longer given legal weight. Thus, it is not clear why the state did not succeed in showing that there were no nondiscriminatory alternatives.[38] Now, the district court noted that the state did not much argue that there were no such alternatives, including not building a record, and that might pose an insurmountable challenge to Colorado in appealing this case. Yet if all Colorado would have to do to have its regulations upheld is to build a meaningful record, the district court opinion perhaps does not place much of a bar to prevent Colorado from reenacting a modified version of its act and regulations or from other states doing the same.

Pike Balancing?

Again, there is a strong argument that the Colorado Act and Regulations should have been analyzed as a regulation and, as a regulation, that the act and regulations were not discriminatory. If one accepts that line of argument, the next step would be to apply *Pike* balancing, and under *Pike* balancing, there is then a sound argument that the Colorado Act and Regulations should have been upheld. We will not go through the *Pike* balancing analysis here. Instead, we direct readers to Andrew Haile's prior discussion of that question.[39]

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[37]*See, e.g.*, California State Board of Equalization, "Discussion of Recent Economic Developments," Publication 329, Vol. XVII, No. 1, Feb. 2011, *available at* http://www.boe.ca.gov/news/pdf/EP2-11.pdf. (California collected approximately $10 million in use tax in 2010 and "only about 0.36 percent of all personal income tax returns" reported use tax — and this was an improvement!)

[38]Note that we do believe that Colorado did have a nondiscriminatory alternative in that the state could have compensated remote vendors for all the compliance costs imposed by its act and regulations. Following that logic, and assuming that the district court had properly found that there was a discrimination, the district court (and the Tenth Circuit) might properly strike down Colorado's Act and Regulations on the grounds that they do not offer remote vendors adequate compensation for compliance costs. Regrettably, in our view, that was not the approach used by the district court opinion. *See* David Gamage and Devin Heckman, "A Better Way Forward for State Taxation of E-Commerce," 92 *B.U. Law Rev.* 483 (2012). We should reiterate that just because we think that adding vendor compensation nullifies any argument that there is discrimination does not mean that the act and regulations without compensation is necessarily a discrimination; as indicated above, there are many viable arguments to that effect.

[39]Haile, *supra* note 29.

Attention Legislators (and the MTC)[40]

We do not know how to handicap Colorado's appeal, but it seems to us that there are a number of fundamental questions that the district court opinion failed to answer. Regardless, the Colorado district court decision adds to a developing body of case law that in the aggregate indicates a way forward for states that want to tax interstate e-commerce (and that do not want to wait for enabling federal legislation that may never come).

> ***Under a regulation analysis, the lower the burdens placed on remote vendors, the more likely that a statute will survive dormant commerce clause challenges.***

The first approach that state legislatures should consider for taxing interstate e-commerce is to minimize the burdens that doing so places on remote vendors. Under a regulation analysis, the lower the burdens placed on remote vendors, the more likely that a statute will survive dormant commerce clause challenges. And even under a tax analysis, a statute might survive dormant commerce clause challenges if the statute avoids imposing *any* burdens on remote vendors. To that end, one of the authors (Gamage) has argued previously that the approach of requiring remote vendors to collect use taxes while compensating the remote vendors for all resulting administrative and compliance costs can successfully reduce the burdens imposed on remote vendors to zero — thus potentially protecting a statute from dormant commerce clause challenges.[41]

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[40]Amy Hamilton, "MTC Halts Work on Colorado-Style 'Amazon' Model Statute," *State Tax Notes*, May 14, 2012, p. 441, *Doc 2012-10081*, or *2012 STT 92-2*.

[41]David Gamage and Devin Heckman, "A Better Way Forward for State Taxation of E-Commerce," 92 *B.U. Law Rev.* 483 (2012).

Does adequately compensating remote vendors obviate the importance of this column's discussion of the distinction between the tax and regulation frameworks for dormant commerce clause analysis? Perhaps not. First, as a matter of doctrine, and as noted previously, notifications like those in the Colorado Act and Regulations may be more likely to be found a regulation and thus be subject to a less rigorous test. Even if courts ultimately disagree that adequate vendor compensation can protect a tax statute from dormant commerce clause challenges, courts might still uphold a tax regulation statute that includes adequate compensation for remote vendors. Second, retailers might come to prefer Colorado's notification approach precisely because it means that consumers will not be parting with more money at the moment of sale, thus perhaps reducing the excess burden caused by the tax and shifting some of the incidence from retailers to consumers. *See* note 26 and accompanying text.

The second approach legislatures should consider relies on using the state corporate income tax in lieu of a sales or use tax as a device for taxing remote vendors. To this end, one of the authors (Shanske) has recently argued that a state corporate income tax that is apportioned using a single sales factor can function as a rough substitute for sales and use taxes for remote vendors.[42] Hence, by reforming existing state corporate income taxes, states can tax remote vendors while avoiding the obstacles the dormant commerce clause places on imposing the use tax collection obligation on remote vendors — as a general matter, the rules governing nexus for the purpose of the state corporate income tax are different from the rules governing the collection of the state sales tax.

A state corporate income tax that is apportioned using a single sales factor can function as a rough substitute for sales and use taxes for remote vendors.

Regardless of the outcome of the Colorado appeal, then, states will have options for taxing transactions between their citizens and remote vendors. Nevertheless, we urge the Tenth Circuit to directly address the questions we raise in this column. The existing case law surrounding the application of the dormant commerce clause to interstate e-commerce transactions has devolved into a morass. In our view, the Colorado district court opinion (understandably) adds to that confusion. We thus exhort the Tenth Circuit to clarify and rationalize the application of the dormant commerce clause to state sales and use taxation.

[42]Darien Shanske, "A New Theory of the State Corporate Income Tax: The State Corporate Income Tax as a Retail Sales Tax Complement," *Tax L. Rev.* (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2078488 (making the argument noted above and also including numerous qualifications, including about the effect of P.L. 86-272).

Addendum

The recent ACA decision distinguishes between a tax for purposes of the AIA and for purposes of Congress's taxing power. *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services*, 567 U.S. ___ (2012) (Section II). The basic rule established by the ACA decision is that the label given to a measure by Congress is determinative of what a tax is under the AIA, but that label does not govern for constitutional analysis. The rationale for this distinction is that the AIA is a creature of Congress and Congress should be presumed to be consciously deciding whether the AIA applies or not through its choice of labels. Arguably this distinction should apply to the TIA and the dormant commerce clause; state legislatures can also be presumed to know of the TIA (and likely analogous state law provisions), and thus the TIA applies only to state laws labeled as "taxes." The dormant commerce clause, as a constitutional provision, would look beyond labels. Yet it could be maintained that Congress did not intend that the states, as separate sovereigns, should have the protection granted to them by the TIA limited in this (formalistic) way. Furthermore, to the extent that the dormant commerce clause is an implied limitation, one can argue that the judicial construction of a "tax" for purposes of the dormant commerce clause should be no broader than Congress's construal of what a tax is, as it is Congress that has the positive power over commerce. This suggests that a "tax" should be exactly as broad under the dormant commerce clause as under the TIA (if not narrower). In conclusion then, the ACA decision adds more to be considered, but does not answer the questions we have posed. ✰

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