STATUTORY OBSOLESCENCE: DIMINISHED PROTECTIONS UNDER P.L. 86-272

H. Beau Baez III[*]

[*] Associate Professor of Law, Ohio Northern University Pettit College of Law; J.D. & LL.M. (taxation), Georgetown University Law Center. I would like to thank all of my colleagues who provided me with feedback, which made this a much stronger article.

INTRODUCTION

> Two vast and trunkless legs of stone [s]tand in the desert. . . . And on the pedestal, these words appear: "My name is Ozymandias, King of Kings. Look on my works, ye Mighty, and despair!" Nothing beside remains. Round the decay [o]f that colossal [w]reck, boundless and bare [t]he lone and level sands stretch far away.
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> – Percy Shelley[1]

In life, as in law, change is the only constant.[2] Some laws age like a fine bottle of wine.[3] Others fade away, much as an abandoned statue disappears into the desert sands. Impermanence is a common human condition that affects many endeavors because of societal, political, economic, and technological changes—a new gilded-age mansion in New York is torn down after twenty years to make way for a skyscraper. The law is no different, with yesterday's statute becoming archaic or obsolete. An archaic statute has the force of law because it has not been repealed, existing in some musty law book and not enforced. For example, a 1313 English statute prohibits the wearing of a suit of armor into Parliament—this law is not enforced.[4] Statutory

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[1] Percy Bysshe Shelley, *Ozymandias*, POETRY FOUND., https://www.poetryfoundation.org/poems/46565/ozymandias [https://perma.cc/A6QD-P4S4] (last visited Dec. 11, 2025). Shelley wrote the poem after hearing about the discovery of a statue of Ramses II in Egypt. John Rodenbeck, *Travelers from an Antique Land: Shelley's Inspiration for "Ozymandias"*, 24 ALIF J. COMP. POETICS 121, 121-23 (2004).

[2] *Cratylus*, *in* 4 PLATO: CRATYLUS, PARMENIDES, GREATER HIPPIAS, LESSER HIPPIAS 1, 66-67 (E. Capps, T.E. Page, & W.H.D. Rouse eds., H.N. Fowler trans., 1926) (paraphrasing "[e]verything changes and nothing stands still" from Plato's quotation of Heracleitus in *Cratylus* "πάντα χωρεῖ καὶ οὐδὲν μένει").

[3] For example, in 1768, Sir William Blackstone discussed the tort of defamation. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 123-27 (1768). When compared to defamation today, the law has not changed in any significant manner. Or, to go back to Magna Carta (1215), one enduring legal principle is that no one is above the law. *See generally* Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 ST. MARY'S L.J. 1, 46 (2015) (arguing that Magna Carta "symbolizes the principle that no one is above the law"). *See generally* MAGNA CARTA (National Archives trans., 1215).

[4] A Statute Forbidding Bearing of Armour 1313, 7 Edw. 2 c. 0 (Eng.). In 2019, YouTuber Oobah Butler tested the law by wearing a suit of armor into Parliament, knowing he could lose his head as punishment—presumably at the Tower of London.

obsolescence describes statutes enacted for one purpose, still enforced, but the original purpose or context has changed.[5] For example, marijuana possession and trafficking is a federal crime,[6] but due to gradual state law acceptance of marijuana, the federal government is rarely enforcing this drug law.[7] Public Law 86-272, 73 Stat. 555, 15 U.S.C. § 381 ("P.L. 86-272"), is an example of statutory obsolescence as it is still enforced but to a lesser degree due to technological changes.[8]

P.L. 86-272 was enacted in 1959 as a temporary measure[9] to immunize out-of-state businesses from state income taxation if

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He entered Parliament in the sight of several police officers and exited without being arrested, demonstrating this law is no longer enforced. VICE, *I Broke Dumb Laws in Front of Police*, at 02:37-03:33 (YouTube, Mar. 25, 2019), https://youtu.be/vDBzi0n9Fxg?si=ceVFNnOAoiELDh5B [https://perma.cc/A8PP-X5YE].

[5] *See generally* Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987).

[6] 21 U.S.C. §§ 841-844.

[7] "[I]n every fiscal year since 2015, Congress has prohibited the Department of Justice from 'spending funds to prevent states' implementation of their own medical marijuana laws.'" Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2237 (2021) (quoting United States v. McIntosh, 833 F.3d 1163, 1168, 1175-77 (9th Cir. 2016)).

[8] The Interstate Commerce Tax Act states:

> No state or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
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> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
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> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

15 U.S.C. § 381(a).

[9] 105 Cong. Rec. 16354 (1959) ("The bill now before the Senate . . . will serve as a[] . . . temporary solution while detailed studies are being made of this problem.").

they engaged in certain enumerated activities.[10] But technological and jurisprudential changes have slowly eroded what the statute was designed to protect. At that time, many interstate enterprises had long-established marketing strategies that fell well within the statute's protected activities.[11] The only in-state activity allowed was solicitation of orders for tangible personal property;[12] and all other activities must occur out-of-state, including order acceptance and shipment via common carrier.[13] But what does solicitation mean in a twenty-first century economy where companies operate across state lines, without sending traveling salesmen—wearing suit, tie and hat—from town to town, taking clients to the local diner for a burger, soda pop, and apple pie à la mode?[14] Since those halcyon days of the 1950s, businesses now use mobile

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[10] Tax practitioners, commentators, and courts generally refer to this legislation as P.L. 86-272, so this article follows this convention. *See* Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 222 (1992); Paul J. Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 VAND. L. REV. 353, 354 (1976); 21 U.S.C. §§ 841-844 [hereinafter P.L. 86-272].

[11] *See* Butler Bros. v. McColgan, 315 U.S. 501 (1942); *see also Wis. Dep't of Revenue*, 505 U.S. at 239 (Kennedy, J., dissenting) ("Firm expectations within the business community were built . . . . Companies engaging in interstate commerce conformed their activities to the limits our cases seemed to have endorsed.").

[12] Solicitation for the sale of intangibles, realty, and services are not protected activities. These activities were much less common in 1959 than today, as the nation has moved away from a manufacturing-based economy to a service-based economy. Francisco J. Buera & Joseph P. Kaboski, *The Rise of the Service Economy*, 102 AM. ECON. REV. 2540, 2541 (2012) (observing that the "share of the service sector in value-added has grown steadily from 60 percent in 1950 to 80 percent in 2000").

[13] Delivery in business owned trucks or use of a contract carrier is not protected. However, some state courts allow delivery in company owned trucks. *See* Nat'l Priv. Truck Council, Inc. v. Comm'r, 688 N.E.2d 936 (Mass. 1997).

[14] Then there was the door-to-door salesman:

> There would be times when a salesman would come calling with a vacuum cleaner in hand. They would appear more often in the evening so they could catch both of my parents at home. Their sales technique was a show. It was all about suction power. A bag full of sand, grit and who knows what all, would be poured on the carpet before asking if it was OK. . . . But always the powerful vacuum did its job.

Gary P. West, *Remembering Door-to-Door Salesmen*, MURRAY LEDGER & TIMES (July 7, 2018), https://www.murrayledger.com/news/state/remembering-door-to-door-salesmen/article_eb8228be-813a-11e8-b69c-2b1b51dbe7bd.html [https://perma.cc/D4DJ-GQUZ].

phones, computers, the internet, instant banking services, and a host of other advancements that Congress did not envision when it passed the law. These changes mean many modern business practices exceed P.L. 86-272's protections, creating an income tax obligation for many out-of-state businesses.

Business activities within a state are protected, but the statute fails to define "within."[15] For example, when a business and customer interact through an online live chat box, does that activity occur inside the customer's state, the business's state, somewhere in between, or where the computer servers are located?[16] Imagine a customer in Texas, a business in Idaho, the customer's computer server in Virginia, and the business's computer server in California. Likely, the business's activity occurs in multiple states simultaneously, all without the business's or customer's knowledge.[17] One reading of P.L. 86-272 is to interpret "within" as mandating a physical presence requirement; however, the words "physical presence" do not appear in the statute. While the Supreme Court of the United States has never defined this portion of P.L. 86-272, in a recent Commerce Clause case, the Court noted "[b]etween targeted advertising and instant access to most consumers via any internet-enabled device, 'a business may be present in a State in a meaningful way without' that presence 'being physical in the traditional sense of the term.'"[18] The only protected activity is solicitation of orders—other activities are not protected by the statute.

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[15] P.L. 86-272.

[16] "Live chat is a tool that connects customers with real human support representatives, enabling them to resolve issues in real-time. With live chat, customers can swiftly obtain answers, reducing their time waiting for solutions or searching through your website's knowledge base." *What Is Live Chat, and How Is It Important to Your Customers?*, SALESFORCE (Dec. 13, 2023), https://www.salesforce.com/au/blog/what-is-live-chat/ [https://perma.cc/AL46-2NM3].

[17] While lack of knowledge by a business might result in a Due Process Clause issue, all of a business's activities are considered when determining whether the forum state can require the out-of-state business to comply with its income tax laws. In the colorful words of Chief Justice Rehnquist, a company directing its activities into the forum state likely has "nexus aplenty." D. H. Holmes Co. v. McNamara, 486 U.S. 24, 33 (1988).

[18] South Dakota v. Wayfair, Inc., 585 U.S. 162, 181 (2018) (quoting Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 18 (2015) (Kennedy, J., concurring)).

For midsize to large businesses, losing P.L. 86-272 income tax protection does not necessarily result in a higher tax burden. This is because state income taxation is based on apportionment principles, which do not allow a state to tax more than its fair share of a business's net income.[19] Essentially, a state may only tax the portion of a company's income that reasonably reflects business activity within that state. This is accomplished through the use of formulary apportionment,[20] where a business takes its federal net income and divides it amongst the states where it conducts business—ideally, no more than 100% of a business's income is taxed.[21] Think of apportionment as a pie, where each state receives one piece. Though unlike in childhood, the pieces are not sliced equally. For example, a large state like California may get a large slice, while a small state like Delaware may get a sliver of pie.[22] And if a business is immunized from taxation by P.L. 86-272 in some states, or a state does not have an income tax, then the other states get to increase the amount of their tax base. Using the pie analogy, the other states each get a bit more piece of

[19] As the Court has explained: "Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice." Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 462 (1959).

[20] There are several formulas states use, but the traditional formula includes three factors: property, payroll, and sales. The numerator of the fraction comprises in-state activity, while the denominator comprises activity everywhere. For example, suppose a business has $1,000,000 in federal net income. In the State of Indiana, the business has $10,000 in property, $5,000 in payroll, and $100,000 in sales, while its nationwide numbers are $100,000 in property, $25,000 in payroll, and $200,000 in sales. The fractions for Indiana are $10,000/$100,000 + $5,000/$25,000 + $100,000/$200,000, all divided by 3. This fraction, converted to decimal form, comes out to 0.267 for Indiana. The taxpayer would then multiply 0.267 by $1,000,000 to get $267,000—this is Indiana's apportioned share of Federal net income. Assuming Indiana imposes a 5% tax rate on corporations, this business would pay $13,350 in taxes to Indiana (267,000 x 0.05). If North Dakota's apportioned share amounts to 0.062 and their tax rate is 4%, then this business will pay $2,480 in taxes to North Dakota.

[21] "If the taxpayer believes that application of this formula subjects it to taxation on a greater portion of its net income than is 'reasonably attributable' to business within the State, it may file a statement of objections and submit an alternative method of apportionment. . . . [T]he Director of Revenue . . . may recalculate the corporation's taxable income." Moorman Mfg. Co. v. Bair, 437 U.S. 267, 270 (1978).

[22] This is because a business is likely to have more sales in a large state than a smaller one. However, if a business is located in a small state and its activities are primarily in that state, then more income may be apportioned to the small state.

pie—state tax policies ensure no pie gets left behind.[23] When a business loses its P.L. 86-272 tax immunity in a state, it is often not paying more in tax because the business's tax burden shifts to different states.[24] However, filing in additional states increases a business's compliance costs.[25] In 1959, these additional costs were significant, with the Court noting "as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer."[26] Today, the costs are appreciably lower with the advent of computerized tax return preparation.[27] However, larger businesses have learned how to alter their corporate structure to lower their tax burden through careful planning.[28] Without P.L. 86-272, businesses could no

[23] States accomplish this through one of three mechanisms: throwback, double throwback, or throw-out. While this does not exactly achieve a perfectly distributed tax base, it is close enough, as the Supreme Court does not require perfection in apportionment formulas. *See* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 9.18 (3d ed. 2025).

[24] Technically, a business's overall tax burden might be higher or lower, depending on the mix of states where it is required to file. Suppose New York has a 10% corporate income tax rate and Arkansas 1%. If a company is located in New York and is apportioning its income to several states, the income is taxed at each state's tax rate. Next, assume this company has $100,000 in sales apportioned to Arkansas, but is currently protected from filing in Arkansas by P.L. 86-272. Those sales are thrown back to New York with its higher tax rate. Although this could work in reverse for an Arkansas-based company, which might see New York sales thrown back to Arkansas and taxed at the lower Arkansas tax rate.

[25] As of the time this article was written, one accounting firm stated that their rate for a federal income tax return was, depending on the quality of accounting records, about $1,500, and the cost for each state income tax return was $250. *Business Tax Return Preparation*, WCG INC. (June 22, 2025), https://wcginc.com/business-services/corporate-tax-prep/ [https://perma.cc/7SLG-5LY5]. However, in 1999, I spoke with the tax manager of a Fortune 100 company, who mentioned his tax department had seven full-time employees preparing state income tax returns. This almost certainly included tax minimization strategies, not just preparing the tax returns.

[26] U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 456 (1978).

[27] In 1959, computers were in their infancy and were not used for preparing tax returns. This meant businesses needed to get paper tax returns from each state where they were required to file returns, hire experts who understood the nuances of each state's taxing scheme, and potentially answer questions from each state taxing authority. Today, software handles almost all of this complexity.

[28] "For the multijurisdictional taxpayer, this can be an extremely costly and treacherous game to play. If played correctly, those in a position to benefit by this rule will succeed in minimizing their multistate corporate income tax liabilities." Philip M. Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 TAX LAW. 293, 294 (1985).

longer avoid paying income taxes in states where they exploit the local market.

Part I of the Article examines the history leading to the enactment of P.L. 86-272, as well as the current Dormant Commerce Clause nexus standard. This requires a relatively lengthy discussion and a bit of educated guessing, as the Court has not heard an income tax nexus case since 1959. Part II delves into the statute, examining the changes that have made much of P.L. 86-272 obsolete—not archaic yet, but beginning to show its age. Part III considers negative consequences to small businesses, which, due to technological changes, suddenly find themselves taxable in many states. Also, this section discusses how larger businesses use P.L. 86-272 to significantly minimize their state income tax burden. These significant problems were not contemplated by the statute but should be addressed to avoid undue burdens on interstate commerce and to protect the state tax base. Until P.L. 86-272 is repealed, it will continue to be abused as it slowly becomes more obsolete.

I. NEXUS AND CONGRESSIONAL ACTION

> The most damaging thing you can do to any businessman in America is to keep him in doubt, and to keep him guessing, on what our tax policy is.
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> – President Lyndon B. Johnson[29]

The Supreme Court's decision in *Northwestern States Portland Cement Co. v. Minnesota* was the catalyst in the enactment of P.L. 86-272[30]—the first time Congress exercised its plenary commerce powers to restrict state taxing authority.[31]

[29] President Lyndon B. Johnson, *in* JEFFERY L. YABLON, AS CERTAIN AS DEATH: QUOTATIONS ABOUT TAXES 60 (2010).

[30] H.R. REP. NO. 88-1480, at 7 (1964).

[31] Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. LEGIS. 171, 182 (1997) ("Congress has introduced bills regulating state and local taxation as far back as 1934 yet did not actually enact any legislation limiting the States' power to tax interstate commerce until [it passed Public Law 86-272 in] 1959."). Some have argued that P.L. 86-272 is unconstitutional, though this article will not delve into that issue. *See, e.g.*, Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST.

Within six months of this opinion,[32] an apoplectic business community convinced Congress to hastily enact the statute as a stopgap measure, with the goal of creating a comprehensive measure within a few years.[33] Congress then embarked on a comprehensive six-year examination of state and local taxation, resulting in a four-volume Congressional Report commonly referred to as the Willis Commission Report.[34] Given the influence that state governments tend to enjoy in Congress, along with the often glacial movement to pass federal legislation, the speed with which this law was enacted is astonishing. In the first Supreme Court case examining P.L. 86-272, the Court explained:

> In this statute, Congress attempted to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, *Northwestern States Portland Cement* did not adequately specify what local activities were enough to create a 'sufficient nexus' for the exercise of the State's power to tax. [P.L. 86-272] was designed to define clearly a lower limit for the exercise of that power.[35]

L. REV. 41 ("Though, a law, therefore, for laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled, yet 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." (citing THE FEDERALIST No. 33, at 173 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[32] Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). This case was decided on February 24, 1959. P.L. 86-272 was enacted on September 14, 1959.

[33] A few months after its enactment, the Louisiana Department of Revenue's Director of Revenue stated, "I am convinced that [P.L. 86-272] was a piece of hasty, hysteria legislation . . . pressured through the Federal Congress by a highly organized and certainly skillfully handled group of trade organizations." Robert L. Roland, *State Taxation of Interstate Income: A State Tax Administrator's Viewpoint*, 12 TAX EXEC. 35 (1959).

[34] *See generally* H.R. REP. NO. 88-1480 (1964). Congressman Edwin E. Willis was the chairman of the subcommittee which produced the over 1,200-page report.

[35] Heublein, Inc. v. S.C. Tax Comm'n, 409 U.S. 275, 280 (1972). Heublein's activities, which far exceeded the protections on P.L. 86-272, were not at issue. What Heublein argued was that South Carolina's alcohol beverage laws forced alcohol sellers, like Heublein, to engage in activities designed to exceed the protections of P.L. 86-272. The Court held states can enact valid regulatory schemes, which have the effect of creating an income tax filing obligation for out-of-state businesses.

P.L. 86-272 was designed to temporarily preserve the nexus rules that existed prior to *Northwestern States Portland Cement Co*.[36] The Willis Commission was charged with completing its report, and then Congress was supposed to impose uniform income tax rules on the states. The states reacted quickly to this federal threat by many adopting the Multistate Tax Compact, which imposed uniform income tax rules on the states.[37] This action kept Congress at bay as they failed to preempt state taxing authority.[38] This left P.L. 86-272 in place, decades after this stopgap measure should have been repealed.

Northwestern States Portland Cement Co., on its own, was not sufficient to galvanize the business community.[39] Six days[40] after its opinion in *Northwestern States Portland Cement Co.*, the Supreme Court denied certiorari in another income tax nexus case,[41] and then a few months later denied certiorari in a second income tax nexus case.[42] These three cases caused many in the business community to believe marginal activities—at least by 1959 standards—would create income tax liability for their companies.[43] The primary problem, from the business community's perspective, was the *Northwestern States Portland Cement Co.* Court did not define "sufficient nexus," the test employed in the case.[44] Justice Whittaker's dissent supports the business community's concern:

> [T]he Court 'conclude[s] that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.' I

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[36] H.R. REP. NO. 88-1480, at 8 (1964).

[37] U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 456 (1978).

[38] *Id.* at 456, 456 n.4.

[39] Paul J. Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 VAND. L. REV. 354, 354-55 (1976).

[40] H.R. REP. NO. 88-1480, at 7 (1964).

[41] Brown-Forman Distillers Corp. v. Collector of Revenue, 359 U.S. 28 (1959) (dismissing appeal and denying certiorari).

[42] Int'l Shoe Co. v. Fontenot, 359 U.S. 984 (1959).

[43] Hartman, *supra* note 39, at 358.

[44] Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959).

> respectfully submit that this is novel doctrine, and that this Court has never before so held.[45]

A. Dormant Commerce Clause History

> The history of [the Dormant Commerce Clause tax cases] is spread over hundreds of volumes of [Supreme Court] Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future.[46]
>
> – Supreme Court Justice Felix Frankfurter

The Dormant Commerce Clause, also known as the Negative Commerce Clause, is not found in the explicit words of the United States Constitution. The Commerce Clause reads: "The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[47] Unlike the affirmative grant expressly given to Congress by the Constitution, the Dormant Commerce Clause is a judicially created doctrine giving courts the power to invalidate state laws which interfere with interstate commerce.[48] Though not found in the text of the Constitution, the nation as it exists today would be quite different without it.[49]

The Dormant Commerce Clause has its legal genesis in *Gibbons v. Ogden*, a case decided on Supremacy Clause grounds by Chief Justice John Marshall in 1824.[50] In dicta, he suggested[51] the Commerce Clause's grant of power to Congress might

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[45] *Id.* at 484 (alteration in original).

[46] Freeman v. Hewit, 329 U.S. 249, 252 (1946).

[47] U.S. CONST. art. I, § 8, cl. 3.

[48] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 401 (2d ed. 1988).

[49] *Id.* ("Without [the dormant commerce clause doctrine], the Union as we know it would be unthinkable.").

[50] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[51] *Id.* at 17 ("The States may legislate, it is said, wherever Congress has not made a plenary exercise of its power. But who is to judge whether Congress has made this plenary exercise of power?") (implying the Courts can decide how much power the States can exercise over commerce).

inherently limit state authority.[52] However, the idea of a negative power goes back to at least 1787—two years before the ratification of the Constitution—when James Madison explained in a letter to George Washington that "[t]he National Government should be armed with complete authority in all cases which require uniformity; such as the regulation of trade. . . . Over and above this positive power, a negative in *all cases whatsoever* on the legislative acts of the States."[53] Five years later the word "dormant" appeared for the first time in *Willson v. Black-Bird Creek Marsh Co.*, where the Court upheld a state law that was not "considered as repugnant to the power to regulate commerce in its *dormant* state, or as being in conflict with any law passed on the subject."[54]

The nineteenth century saw the Supreme Court gradually develop the doctrine's framework, generally elevating form over substance. In *Cooley v. Board of Wardens*, the Court established a distinction between matters requiring national uniformity, and those of local concern which states could regulate.[55] The Court then held Pennsylvania could require local ships to hire local pilots in Philadelphia.[56] Two decades later, the Court expanded the *Cooley* test to cover state taxation in *Reading Railroad Co. v. Pennsylvania*.[57] There, Pennsylvania imposed a tonnage tax on all freight transported within the state by railroad or boat, without

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[52] Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 575.

[53] BORRIS I. BITTKER & BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE 1-5 (1999) (citing Letter from James Madison to George Washington (Apr. 16, 1787), *reprinted in* 9 The Papers of James Madison 383-84 (Rutland ed., 1975)).

[54] *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 252 (1829) (emphasis added). The State of Delaware passed a law allowing the plaintiff to build a dam across a navigable body of water, and the Federal government had not passed any laws on the subject. The Court explained that the Commerce clause would have prohibited the dam if there had been legislation, and also that the dormant aspect of the Commerce clause was not an impediment to building the dam.

[55] *See* Cooley v. Bd. of Wardens, 53 U.S. 299 (1852).

[56] *Id.* at 319.

[57] *See In re* State Freight Tax, 82 U.S. 232, 279-80 (1872).

distinguishing whether the goods were in interstate or intrastate commerce..[58] The Court explained:

> Interstate transportation of passengers is beyond the reach of a State legislature. And if State taxation of persons passing from one State to another . . . is unconstitutional . . . [then so] is a State tax upon the carriage of merchandise from State to State, in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is pro tanto a restriction. . . . [W]e regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation.[59]

In striking down the tax, the Court established the principle that states cannot tax the privilege of conducting interstate commerce, even absent federal legislation.[60] This approach, which examined the form of commerce, survived in some form until 1977.[61]

In *Wabash v. Illinois*, where a railroad was transporting goods in interstate commerce, the Court held that Illinois could not regulate fares, even when there was no congressional act prohibiting the regulation.[62] The Court explained, "if it be a regulation of commerce . . . it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."[63]

Within a few years, the Court recognized that property used in interstate commerce could be taxed by multiple states as long

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[58] *See id.* at 232-33, A flat rate per ton was imposed depending on the nature of the goods. For example, for every two thousand pounds coal was taxed at two cents, livestock at three cents, and general merchandise at five cents.

[59] *See id.* at 281.

[60] *See id.*

[61] *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

[62] *See* Wabash, St. Louis & P. Ry. Co. v. Illinois, 118 U.S. 557 (1886). Though the majority did not use the word "dormant," they clearly explained that Congress had not passed any legislation in this area—the implication is that the Court is using the Dormant Commerce clause. The dissent used the word "dormant" several times, arguing that the Dormant Commerce clause did not apply. *See id.* at 582.

[63] *Id.* at 577.

as a fair and non-discriminatory[64] apportionment formula was employed.[65] In the key case, involving the taxation of railroad passenger cars, the Court explained:

> The [railroad] cars . . . are employed in interstate commerce, but their being so employed does not exempt them from taxation by the State, and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. . . . If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. . . .
>
> The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States over which its cars were run. This was a just and equitable method of assessment, and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.[66]

During this same 1886 term, the Court explained "goods in course of transportation through a State . . . are . . . in the course of commercial transportation, and are clearly under the protection of the Constitution."[67] This further limited the states from taxing goods under what is called the stream of commerce test.

During most of the twentieth century, the Court continued to limit how states could impose taxes on interstate commerce, preventing economic protectionism and ensuring a unified national market; however, the prior century's rigid formalistic rules began to evolve towards a more refined balancing test. For

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[64] Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 25 (1891) ("The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not.").

[65] *Id.* at 25-26.

[66] *Id.* at 25-26.

[67] Coe v. Errol, 116 U.S. 517, 525 (1886).

example, direct taxes on interstate commerce or freight were invalidated, while taxes in lieu of property taxes were allowed if structured in court-sanctioned formulaic language.[68] This effectively created a "tax-free haven" for interstate businesses, shielding them from state taxes even when local businesses faced comparable burdens.[69] This formalistic approach drew criticism in the 1927 dissent by Justice Harlan Fiske Stone for being overly mechanical and disconnected from economic realities.[70]

By the 1930s, the Court began prioritizing substantive economic effects over formal distinctions.[71] For example, in 1938, the Court moved away from the direct/indirect tax distinction, emphasizing that states could impose direct taxes on interstate commerce if those taxes did not lead to discrimination or multiple taxation.[72] Nonetheless, "formalism over substance"[73] survived,

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[68] Jerome R. Hellerstein, *State Taxation Under the Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335, 336 (1976).

[69] *Id.* at 337.

[70] Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) ("In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.").

[71] The rejection of formalism began after World War I as it entered "a protracted period of breakdown and dissolution." GRANT GILMORE, THE AGES OF AMERICAN LAW 12 (1977).

[72] W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 254-55 (1938). The Court explained:

> It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. "Even interstate business must pay its way," and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce[,] and if the property devoted to interstate transportation is used both within and without the state[,] a tax fairly apportioned to its use within the state will be sustained. Net earnings from interstate commerce are subject to income tax, and, if the commerce is carried on by a corporation[,] a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from

with the Court invalidating a "tax . . . computed at a nondiscriminatory rate on that part of the corporation's net income which is reasonably attributable to its business activities within the State."[74] Specifically, the Court found it Constitutionally objectionable that "[t]he tax is then a tax . . . upon the franchise of corporations for the privilege of carrying on or doing business in the state."[75] To avoid this pitfall, a state could change a few words in their statute to directly tax income, thereby making their statute constitutional.[76] But this placed the states in a revenue dilemma. An indirect franchise tax allowed states to tax interest income earned by businesses on federal debt obligations, while a direct income tax prohibited a state from taxing this earned income.[77]

In *Complete Auto Transit, Inc. v. Brady*, the Court abandoned the vestiges of formalism, creating the four-pronged test still used

> interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment.

Id. (citations omitted).

[73] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 281 (1977).

[74] Spector Motor Serv. v. O'Connor, 340 U.S. 602, 603 (1951).

[75] *Id.* at 606.

[76] The Court noted:

> The tax does not discriminate between interstate and intrastate commerce. Neither the amount of the tax nor its computation need be considered by us in view of our disposition of the case. The objection to its validity does not rest on a claim that it places an unduly heavy burden on interstate commerce in return for protection given by the State. . . . It is a "tax or excise" placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State. . . . Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so.

Id. at 607-08.

[77] JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION ¶ 7.01 (3d ed. 2025). Because an income tax is a direct tax, any attempt by a state to impose a direct tax on the federal government violates the intergovernmental immunity doctrine. To this day, only states with a franchise tax can require someone to report interest income earned from the federal government. States that directly tax income cannot tax this interest income as this concept is now enshrined in a federal statute.

today.[78] For a state tax to survive Dormant Commerce Clause scrutiny, the tax must:

- Apply to activities with a substantial nexus[79] to the state;
- Be fairly apportioned (both internally and externally);
- Avoid discriminating against interstate commerce; and
- Be fairly related to services the state provides.[80]

The Court restated the *Complete Auto* test in *South Dakota v. Wayfair*, which is discussed in the next section.[81] For purposes of this article, the important part of the *Complete Auto* test is the substantial nexus prong.

B. Nexus Standard

> We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution, but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.[82]

The Supreme Court's understanding of state tax nexus has significantly changed since 1959, which has led to the further graying of P.L. 86-272. Before examining the Court's modern approach, it is important to first see how the Court envisioned nexus in the 1950s. Nexus-creating activities exist on a

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78 *Complete Auto Transit*, 430 U.S. at 287.

79 In addition to calling it "substantial nexus," the Court has used numerous other terms, which all represent the same thing—state tax jurisdiction is present. Here are some of the terms for the nexus test: "sufficient nexus" (*id.* at 278); "sufficiently connected" (*id.* at 287); "requisite nexus" (Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551, 556 (1977)); "necessary basis" (*id.* at 557); "sufficient relation" (*id.*); "necessary nexus" (*id.* at 558); "adequate nexus" (*id.* at 562); "obvious nexus" (Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 750 (1978)); "clear and sufficient nexus" (Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207, 225 (1980)); and Chief Justice Rehnquist's colorful phrase, "nexus aplenty" (D.H. Holmes Co. v. McNamara, 486 U.S. 24, 33 (1988)).

80 *Complete Auto Transit*, 430 U.S. at 279.

81 South Dakota v. Wayfair, Inc., 585 U.S. 162, 174 (2018).

82 Wisconsin v. J.C. Penney Co., 311 U.S. 435, 445 (1940).

continuum, with activities on one end[83] clearly creating nexus and activities on the other end[84] not creating nexus—the problems occur with activities near the middle, with their "countless shadings and gradations of taxability."[85] The Commerce Clause "nexus requirement is 'closely related,' to the due process requirement that there be 'some definite link, some minimum connection, between a state and the person, property[,] or transaction it seeks to tax.'"[86] As noted earlier, the impetus for P.L. 86-272 was the Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, where the taxpayers claimed they were immune from the state's income tax because they were engaged solely in interstate commerce.[87] After the Court rejected the immunity argument, the Court had no difficulty pronouncing that the taxpayer's activities created a nexus within the state.[88]

Northwestern States Portland Cement Co. involved two companion cases—one from Minnesota and the other from Georgia. As nexus inquiries are necessarily fact intensive, what follows are the detailed circumstances from each case. Northwestern States Portland Cement Company was an Iowa business that manufactured cement close to the Minnesota border.[89]

> [The business] maintained in Minneapolis a leased sales office equipped with its own furniture . . . and under the supervision of an employee-salesman known as "district manager." Two salesmen, including this district manager, and a secretary occupied this three-room office. Two additional salesmen used it as a clearing house. Each employee was paid a straight salary . . . and two cars were furnished by it for the salesmen. . . . All sales were made on a delivered price basis . .

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[83] For example, Illinois can impose an income tax on a retail store located in Illinois. *See generally* Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).

[84] For example, Illinois cannot impose an income tax on a retail store located in Indiana, which attracts customers from Illinois. *See generally* Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954) (noting that a retail store in Delaware does not have nexus in Maryland merely because Maryland residents shop at that store).

[85] John Dane, Jr., *State Taxation of Interstate Income: Congress Takes Historic Action*, 12 TAX EXEC. 18, 21 (1959).

[86] *Wayfair*, 585 U.S.at 177 (citation omitted).

[87] *See* Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 461 (1959).

[88] *See id.* at 464-65.

[89] *Id.* at 453.

> . and no "pick ups" were permitted at its plant [in Iowa]. . . . Orders received by the salesmen or at the Minneapolis office were transmitted daily to appellant in [Iowa], were approved there, and acknowledged directly to the purchaser . . . .
>
> In addition to the solicitation of approved dealers, appellant's salesmen also contacted potential customers and users of cement products . . . . Salesmen would also receive and transmit claims against appellant for loss or damage in any shipments made by it, informing the company of the nature thereof and requesting instructions concerning the same.[90]

Stockham Valves & Fittings was the second taxpayer before the Court.[91] The business was audited by the State of Georgia, and its activities were as follows:

> [I]ts principal office and plant [are] in Birmingham, Alabama. It manufactures and sells valves and pipe fittings through established local wholesalers and jobbers who handle products other than respondent's. . . . [T]he corporation maintained no warehouse or storage facilities in Georgia. It did maintain a sales-service office in Atlanta. . . . This office was headquarters for one salesman who devoted about one-third of his time to solicitation of orders in Georgia. . . . [There was also] a full-time . . . secretary employed there . . . . She was "a source of information" for respondent's products, performed stenographic and clerical services and "facilitated communications between the . . . home office in Birmingham, . . . [the] sales representative . . . and customers, prospective customers, contractors and users of [its] products." Respondent's salesman carried on the usual sales activities, including regular solicitation, receipt and forwarding of orders to the Birmingham office and the promotion of business and good will for respondent. Orders were taken by him, as well as the sales-service office, subject to approval of the home office and were shipped from Birmingham direct to the customer on an "f.o.b. warehouse" basis. Other than office equipment, supplies, advertising literature and the like,

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[90] *Id.* at 454-55.
[91] *Id.* at 455.

> respondent had no property in Georgia, deposited no funds there[,] and stored no merchandise in the State.[92]

Within a few months after the Court's opinion, the Court denied certiorari in two more nexus cases. Legally, a certiorari denial means nothing. The Court has explained:

> [A]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.[93]

Yet, the business community acted as if these two denials were decisions on the merits by the Supreme Court of the United States. In the first case, *Brown-Forman Distillers Corp. v. Collector of Revenue*, the Louisiana Supreme Court upheld its state income tax, noting the out-of-state business maintained salesmen in Louisiana—the salesmen solicited orders in the state but did not accept orders in the state; orders were approved out-of-

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92 *Id.* at 455-56.

93 Maryland v. Balt. Radio Show, Inc., 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of the petition for certiorari). For example:

> A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

Id. at 917-18.

state, and shipments were from out-of-state.[94] In the second case, *International Shoe Company v. Fontenot*, Louisiana again upheld its state income tax when an out-of-state company with fifteen salesmen engaged solely in the solicitation of orders.[95]

Interestingly, there was another per curiam state income tax nexus case decided less than a week after *Northwestern States Portland Cement Co.*, though it is rarely mentioned.[96] The Court upheld a nexus challenge to North Carolina's income tax by an out-of-state business.[97] Given that this case was ignored by the business community in 1959, it appears they accepted these activities as properly subjecting the business to the state's income tax, presumably because the activities exceeded mere solicitation of orders within the state.

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[94] Brown-Forman Distillers Corp. v. Collector of Revenue, 101 So.2d 70, 70 (La. 1958).

[95] Int'l Shoe Co. v. Fontenot, 107 So.2d 640 (La. 1958).

[96] *See, e.g.*, Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 220-21 (1992). The Supreme Court does not cite to this case when discussing the three cases that galvanized the business community to get Congress to pass P.L. 86-272. Also, Professor Hartman, for example, does not include this case when he refers to "[t]his trilogy of decisions." Paul J. Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 VAND. L. REV. 353, 359 (1976).

[97] ET & WNC Transp. Co. v. Currie, 359 U.S. 28 (1959). The facts illustrate a great deal of presence in North Carolina. Specifically:

> Plaintiff rents and maintains freight terminals … in the State for its interstate operations, for which terminals it paid in rent. . . . It owns and operates pickup and delivery trucks in North Carolina for use at its terminals, and owns furniture, fixtures and equipment in its terminals in North Carolina . . . . Its delivery trucks pick up interstate freight from its customers in North Carolina destined for or consigned to points or parties outside of North Carolina, and take such freight to its terminals in North Carolina. When freight is received at its various terminals in North Carolina, it is delivered to the consignees, either direct from the interstate vehicles, or in delivery trucks stationed at the respective terminals. Its terminals in North Carolina are manned by its employees, who usually live in North Carolina. . . . [Given] the number of plaintiff's employees at its terminals in North Carolina, their salaries, the number of its delivery trucks there stationed, and the money it collects in North Carolina in its business, are considerable.

ET & WNC Transp. Co. v. Currie, 104 S.E.2d 403, 413-14 (N.C. 1958), *aff'd*, 359 U.S. 28 (1959).

From a nexus perspective, *Northwestern States Portland Cement Co.* holds that an out-of-state business which engages in soliciting orders within a state is subject to state income taxation.[98] Not decided at that time were the plethora of other activities that could subject an out-of-state business to a state's income tax. One commentator at the time noted:

> In analyzing what the situation is under the law as it stood prior to the recent legislation and as it applies for taxable years ending on or before the effective date of the act, i.e. September 14, 1959, it will not be possible in many instances to give a definite answer based on cases involving an asserted income tax liability.[99]

The critical question asks what activities, other than solicitation of orders, can subject a business to a state's income tax jurisdiction. Unfortunately, the Court has not decided an income tax nexus case—one where nexus was the primary issue—since 1959.[100] However, the *Northwestern States Portland Cement Co.* Court, explaining one of its recent per curiam decisions, stated:

> While the statement of the facts in that opinion recites that "The employees were given space in the offices of attorneys in return for the use of plaintiff's books stored in such offices," it is significant to note that West had not qualified to do business in California and the State's statute itself declared that the tax was levied on income derived from interstate commerce within the State, as well as any arising intrastate. The opinion was not grounded on the triviality that office

[98] *See generally* Nw. States Portland Cement Co. v. Minnesota*,* 358 U.S. 450 (1959).

[99] Dane, Jr., *supra* note 85, at 21.

[100] The Court has decided many income tax cases since 1959, but nexus was not an issue in any of them. *See, e.g.*, MeadWestvaco Corp. *ex rel.* Mead Corp. v. Illinois Dep't of Revenue, 553 U.S. 16, 25 (2008) ("Where, as here, there is no dispute that the taxpayer has done some business in the taxing State, the inquiry shifts from whether the State may tax to what it may tax."); Allied-Signal, Inc. v. Div. of Tax'n, 504 U.S. 768 (1992) ("Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax . . . . The present inquiry, by contrast, focuses on the guidelines necessary to circumscribe the reach of the State's legitimate power to tax." (citation omitted)).

> space was given West's solicitors by attorneys in exchange for the chanceful use of what books they may have had on hand for their sales activities. Rather, it recognized that the income tax[es] arose from a purely interstate operation.[101]

This language suggests physical presence within a state is not necessarily required to create taxable nexus. However, "the Court did not tell us if it would adhere to this conclusion if the taxpayer were not physically present."[102]

The physical presence test is at least 2,000 years old, with its use recorded in the laws of ancient Rome.[103] In American jurisprudence, the cornerstone of the physical presence nexus test is the Due Process Clause case *Pennoyer v. Neff*, [104] which established that state geographic boundaries are important for purposes of personal jurisdiction.[105] The *Pennoyer* era ended in 1945 when the Supreme Court replaced the Due Process Clause physical presence test with the minimum contacts test.[106] For state tax purposes, the Dormant Commerce Clause physical presence test endured until 2018.[107]

An important issue during the *Pennoyer* era was the meaning of physical presence for corporations—fictional entities—which do not exist except in the records of the government agency that created them. Nearly one hundred years ago, Judge Learned Hand explained the problem:

> It scarcely advances the argument to say that a corporation must be "present" in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question

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[101] *Nw. States Portland Cement Co.*, 358 U.S. at 460-61.

[102] John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 353 (2003).

[103] *See* Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 802-03 (1955).

[104] *See generally* Pennoyer v. Neff, 95 U.S. 714 (1878) (out of state landowner did not receive proper notice under the Due Process Clause because he was not served with notice in the forum state).

[105] *Cf.* Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871 (1989) (discussing the history of personal jurisdiction in the United States as rooted in the law of nations).

[106] *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[107] *See generally* South Dakota v. Wayfair, Inc., 585 U.S. 162 (2018).

> to be answered. Indeed, it is doubtful whether it helps much in any event. It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purposes. The shareholders, officers and agents are not individually the corporation, and do not carry it with them in all their legal transactions. It is only when engaged upon its affairs that they can be said to represent it, and we can see no qualitative distinction between one part of its doings and another, so they carry out the common plan. If we are to attribute locality to it at all, it must be equally present wherever any part of its work goes on, as much in the little as in the great.[108]

The physical presence of an individual is much simpler to determine, barring an existential inquiry beyond the scope of this Article. If a person lives in Ohio and vacations in Florida, a global positioning device can locate the individual's exact location. Even an anomalous situation, such as the "four corners" area of the United States, where it is possible to be in Utah, Arizona, New Mexico, and Colorado simultaneously, presents little in the way of intellectual complexity in determining where an individual is present.[109] Corporations, however, are much harder to locate. The tendency in the *Pennoyer* era was for courts to interpret physical presence in a descriptive sense, not substantively. Judge Learned Hand avoided the substantive metaphysical interpretation by explaining "[w]hen we say . . . a corporation may be sued only where it is 'present,' we understand that the word is used, not literally, but as shorthand for something else."[110]

The failed Due Process Clause physical presence nexus test does not fare any better under the Dormant Commerce Clause, with the Supreme Court describing its jurisprudence in this area as "something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leav[ing] much room for controversy and confusion and little in the way of precise guides to

[108] Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930).

[109] Though a law school exam hypothetical might envision a person being shot exactly at four corners, leaving it to a law student to write an answer about which state has jurisdiction.

[110] *Hutchinson*, 45 F.2d at 141.

the States in the exercise of their indispensable power of taxation.'"[111] As an initial matter, for over a hundred years the Supreme Court was unclear in state tax cases whether it was deciding the case under the Commerce Clause, Due Process Clause, or both.[112] This appears to have been by design, as the problem was noted by Justice Rutledge in 1944:

> "Due process" and "commerce clause" conceptions are not always sharply separable in dealing with these problems. . . . To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes "undue." But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones.[113]

This ambiguity allowed state tax nexus cases to keep the physical presence test long after the Court jettisoned it in *International Shoe*.[114] In *National Bellas Hess v. Department of Revenue*, the Court held a state could not impose a sales or use tax[115] on a remote seller, who conducted business solely through

[111] Quill Corp. v. North Dakota, 504 U.S. 298, 315 (1992) (citing Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457-58 (1959)).

[112] *Id.* at 305.

[113] Int'l Harvester Co. v. Dep't of Treasury, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part).

[114] Interestingly, *International Shoe* is a state tax case, though unusual from other state tax cases because it involved a tax where Congress had specifically granted the states authority to impose the tax at issue. As Congress has plenary authority to regulate commerce, the Court was able to avoid the Dormant Commerce Clause and decide the case solely on Due Process Clause grounds. *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[115] Technically, the case only addressed the use tax. The distinction between a sales and use tax hearkens back to the Court's more formalistic jurisprudence of the 1930's. *See, e.g.*, Henneford v. Silas Mason Co., 300 U.S. 577, 584 (1937) (noting that sales taxes and use taxes are distinct, and a state may have both taxes). Today, it is unlikely

catalog sales and shipped goods from out-of-state through common carriers.[116] Then in 1992, in *Quill Corp. v. North Dakota*, the Court finally addressed Justice Rutledge's concern and decoupled the Due Process Clause nexus from the Commerce Clause nexus in state tax cases.[117] The *Quill* Court reaffirmed the physical presence test on *stare decisis* grounds[118] under the Commerce Clause; however, the Court recognized that the physical presence test would not have been adopted if the issue had been one of first impression.[119] Finally, in 2018, the Court dumped the physical presence test completely in *South Dakota v. Wayfair*; noting that "'while nexus rules are clearly necessary,' the Court 'should focus on rules that are appropriate to the twenty-first century, not the nineteenth.'"[120]

South Dakota v. Wayfair is the lynchpin for understanding the Court's current nexus jurisprudence. The *Wayfair* Court explained:

> Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. . . . State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Although subject to exceptions and variations, these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause.[121]

that the Court would distinguish between the two taxes, so this article will treat them as one tax. Also, it would take some time to distinguish the technical differences between the two taxes, which are not relevant for the current discussion.

[116] Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 754 (1967).

[117] Quill Corp. v. North Dakota, 504 U.S. 298, 306 (1992).

[118] *Id.* at 316.

[119] *Id.* at 311.

[120] *Id.* at 176 (citing Walter Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 549, 553 (2000)).

[121] South Dakota v. Wayfair, Inc., 585 U.S. 162, 173-74 (2018) (alteration in original) (citations omitted).

In addition to these two principles, the *Wayfair* Court used the *Complete Auto* test to explain that the "Court will sustain a tax so long as it . . . applies to an activity with a substantial nexus with the taxing State."[122] The Court also cited to the *Bellas Hess* dissent, explaining that "large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect . . . and to remit the use tax."[123] Next, the *Wayfair* Court opined that "[e]ach year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause."[124]

> For example, a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers. A website may leave cookies saved to the customers' hard drives, or customers may download the company's app onto their phones. Or a company may lease data storage that is permanently, or even occasionally, located in South Dakota.[125]

It is hard to imagine the Court imposing a physical presence requirement today on income tax cases given the Court's hostility to the test,[126] and also because it has explicitly stated "[p]hysical presence is not necessary to create a substantial nexus."[127]

The *Wayfair* Court, after discarding the physical presence test, shifted its analysis to the modern nexus test: "the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State. '[S]uch a nexus is established when the taxpayer . . . avails itself of the substantial

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[122] *Id.* at 174.

[123] *Id.* at 174-75.

[124] *Id.* at 176.

[125] *Id.* at 181.

[126] A physical presence test "creates rather than resolves market distortions . . .[a]nd . . . imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow." *Id.* at 176.

[127] *Id.* at 178.

privilege of carrying on business' in that jurisdiction."[128] This test is strikingly similar to the purposeful availment test found in Due Process Clause personal jurisdiction cases, "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."[129] Applying the modern nexus test to the facts in *Wayfair*, the Court demonstrated:

> [T]he nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. . . . This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case.[130]

The Supreme Court, when it addresses its next income tax nexus case, will almost certainly use this modern Commerce Clause nexus test—not one last used in 1959. In relation to P.L. 86-272, when a business exceeds the limited protections provided

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[128] *Id.* at 188 (citation omitted) (citing Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)).

[129] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). The Court later noted:

> The defendant . . . must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." The contacts must be the defendant's own choice and not "random, isolated, or fortuitous." They must show that the defendant deliberately "reached out beyond" its home—by, for example, "exploi[ting] a market" in the forum State or entering a contractual relationship centered there. Yet even then—because the defendant is not "at home"—the forum State may exercise jurisdiction in only certain cases. The plaintiff 's claims, we have often stated, "must arise out of or relate to the defendant's contacts" with the forum. Or put just a bit differently, "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'"

Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 359-60 (2021) (citations omitted).

[130] South Dakota v. Wayfair, Inc., 585 U.S. 162, 188 (2018).

by the statute, a state may impose its income tax if the business avails itself of the substantial privilege of carrying on business in that state.

II. SOLICITATION

> We do not inquire what the legislature meant; we ask only what the statute means.
>
> – Supreme Court Justice Oliver Wendell Holmes, Jr.[131]

The most important word in P.L. 86-272 is *solicitation*. Before defining this term, it is important to discuss the hermeneutical approach taken by this Article. The two primary approaches for statutory interpretation are intentionalism and textualism, with the first a subjective approach and the latter objective.[132] Intentionalism is interpreting a statute as it was intended to be understood when it was passed. Jurist Frank Easterbrook explained, "[i]ntent is empty. Peer inside the heads of legislators and you find a hodgepodge."[133] The problem with intentionalism is twofold: first, the need to examine the entire legislative record, and then second, divining what 435 Representatives, 100 Senators, and the President believed they were passing. Discovering the intent of one person is challenging,[134] but the collective intent of 536 people is impossible. Also, "because legislators vote on the statutory language rather than on the legislative history, they cannot be presumed to have assented to all that has been said, either in the committee reports or on the floor, about a bill that becomes law."[135] Though some,

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[131] Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

[132] Some believe "the distinction itself is exaggerated." Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348 (2005).

[133] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994).

[134] Some areas of law, including torts and criminal law, use subjective intent—the jury is required to determine what the person desired at the time of the act.

[135] Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 274 (1982).

including Professor Tatarowicz, take this more subjective approach with P.L. 86-272, this Article does not.[136]

In contrast, textualism "look[s] at the statutory structure and . . . the words as they would sound in the mind of a skilled, objectively reasonable user of words"[137] and is "a method of interpretation based upon the original public meaning of a statute, rule, or constitutional provision as it was commonly understood at the time of enactment."[138] Oliver Wendell Holmes, Jr. explained legal texts should be interpreted through the lens of the reasonably prudent person—objectively and not subjectively.[139] Not that this approach is perfect, as words can

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[136] *See* Philip M. Tatarowicz, Professor, Georgetown Univ. L. Ctr., Comments to Public Hearing on Proposed Revisions to Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-2721 (Aug. 5, 2020) (transcript available at https://www.mtc.gov/wp-content/uploads/2023/02/MTC-Comments-Re-PL-86-272-Proposed-Revisions_PMT.pdf) [https://perma.cc/R9Y2-DUJR]. A brief thank you to Professor Tatarowicz, who was one of my state and local tax professors at Georgetown Law. *See also* Darien Shanske & David Gamage, *The Ordinary Diet of the Law: How to Interpret Public Law 86-272*, 96 TAX NOTES STATE 161 (2020) ("[A] proper, fair reading of the statute should not involve expanding its coverage to protect current business practices that differ from those Congress specifically meant to protect when enacting P.L. 86-272.").

[137] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988).

[138] Robert Alt, Opinion, *Originalism Bolsters the Democratic Process by Checking Judges*, BLOOMBERG L.: U.S. L. WK. (Nov. 15, 2022, at 03:00 CT), https://news.bloomberglaw.com/us-law-week/originalism-bolsters-the-democratic-process-by-checking-judges [https://perma.cc/35UK-32AX]. Retired Supreme Court Justice Breyer supported purposivism, "maintain[ing] that the process of interpretation should be informed and driven by study of the discussions, purposes, and other context within which the legislature acted—apparently evidence of 'the legislator's will' and 'the people's will.'" WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 6 (2016). Breyer's approach exacerbates interpretation, as how does one determine the will of the American people? Is this all the people, a majority of people, a majority in one political party, or maybe a majority of those who voted in the prior election?

[139] Oliver Wendell Holmes wrote:

> It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other, because the known object is to achieve some definite result. It is not true that in practice . . . a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of

have different meanings,[140] or different shades of meaning.[141] Since courts regularly define words and phrases, those judicial interpretations can be relied upon in similar situations. However, courts change their approach with time:

> At some point there will be a noticeable but unexplained shift toward canons of construction such as literalism, strict interpretation, and extreme deference to administrative expertise. While the rhetoric of fidelity to statutory intent remains, application of these maxims in fact produces outcomes that are removed from any accurate understanding of original legislative will. This shift takes place at roughly the time when the obsolescence of the statute starts to become apparent. A strong implication . . . is that these canons are

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> significance more refined than any given in the word book. But in this first step, at least, you are not troubling yourself about the idiosyncrasies of the writer, you are considering simply the general usages of speech. . . .
>
> How is it when you admit evidence of circumstances and read the document in the light of them? Is this trying to discover the particular intent of the individual, to get into his mind and to bend what he said to what he wanted? No one would contend that such a process should be carried very far, but, as it seems to me, we do not take a step in that direction. It is not a question of tact in drawing a line. We are after a different thing. What happens is this. Even the whole document is found to have a certain play in the joints when its words are translated into things by parol [sic] evidence, as they have to be. It does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law.

Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).

[140] Take for example the homograph "ruler." A statute might read: "One must defer to the ruler of the nation." Ruler could mean a head of state or a tool to measure distances.

[141] The word "look," for example, could mean glance, peek, scowl, glare, watch, gaze, stare, or ogle.

> chosen at this point because they effectively limit the applicability of statutes that may be approaching a stage of harmful senility.[142]

A. Marketing and Technological Changes

> We live in a society exquisitely dependent on science and technology, in which hardly anyone knows anything about science and technology.
>
> – Carl Sagan[143]

Technology constantly changes how businesses market and sell their products, though the trend is to make selling less physical than in the past. In eighteenth century America, towns and cities had shopkeepers who sold wares stocked in a local store. Customers would go to the shopkeeper, inspect the physical goods, negotiate a price,[144] purchase the goods, and then take the goods to their homes. But for the vast majority of people who did not reside in a town or city, they could often purchase goods from a peddler—"one who carries about small commodities on his back, or in a cart or wagon, and sells them."[145] By the nineteenth century, marketing by out-of-state sellers expanded to include the drummer—a person who got his name because he tapped on his box of samples, creating a sound similar to a snare drum.[146] Unlike the peddler, who carried goods for sale, the drummer carried samples, taking orders from retailers and getting in-state wholesalers to sell the merchandise.[147]

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[142] Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 675 (1987).

[143] *See* CARL SAGAN, THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK 28 (1997).

[144] *John Wanamaker*, PBS: THEY MADE AM., https://www.pbs.org/wgbh/theymadeamerica/whomade/wanamaker_lo.html [https://perma.cc/PL83-96CE] (last visited Apr. 3, 2026). Until the late nineteenth century, with the invention of the price tag by John Wanamaker, haggling over prices was the way merchandise was purchased.

[145] THE SYSTEM OF COMMERCIAL TRAVELLING IN EUROPE AND THE UNITED STATES: ITS HISTORY, CUSTOMS, AND LAWS 12 (1869).

[146] William D. Harris III & Paul D. Larson, *The Evolution of the Manufacturer's Drummer*, 3 PROC. BIENNIAL CONF. HIST. ANALYSIS & RSCH. MKTG. 91, 92 (1987).

[147] *Id.* at 93.

To grasp the drummer's role, envision a scene from the late 1800s: A drummer would arrive in a small town, carrying sample cases brimming with items from the companies they represented. These samples might include anything from clothing and textiles to tools and household goods. The drummer would visit local merchants, display their samples, take orders, and arrange for goods to be shipped directly from the manufacturer to the store. In *Robbins v. Shelby County*, the Court held a state occupational tax could not be imposed on drummers because this was an area requiring national regulation by Congress.[148] The image of the drummer is ingrained in American culture, inspiring literary works like Arthur Miller's *Death of a Salesman*, whose protagonist, Willy Loman, represents the twilight of this tradition.[149] The rise of automobiles, improved communication systems, and eventually the internet gradually diminished the need for traveling salesmen.

Marketing in the internet age has radically altered the older model. Today, even the Supreme Court understands "[a] virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores."[150] For instance, cookies are a technology that enables businesses to track customer behavior, creating information businesses can use to increase sales. Cookies are small text files containing data that web servers store on client devices when customers browse a website—the website can then track devices across multiple page requests.[151] There are different types of cookies, which are stored differently. Session cookies remain in the browser's memory but are deleted when the browser closes, while persistent cookies are saved to the

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[148] Robbins v. Shelby Cnty. Taxing Dist., 120 U.S. 489, 498-99 (1887).

[149] *See generally* ARTHUR MILLER, DEATH OF A SALESMAN (1949).

[150] South Dakota v. Wayfair, Inc., 585 U.S. 162, 181 (2018).

[151] *See generally, e.g.*, Joon S. Park & Ravi Sandhu, *Secure Cookies on the Web*, IEEE INTERNET COMPUTING, July-Aug. 2000, at 36. The cookie creation process begins when a web server includes a Set-Cookie header in its HTTP response to a client. This header contains not just the cookie's name and value, but also several optional attributes that control the cookie's behavior and security properties.

device's storage system with an expiration date.[152] This process happens automatically as a user visits a website and can keep a user logged in across page loads on the same website.[153] Cookies on devices act like a digital fingerprint, tracking activities and preferences as the user browses the internet.[154] For example, an e-commerce site records which items were viewed, how long the user spent viewing an item, and what remains in the shopping cart.[155]

This data is valuable. Imagine someone shopping for a shirt and spending time looking at several options on a store's website. The cookie tracks this behavior, so when the person visits other websites that show advertisements, the original site can use that cookie data to show targeted ads for the specific shirts viewed on its website.[156] This process is called retargeting or remarketing.[157] Cookies also enable cross-site tracking.[158] Suppose someone is thinking about vacationing in New York City and they research attractions on several websites. Third-party cookies placed by advertising networks can compile this information to build a customer profile.[159] This might indicate that a potential customer

[152] *Session Cookies vs Persistent Cookies: What Are the Differences*, CAPTAIN COMPLIANCE (May 13, 2024), https://captaincompliance.com/education/session-cookies-vs-persistent-cookies/ [https://perma.cc/66GL-VKN6].

[153] *See generally* Paul Wagner, Cookies: Privacy Risks, Attacks, and Recommendations (Dec. 8, 2020) (unpublished manuscript) (available on SSRN).

[154] Oksana Kulyk et al., "This Website Uses Cookies": Users' Perceptions and Reactions to the Cookie Disclaimer (Apr. 2018) (unpublished manuscript) (available on ResearchGate).

[155] *Session Cookies vs Persistent Cookies: What Are the Differences*, CAPTAIN COMPLIANCE (May 13. 2024), https://captaincompliance.com/education/session-cookies-vs-persistent-cookies/ [https://perma.cc/66GL-VKN6].

[156] Jose Kantola, The Effectiveness of Retargeting in Online Advertising (Nov. 19, 2014) (M.S. thesis, Aalto University) (on file with the Aalto University School of Science).

[157] Dawood Saleem, *Retargeting vs Remarketing: A Complete Guide for Marketers*, RELEVIC (Jan. 7, 2025), https://www.relevic.com/blog/retargeting-vs-remarketing [https://perma.cc/K45Y-MHND].

[158] *See* Paul Jarvis, *What Is Cross-Site Tracking: Privacy Considerations and Solutions*, FATHOM ANALYTICS (Apr. 22, 2024), https://usefathom.com/learn/what-is-cross-site-tracking [https://perma.cc/F7SN-48AU] (discussing what and how and various technologies facilitate cross-site tracking).

[159] Natalia Figas, *The Role of Third-Party Cookies in Digital Advertising*, CLEARCODE (Oct. 21, 2024), https://clearcode.cc/blog/third-party-cookies-google/ [https://perma.cc/2WMQ-T8FT].

will likely want to see a Broadway show, so they start to see relevant ads on different websites.

Cookies also help create personalized marketing experiences. When someone returns to an online store, cookies remember previous purchases and browsing history.[160] The site can then customize the customer experience by showing recommended products based on prior visit interests. For instance, if a user frequently browses men's boots, the website might prominently feature new men's boots when the user next visits the site.[161] Cookies also play a crucial role in measuring marketing effectiveness. They help marketers understand the customer journey by tracking how users interact with ads across different platforms and websites.[162] For example, if someone clicks on a YouTube ad and later makes a purchase on a different site, cookies help marketers correctly attribute that sale and adjust their advertising strategy.[163]

The traditional third-party cookie system is being phased out, largely due to privacy regulations and browser changes.[164] This shift has led marketers to develop new approaches that respect privacy while still delivering personalized experiences. One major adaptation is the rise of first-party data strategies.[165] Instead of relying on third-party cookies, companies are focusing on collecting data directly from interactions with their own customers. This is similar to how a local store employee might remember that a regular customer wants a café latte with half

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[160] *See* Oliver Thyra, *How Cookies Help E-commerce Websites*, COOKIE L. INFO (July 27, 2023), https://www.cookielawinfo.com/e-commerce-cookies/ [https://perma.cc/2EAW-6JK8].

[161] *See generally* Chris Jay Hoofnagle et al., *Behavioral Advertising: The Offer You Cannot Refuse*, 6 HARV. L. & POL'Y REV. 273 (2012).

[162] *See Understanding Conversion Paths Through Attribution Models*, LINKEDIN (Aug. 25, 2023), https://www.linkedin.com/pulse/understanding-attribution-modelling-beginners-guide-vala-marcou-espue [https://perma.cc/ND2Z-578W].

[163] *See YouTube Ads Attribution Models: A Guide for SEM*, LINKEDIN (Aug. 25, 2023), https://www.linkedin.com/advice/0/how-do-you-use-youtube-ads-attribution [https://perma.cc/8PMP-PXBB].

[164] *See generally* Nadr El Hana, Maria Mercanti-Guérin & Ouidade Sabri, *Cookiepocalypse: What Are the Most Effective Strategies for Advertisers to Reshape the Future of Display Advertising?*, 188 TECH. FORECASTING & SOC. CHANGE 122297.

[165] *See generally* Lawrence Latvala, Jeff Horn & Bill Bruno, *Thriving in the Age of Privacy Regulation: A First-Party Data Strategy*, 7 APPLIED MKTG. ANALYTICS: THE PEER-REVIEWED J. 211 (2022).

milk and half soy. In the digital world, when someone logs into an online retailer's website, the retailer can still track customer behavior and preferences within its own domain, without sharing this data with other businesses.

There are also other tracking mechanisms used by browsers and apps. For instance:

> [M]ultiple cookies and identifiers are sent by Google servers and stored on the handset, even when no Google apps have ever been opened by the user. This includes advertising analytics/tracking cookies, links and device identifiers. No consent is sought for storing any of this data and there is no opt out.[166]

Marketers are also embracing contextual advertising, which doesn't rely on personal data at all.[167] Rather than targeting users based on their browsing history, this approach displays ads based on the content of the webpage the user is currently viewing.[168] For instance, suppose someone is reading about hiking poles. That person might begin to see ads for hiking poles and backpacks regardless of past browsing history. This represents a modern technological sophistication that was not available in the 1950s.

Another innovative approach is the use of cohort-based targeting. Instead of tracking individual users, this method groups people with similar interests or behaviors together.[169] Google's Privacy Sandbox initiative, for example, proposes replacing individual tracking with interest-based cohorts.[170] Imagine being

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[166] D.J. Leith, Cookies, Identifiers and Other Data That Google Silently Stores on Android Handsets (Feb. 13, 2025) (unpublished manuscript) (on file with Trinity College Dublin).

[167] *Contextual Advertising: How Contextual Targeting Works in Advertising*, AMAZON ADS, https://advertising.amazon.com/library/guides/contextual-advertising#1 [https://perma.cc/45DT-PHF3] (last visited Feb. 6, 2025).

[168] Ian Kirk, *How Embracing Contextual Advertising Benefits B2B Marketers and Customers*, 1827 MKTG., https://1827marketing.com/smart-thinking/how-contextual-advertising-benefit-b2b-marketers-and-customers/ [https://perma.cc/CSQ5-JE4X] (last visited Nov. 2, 2025).

[169] *See generally* Mary Rani Thomas & Ginu George, *Segmenting, Targeting, and Positioning (STP) of Generational Cohorts Y, Z and Alpha*, 12 IIMS J. MGMT. SCI. 115 (2021).

[170] *See* Justin Schuh, *Building a More Private Web*, GOOGLE: THE KEYWORD (Aug. 22, 2019), https://blog.google/products/chrome/building-a-more-private-web [https://perma.cc/4LFY-NUHT].

placed in a group called "outdoor enthusiasts" based on your browsing patterns, but without any individual identification. Advertisers can then target these groups rather than specific individuals.

The use of a privacy-preserving Application Programming Interface ("API") is emerging as another solution. These tools allow marketers to measure campaign effectiveness and gather insights without directly tracking users.[171] For instance, Facebook's Conversions API enables businesses to share customer actions directly from their servers to Facebook, reducing reliance on browser-based cookies while still allowing measurement of advertising effectiveness.[172]

Machine learning and Artificial Intelligence ("AI") are also becoming increasingly important in this new landscape.[173] These technologies can identify patterns and predict user interests with less reliance on personal data. For example, AI might analyze the content someone is currently viewing and make real-time decisions about relevant products to show, without needing to know anything about their past behavior.

Device fingerprinting is another technique used to track customer behavior, which "combines multiple user data signals collected on [a] device, building a profile that transcends websites to identify you and everything you like and are likely to buy."[174] Unlike cookies, which can be disabled or deleted, "developers have found ways to use tiny bits of information that vary between users, such as what device they have or what fonts they have

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171 *See generally* Badih Ghazi et al., *On the Differential Privacy and Interactivity of Privacy Sandbox Reports*, 2025 PROCS. ON PRIV. ENHANCING TECHS. 382.

172 *Conversions API*, META (Feb. 25, 2026), https://developers.facebook.com/docs/marketing-api/conversions-api [https://perma.cc/Y432-BR6N] (explaining that the API allows advertisers to share data directly from their servers, improving measurement reliability and reducing dependency on browser-based technologies like cookies).

173 Yiming Yang, *Research on User Interest Prediction and Recommendation Algorithm Based on Artificial Intelligence Algorithm*, 2024 IEEE 3RD INT'L CONF. ON ELEC. ENG'G, BIG DATA AND ALGORITHMS 915, 915, 919.

174 Zak Doffman, *Google Starts Fingerprinting Your Devices in 10 Days*, FORBES (Feb. 18, 2025, at 00:54 ET), https://www.forbes.com/sites/zakdoffman/2025/02/08/forget-chrome-google-starts-tracking-all-your-devices-in-10-days/ [https://perma.cc/675T-7V5X].

installed to generate a unique identifier which can then be used to match a user across websites."[175]

The Court understands the "far-reaching systemic and structural changes in the economy and many other societal dimensions caused by the Cyber Age."[176] The legal issue is whether these activities exceed solicitation of orders and whether they create a nexus for income tax purposes.

B. Solicitation Defined

> The only way on earth to influence other people is to talk about what they want and show them how to get it.
>
> – Dale Carnegie[177]

"Solicitation of orders" is protected by P.L. 86-272, but the statute fails to define this key term. The Oxford English Dictionary defines solicitation as "[t]he action of soliciting, or seeking to obtain by earnest request; entreaty, petition, diligent or importunate asking."[178] Black's Law defines it as "[t]he act or an instance of requesting or seeking to obtain something."[179] In 1992 the Supreme Court examined this specific issue in *Wisconsin Department of Revenue v. Wrigley*, where it found that the activities engaged in by Wrigley exceeded the protections of P.L. 86-272.[180]

Wrigley was the largest manufacturer in the world, headquartered in Chicago, and its gum sold by many retailers in the United States.[181] It marketed its products through the use of

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[175] Justin Schuh, *Building a More Private Web*, GOOGLE: THE KEYWORD (Aug. 22, 2019), https://blog.google/products/chrome/building-a-more-private-web/ [https://perma.cc/ACY6-EXB2]. Though not related to the tax issues in this article, from an ethical perspective, the author has this to say about device fingerprinting: "We think this subverts user choice and is wrong." *Id.*

[176] South Dakota v. Wayfair, Inc., 585 U.S. 162, 184 (2018).

[177] DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE pt. 1, ch. 45 (Dorothy Carnegie & Arthur R. Pell eds., Simon & Schuster 2009) (1936).

[178] *Solicitation*, OXFORD ENG. DICTIONARY (Dec. 2025), https://www.oed.com/dictionary/solicitation_n?tl=true [https://perma.cc/U59S-ESSJ].

[179] *Solicitation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[180] *See generally* Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992).

[181] *Id.* at 216.

"districts, regions, and territories," with the district manager for Wisconsin living in Illinois and visiting Wisconsin "six to nine days each year, usually for a sales meeting or to call on a particularly important account."[182] Residing in Wisconsin was a regional manager, who worked with important customers, handled administrative matters, and supervised resident sales representatives.[183] Wisconsin employees were provided with company cars, gum, display racks, and promotional literature.[184] The sales representatives, then had to conduct business as follows:

> In addition to handing out promotional materials and free samples, and directly requesting orders of Wrigley products . . . [representatives] would engage in a number of other activities which Wrigley asserts were designed to promote sales of its products. He would, for example, provide free display racks to retailers . . . and would seek to have these new racks, as well as pre-existing ones, prominently located. The new racks were usually filled from the retailer's existing stock of Wrigley gum, but it would sometimes happen . . . that the retailer had no Wrigley products on hand . . . . In that event, the rack would be filled from the stock of gum in the salesman's car. This gum . . . was not provided without charge. The representative would issue an "agency stock check" to the retailer, . . . and the retailer would ultimately be billed (by the wholesaler) in the proper amount.
>
> When visiting a retail account, Wrigley's sales representative would also check the retailer's stock of gum for freshness, and would replace stale gum at no cost to the retailer. This was a regular part of a representative's duties, and at any given time[,] up to 40% of the stock of gum in his possession would be stale gum that had been removed from retail stores.[185]

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182 *Id.* at 216-17.

183 *Id.* at 217. The regional manager's activities included "writing and reviewing company reports, recruiting new sales representatives, making recommendations . . . concerning the hiring, firing, and compensation of sales representatives, and evaluating their performance." *Id.*

184 *Id.* at 217-18. Also, one employee, whose apartment was too small for the gum and display materials, was reimbursed for renting a storage unit. *Id.*

185 *Id.* at 218.

Wrigley asserted all these activities within Wisconsin were protected by P.L. 86-272.[186]

The *Wrigley* Court opined, "[t]he key question in this case is whether, and to what extent, 'solicitation of orders' covers activities that neither explicitly nor implicitly propose a sale."[187] Wisconsin took the very narrow position that a taxpayer loses its tax immunity when it embarks on "any activity other than requesting the customer to purchase the product."[188] Rejecting the position that only the act of requesting an order was contemplated by the statute, the Court noted, "We hardly think the statute had in mind only day-trips into the taxing jurisdiction by empty-handed drummers on foot."[189] Wrigley took the other extreme, arguing that "solicitation of orders" includes all "activities that are 'ordinary and necessary 'business activities' accompanying the solicitation process' or are 'routinely associated with deploying a sales force to conduct the solicitation, so long as there is no office, plant, warehouse or inventory in the State.'"[190] In other words, Wrigley claimed whatever salesmen do is protected activity. The Court also rejected this extreme, which it recognized "would render the limitations of [P.L. 86-272] toothless."[191] The *Wrigley* court explained its test as follows:

> "[S]olicitation of orders" covers more than what is strictly essential to making requests for purchases, the next . . . clear line is the one between those activities that are entirely ancillary to requests for purchases—those that serve no independent business function apart from their connection to the soliciting of orders—and those activities that the company

[186] *Id.* at 219.

[187] *Id.* at 223.

[188] *Id.* at 224.

[189] *Id.* at 226. Under Wisconsin's suggested approach, any number of in-state activities go beyond solicitation, including driving a company car, renting a hotel room, carrying samples, or even storing promotional materials.

[190] *Id.* at 227.

[191] *Id.* Imagine a clock parts company salesman, who makes repairs in the state while making a sales call. Or as a courtesy, picks up defective parts and issues a refund for those parts. A traveling salesman could justify just about anything as necessary for soliciting orders.

> would have reason to engage in anyway but chooses to allocate to its in-state sales force.[192]

The Court then pointed out that providing a company car and free samples to customers are ancillary to solicitation, and therefore protected activities.[193] In contrast, repair and servicing by salesmen are not ancillary to solicitation, even though these activities would likely increase sales.[194]

Finally, the *Wrigley* court noted *de minimis non curat lex* (the law does not deal with trifles)[195] applies to P.L. 86-272.[196] As explained earlier, courts will often use maxims as a statute gets older in an attempt to make sense of a law that is slowly becoming obsolete.[197] Wrigley argued that the sale of gum in Wisconsin "accounted for only 0.00007% of Wrigley's annual Wisconsin sales."[198] However, the Court rejected a quantitative analysis,[199] and found these sales were regular and systematic and "constituted a nontrivial additional connection with the State."[200] Restating the P.L. 86-272 nexus standard: only solicitation of orders and activities ancillary to solicitation are protected, and other activities are not protected, unless they are trivial.[201]

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192 *Id.* at 228-29.

193 *Id.*

194 *Id.* at 229-30.

195 *De minimis non curat lex* is best understood as bringing fairness to an otherwise harsh legal result. Understood in this manner, it appears to be a substitute for due process concerns of notice and fair dealing. In nexus cases not involving P.L. 86-272, there is no need for using the *de minimis* maxim as the Due Process Clause protects taxpayers from constitutionally unfair taxation.

196 *Wrigley*, 505 U.S at 231.

197 Langevoort, *supra* note 5, at 675.

198 *Wrigley*, 505 U.S at 235.

199 However, the Court did touch on quantity disapprovingly. *Wrigley*, 505 U.S at 231 ("Wisconsin's reading of the statute renders a company liable for hundreds of thousands of dollars in taxes if one of its salesmen sells a 10-cent item in state.").

200 *Wrigley*, 505 U.S at 235.

201 The Court failed to provide any examples on what might be deemed a trivial addition. But maybe the following example might qualify as *de minimis*. Imagine a California business shipping its goods via rail from California to Virginia. On route, the train derails in Ohio. To secure its goods, the business sends employees into Ohio for the sole purpose of recovering its goods. Though engaged in non-solicitation activities, this appears to be *de minimis* activity, from a qualitative standpoint. However, the *Wrigley* court today might choose to consider these nontrivial connections under the Due Process Clause instead of using the *de minimis* framework.

C. Multistate Tax Commission Guidelines

> The wisdom of man never yet contrived a system of taxation that would operate with perfect equality.
>
> – President Andrew Jackson[202]

The Multistate Tax Commission ("MTC"), an intergovernmental state tax agency,[203] published guidelines in 1986 to assist states and taxpayers in applying P.L. 86-272; the guidelines have since been revised four times.[204] The most recent revision in 2021 builds on the *Wayfair* Court's recognition that a business can be present in a state for income tax purposes without physical presence.[205] To that end, the guidelines regard the "Court's analysis as to virtual contacts to be relevant to the question of whether a seller is engaged in business activities in states where its customers are located for purposes of the statute."[206] Though the MTC does not have the authority to enact legislation, many States follow the MTC guidelines through legislation, regulation, or administrative processes.[207] The guidelines provide examples of protected activities, unprotected activities, and a new section on activities conducted via the internet. Apropos to this Article, what follows is a discussion on some of those internet activities.

The guidelines follow *Wrigley*'s framework, explaining which internet activities are protected as solicitation or activities ancillary to solicitation, and then which internet activities are not protected. The first listed activity involves a static website where customers are provided post-sale assistance through an FAQ page—this is a protected activity.[208] Though this activity is not

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[202] H.R. MISC. DOC. NO. 53-210, at 644 (1893).

[203] The Multistate Tax Commission is the agency created by the Multistate Tax Compact in 1967. *About Us*, MULTISTATE TAX COMM'N, https://www.mtc.gov/the-commission/about-us/ [https://perma.cc/G6CP-PS6M] (last visited Nov. 3, 2025).

[204] MULTISTATE TAX COMM'N, STATEMENT OF INFORMATION CONCERNING PRACTICES OF MULTISTATE TAX COMMISSION AND SUPPORTING STATES UNDER PUBLIC LAW 86-272, at 1 (2021).

[205] *Id.* at 2.

[206] *Id.*

[207] *Id.*

[208] *Id.* at 8.

related to solicitation, presumably it is viewed as a protected activity because there is no direct connection between the customer and the out-of-state business.[209] The following four guidelines demonstrate activities that create an income tax obligation:

> 2. The business regularly provides post-sale assistance to in-state customers via either electronic chat or email that customers initiate by clicking on an icon on the business's website. For example, the business regularly advises customers on how to use products after they have been delivered. This in-state business activity defeats the business's P.L. 86-272 immunity in states where the customers are located because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.[210]
>
> 5. The business places Internet "cookies" onto the computers or other electronic devices of in-state customers. These cookies gather customer search information that will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer for sale. This in-state business activity defeats the business's P.L. 86-272 immunity because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.[211]
>
> 7. The business remotely fixes or upgrades products previously purchased by its in-state customers by transmitting code or other electronic instructions to those products via the Internet. This in-state business activity defeats the business's P.L. 86-272 immunity because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.[212]
>
> 10. The business contracts with in-state customers to stream videos and music to electronic devices for a charge. This in-state business activity defeats the business's P.L. 86-272

[209] *Id.* at 3-4 (a trivial connection to the state, falling under the *de minimis* exception).
[210] *Id.* at 8.
[211] *Id.* at 9.
[212] *Id.*

> immunity because streaming does not constitute the sale of tangible personal property for purposes of P.L. 86-272.[213]

These guidelines demonstrate that many businesses are currently engaging in activities that exceed solicitation of orders, and are not ancillary to solicitation activities. The Council on State Taxation ("COST")[214] concedes "[t]hese are common activities for most, if not all, businesses engaged in remote Internet commerce with their customers or prospective employees."[215] Though it is possible to argue a chat box is physically located in the customer's state, the guidelines eschew this approach in favor of the modern nexus standard—virtual presence.[216] However, a state court could analyze chat box activity under the physical presence standard and find the business is not protected by P.L. 86-272, assuming it views the chat box as having physical presence somewhere.[217]

Not all cookies exceed the protections of P.L. 86-272. The guidelines provide:

> 6. The business places Internet "cookies" onto the computers or other devices of in-state customers. These cookies gather customer information that is only used for purposes entirely ancillary to the solicitation of orders for tangible personal property, such as: to remember items that customers have

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[213] *Id.*

[214] *About COST*, COUNCIL ON STATE TAX'N, https://www.cost.org/about-cost/ [https://perma.cc/E9PD-MJXD] (last visited Nov. 3, 2025) ("COST is a nonprofit trade association consisting of over 500 multistate corporations engaged in interstate and international business.").

[215] E-mail from Karl A. Frieden, Vice President & Gen. Couns., & Nikki E. Dobay, Senior Tax Couns., to Robert Desiderio, MTC Hearing Officer (Aug. 4, 2020) (on file with COST) (noting that COST is opposed to the MTC guidelines and explaining that "under the guise of modernizing the list of 'unprotected activities,' the MTC and any state that adopt these new guidelines will be, in effect, interpreting the 'protected activities' out of existence").

[216] South Dakota v. Wayfair, Inc., 585 U.S. 162, 188 (2018) ("[T]he nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State.").

[217] In a trespass to chattels case, the California Supreme Court held that mass emails sent to a company's computer server were not actionable. *See* Intel Corp. v. Hamidi, 71 P.3d 296 (Cal. 2003). Though the emails physically resided on the company computer, that physical presence was not relevant in the court's decision, as the interference was minimal. *Id.* at 309. But the court suggests it would have ruled otherwise if the physical presence on the server had caused interference. *Id.* at 311.

> placed in their shopping cart during a current web session, to store personal information customers have provided to avoid the need for the customers to re-input the information when they return to the seller's website, and to remind customers what products they have considered during previous sessions. The cookies perform no other function, and these are the only types of cookies delivered by the business to its customers' computers or other devices. This in-state business activity does not defeat the business's P.L. 86-272 immunity because it is entirely ancillary to the in-state solicitation of orders for sales of tangible personal property.[218]

One question concerning these internet activities is why the means of communication makes a difference for some of the "unprotected" activities. Guideline two claims post-sale support by electronic chat or email exceeds solicitations of orders.[219] But why only those two means of communication?[220] By way of illustration, a business regularly advises customers via telephone and through correspondence by U.S. mail. The guidelines do not flag this as unprotected activity, but do so for communication via the internet. Does nexus really depend on whether a business uses landlines or voice over internet protocol phones? As the modern nexus test is availment of the substantial privilege of carrying on business in a jurisdiction, then the means should be irrelevant.[221] The 1959 Court would likely not have found contacts by phone or U.S. mail to result in substantial nexus for income tax purposes. But they were at the tail end of the era where interstate commerce was

[218] MULTISTATE TAX COMM'N, *supra* note 204, at 9.

[219] *Id.* at 8.

[220] The MTC did not address this question. "The work group's assignment was to consider how P.L. 86-272 addressed modern business activities. That explains why the Statement addressed post-sale support via chat or email but not by telephone or U.S. mail." E-mail from Brian Hamer, MTC Couns., to H. Beau Baez, III, Assoc. Professor of L., Ohio N. Univ. Petit Coll. L. (Mar. 19, 2025, at 16:45 ET) (on file with author).

[221] *See* Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 436-37 (1980); Exxon Corp. v. Dep't of Revenue, 447 U.S. 207, 220 (1980); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 165-66 (1983); Hunt-Wesson, Inc. v. Franchise Tax Bd., 528 U.S. 458, 463-64 (2000) ("Due Process and Commerce Clauses . . . do not allow a State to tax income arising out of interstate activities-even on a proportional basis-unless there is a 'minimal connection' or 'nexus' between the interstate activities and the taxing State, and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'").

immune from taxation.[222] Today, the Court has been emphatic that commerce must pay its own way.[223] For all intents and purposes, "the borders between the States are essentially irrelevant."[224]

As of the writing of this article, no state tax nexus case has been decided on many of the internet issues in the guidelines. However, there are numerous Due Process personal jurisdiction cases that are instructive. In an early internet case, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, a Pennsylvania trial court developed a sliding scale for establishing nexus that distinguished between passive, semi-interactive, and interactive websites.[225] When a business "enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet," they have created nexus with the forum state.[226] And if a website merely provides information, that is passive activity which does not create nexus for the out-of-state business.[227] In the middle are semi-interactive websites, where there has been a low volume of information but some interaction between the customer and business. In the cases in the middle, nexus "is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Website."[228] The Fifth Circuit explained:

> *Zippo* seeks to answer the question: Has the defendant targeted the forum state? The touchstone of personal jurisdiction remains the existence of "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[229]

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[222] *See generally* Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734 (1978).

[223] W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938) (quoting Postal Tel.-Cable Co. v. Richmond, 249 U.S. 252, 259 (1919)).

[224] Commonwealth Edison Co. v. Montana, 453 U.S. 609, 618 (1981).

[225] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

[226] *Id.*

[227] Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999).

[228] *Id.* (citing Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996)).

[229] Admar Int'l, Inc. v. Eastrock, L.L.C., 18 F.4th 783, 786 (5th Cir. 2021) (citations omitted).

Other circuits have also applied the purposeful availment standard to internet contacts, which is in keeping with the modern income tax nexus standard.[230]

III. COMPLIANCE CHALLENGES

> Taxes are what we pay for a civilized society[.]
>
> – Supreme Court Justice Oliver Wendell Holmes, Jr.[231]

There are two compliance challenges: (1) small businesses cannot afford to comply, and (2) large businesses avoid compliance through careful planning. P.L. 86-272 limits states from requiring businesses to comply with their income tax laws. Implicitly, this is really a small business concern, as small businesses are less likely to have the financial resources to file tax returns in multiple states. As a temporary measure, this goal was accomplished as most small to midsize businesses in 1959 were soliciting orders of tangible personal property. But with the modern nexus standard, small to midsize businesses are likely to find they have an income tax filing obligation in many states. As to large businesses, they have discovered techniques to artificially minimize, if not completely eliminate, their tax obligations in some states. One commentator observed:

> Public Law 86-272 was originally intended primarily to protect smaller companies from having to comply with the states' allegedly burdensome income tax laws. However, almost before the ink on the Act was dry, a federal subcommittee charged with its review concluded that it did not serve this purpose, but instead benefited larger companies. This disparity has become greater with the passage of time as larger businesses have utilized tax planning to accord themselves the benefits of the Act. Further, since Public Law 86-272 benefits primarily larger companies and not smaller companies, it has the unintended

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[230] *See* UMG Recordings, Inc. v. Kurbanov, 963 F.3d 344, 352 (4th Cir. 2020); Bird v. Parsons, 289 F.3d 865, 874-75 (6th Cir. 2002).

[231] Compañía Gen. de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

effect of actually disadvantaging smaller companies relative to their larger competitors.[232]

A. Small Business Burdens

The future requires decisions—now. It imposes risk—now. It requires action—now.

– Peter Drucker[233]

Small business compliance costs are a significant challenge to imposing income taxes on every out-of-state business with nexus, as compliance costs can exceed a business's gross income.[234] Imagine a business owned and operated by one person, which makes three-dimensional wooden puzzles marketed to people who enjoy a challenge. This entrepreneur purchases marketing services that uses third-party cookies and other techniques to identify customers in twenty-five states. After selling the puzzles, the owner provides free assistance each week over the internet to customers who are having problems solving the puzzles. The post-sale support clearly exceeds the protections of P.L. 86-272, and suddenly this business discovers it has an income tax filing obligation in these twenty-five states, maybe owing a few dollars—or nothing at all—to each state. Further, imagine this business is incorporated and makes a few sales into California, earning $300 in gross income. Unfortunately for the business, California imposes a yearly minimum $800 franchise tax on all corporations.[235] In addition to the tax, the business must also

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[232] Michael T. Fatale, *Federalism and State Business Activity Tax Nexus: Revisiting Public Law 86-272*, 21 VA. TAX REV. 435, 438 (2002) (footnotes omitted).

[233] PETER F. DRUCKER, MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES 125 (1974).

[234] An attorney with the Multistate Tax Commission explains: "The impact on these businesses is something that state policymakers should be concerned about, since placing multistate income tax return filing and payment obligations on small businesses can impose excessive burdens (not only on the businesses but also on revenue departments) with little or no revenue benefit to states." Brian Hamer, *An Insider's View of the MTC's P.L. 86-272 Project*, 99 TAX NOTES STATE 1213, 1224 (2021).

[235] CAL. REV. & TAX. CODE § 23153(d) (West 2025).

register with the California Secretary of State,[236] maintain a registered agent in California,[237] and pay for preparing a California franchise tax return. This amounts to about $1,500 in tax compliance costs for $300 in gross income, and this does not cover the business's indirect costs, like meeting with the tax preparer and getting all documents needed to file the tax return. And yes, California expects compliance for tiny businesses.[238] At least twelve states require corporations with no income to file corporate tax returns: Alabama, Arkansas, California, Delaware, Louisiana, Massachusetts, Mississippi, Missouri, New Hampshire, North Carolina, Tennessee, and Texas.[239]

Businesses are not alone. States also incur processing costs in adding new taxpayers into their systems. Some state tax officials, informally, prefer out-of-state small businesses to not comply with their income tax laws when the amount owed is miniscule—the onboarding and monitoring costs to the state exceed the revenue

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[236] An initial fee of $100 and then a yearly $25 fee. CAL. SEC'Y OF STATE: BUS. PROGRAMS DIV., BUSINESS ENTITIES FEE SCHEDULE 1 (2018).

[237] It is approximately $100 a year to maintain a registered agent per state. Edward A. Haman, *How Much Does It Cost to Have a Registered Agent?,* LEGALZOOM (July 23, 2025), https://www.legalzoom.com/articles/how-much-does-it-cost-to-have-a-registered-agent [https://perma.cc/3GYR-7KHG]. If a corporation is doing business in 25 states, that amounts to $2,500 just to maintain a statutorily required agent, regardless of the business's income.

[238] A former colleague of mine shared the following story. Greg entered the State of California for two days, where he earned money as a workshop presenter. A few years later he received a letter from the California Franchise Tax Board ("FTB"), demanding he file a California income tax return because he had entered and earned money in California, creating nexus with California. Unquestionably, this was a nexus creating activity. He approached his tax advisor, who calculated his California tax liability as $50. Greg offered to send California $50, but the FTB insisted it needed a California tax return. After the FTB threatened to assess him for thousands of dollars in taxes, Greg spent several hundred dollars to prepare a California tax return, which he sent with the $50 to the FTB. While I am unsure how much it cost the FTB to bring Greg into compliance, I suspect the costs exceeded $50. Though to be fair, the FTB did not have a mechanism to verify Greg's representation that he only owed $50 until he filed his California tax return.

[239] ALA. CODE § 40-18-39(a) (2025) (Alabama); ARK CODE. ANN. § 26-51-806(a)(1) (2025) (Arkansas); CAL. REV. & TAX. CODE § 23153 (West 2025) (California); DEL. CODE ANN. tit. 8, § 502(a) (2025) (Delaware); LA. STAT. ANN. § 47:287.614 (2025) (Louisiana); MASS. GEN. LAWS ch. 63, § 32B (2025) (Massachusetts); MISS. CODE ANN. § 27-7-37(1) (2025) (Mississippi); MO. REV. STAT. § 143.481 (2025) (Missouri); N.H. REV. STAT. ANN. § 77-E:5 (2025) (New Hampshire); N.C. GEN. STAT. § 105-130.16(a) (2025) (North Carolina); TENN. CODE ANN. § 67-4-2015 (2025) (Tennessee); TEX. TAX CODE ANN. § 171.201 (West 2025) (Texas).

received.[240] While accountants might and do advise clients to not file in some states because their clients owe negligible tax amounts, lawyers are ethically bound to follow the law and advise compliance.[241] A better solution is for states to create laws limiting filing thresholds, rather than relying on ad hoc decisions by department of revenue employees.

The states need to adopt an alternative for small businesses when applying the modern nexus standard, otherwise they may run afoul of the Commerce Clause. The *Wayfair* Court noted "the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines."[242] To survive a Commerce Clause challenge, states need to think beyond nexus to "the practical effect of a challenged tax."[243] The State of South Dakota avoided this problem in *Wayfair* by enacting simplified tax collection requirements[244] and limiting tax collection to businesses with "a considerable amount of business in the State."[245] Income taxes

[240] When I was counsel to the Multistate Tax Commission (MTC), I managed their multistate voluntary disclosure program. This program allowed taxpayers to come into tax compliance with multiple states simultaneously, reducing their transactional costs by having the MTC contact multiple states on their behalf. One case I handled involved a small business, which had small income tax obligations in multiple states—owing about $75 per state. Several state department of revenue employees told me, going forward, that they preferred to not onboard these types of taxpayers, because the cost to handle their compliance exceeded the amount of generated revenue.

[241] Accountants often handle this situation by having their clients report the possible state income tax liability in their financial documents. This adequately discloses the potential liability to investors and reduces the business's compliance cost. Though anecdotal in nature, accountants have told me that in many of these situations, states never discover the small amounts owed to them.

[242] South Dakota v. Wayfair, Inc. 585 U.S. 162, 187 (2018).

[243] Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981).

[244] *Wayfair*, 585 U.S. at 189. The Court noted South Dakota was a signatory to the Streamlined Sales and Use Tax Agreement, which as of the publishing of this article has been adopted by 24 states. *Id.* at 187. "The purpose of the Agreement is to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance." *About Us*, STREAMLINED SALES TAX GOVERNING BD., INC., https://www.streamlinedsalestax.org/about-us/about-sstgb [https://perma.cc/NP3F-L5ZD] (last visited Oct. 24, 2025).

[245] *Wayfair*, 585 U.S. at 187. By contrast, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), is interesting because it balances the burden with the state interest. However, this approach is rarely used and was not applied in *Wayfair*, even though it

also need a simplified process. And if states don't find a solution, the *Wayfair* Court warned it will limit state tax authority when "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[246]

One possibility is for states to adopt the MTC's factor presence nexus standard.[247] When a business exceeds specific in-state thresholds in property, payroll, or sales, then that business has substantial nexus with that state. The relevant portion of the standard reads:

> B. (1) Substantial nexus is established if any of the following thresholds is exceeded during the tax period:
>
> (a) a dollar amount of $50,000 of property; or
>
> (b) a dollar amount of $50,000 of payroll; or
>
> (c) a dollar amount of $500,000 of sales; or
>
> (d) twenty-five percent of total property, total payroll or total sales.[248]

To deal with inflation, the standard includes a provision to increase the dollar amounts each year based on the consumer price index.[249] While the MTC's approach addresses the nexus issue, it is silent on the verification process. A state revenue agency will want some confirmation from all taxpayers with colorable nexus in their state, which may require a business to provide their federal tax return, a state form with the business's contact information, and a spreadsheet showing all factors for each state.[250] The MTC should consider creating a clearinghouse to gather this information, which the states can access electronically. This would significantly limit costs for small

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was the approach supported by the United States Solicitor General. *Wayfair*, 585 U.S. at 187.

[246] *Wayfair*, 585 U.S. at 173.

[247] *See* MULTISTATE TAX COMM'N, *supra* note 204, at 14-17.

[248] *Id.* at 14.

[249] *See id.*

[250] This would include the property, payroll, and sales in all 50 states and the District of Columbia.

businesses and provide states with some comfort that businesses with nexus are not evading their income tax obligations.

Another solution to deal with the small business issue is to revise P.L. 86-272 by adding a minimum filing threshold. But "getting a statute enacted . . . is much easier than getting the statute revised so that it will make sense in the light of changed conditions."[251] Business will want to expand the law's protections to include a physical presence requirement, while the states want to repeal it.[252] And as to the courts, they are not equipped to update a statute, though the *Wrigley* Court did add a *de minimis* exception—relatively insignificant tinkering that did not help Wrigley avoid nexus.[253] However, noted jurist Guido Calabresi suggested judges should update statutes that are entering senility.[254]

B. Large Business Manipulation

> It has been said that one man's loophole is another man's livelihood. Even if this is true, it certainly is not fair, because the loophole-livelihood of those who are reaping underserved benefits can be the economic noose of those who are paying more than they should.
>
> – Millicent Fenwick[255]

Larger businesses can arrange their affairs to significantly reduce their income tax burdens in "separate entity reporting" states. States can require businesses to file income taxes on a combined basis or separate entity basis. Most states use the combined method, where if one business entity has nexus in a

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[251] GRANT GILMORE, THE AGES OF AMERICAN LAW 86 (2d ed. 2014).

[252] *See* E-mail from Karl A. Frieden, Vice President & Gen. Couns., & Nikki E. Dobay, Senior Tax Couns., to Robert Desiderio, MTC Hearing Officer (Aug. 4, 2020) (on file with MTC).

[253] Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992).

[254] *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

[255] MILLICENT FENWICK, SPEAKING UP 100 (1982). Fenwick notes that "each of us pays a fair share of the burden." *Id.* The Court has done this by requiring fair apportionment—not perfect, but one which approximates fairness. *See, e.g.*, Butler Bros. v. McColgan, 315 U.S. 501, 503 (1942).

state, then the parent and all subsidiaries part of the same unitary business must include their income on a combined income tax return—the entire corporate group is effectively treated as one entity for tax filing purposes.[256] This is true even when those subsidiaries have no nexus with the taxing state, or are located outside the United States. To help explain the unitary business concept, there is a case involving a British beer company which manufactured all of its beer in England and sold most of its beer there too.[257] But the company had nexus in New York, where it sold some beer.[258] The Supreme Court held the activities in England and New York were part of the same unitary business, so the state could properly include the income from England into a New York state income tax return.[259] This tax reporting method makes it difficult for a business to use P.L. 86-272 to avoid paying income taxes as parents and subsidiaries are basically treated as one entity.[260] There are, however, states which use the "separate entity" approach.[261]

Separate entity reporting requires all companies with nexus to file tax returns—entities which are part of the same controlled group are not required to file returns or report their income in these states, even if they engage in the same unitary business.[262] Larger businesses can exploit these states by creating separate legal entities, placing P.L. 86-272 protected activities in one subsidiary and non-protected activities in another. By way of

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256 The unitary business concept is a Constitutional limitation on states. Basically, legal entities that are integrated with each other are part of the same unitary business. This is a simplistic explanation, but enough for this article. For more information, see JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION ¶ 8.07 (3d ed. 2025).

257 *See* Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271, 278 (1924).

258 *Id.* at 278-79. Though the company did not operate with separate entities, later cases show that all entities part of the same unitary business can be required to report their income on a combined tax return. *See* Exxon Corp. v. Dep't of Revenue, 447 U.S. 207, 230 (1980).

259 *Bass, Ratcliff & Gretton, Ltd.*, 266 U.S. at 282.

260 This is a vast oversimplification that does not address some aspects of combined income tax reporting.

261 *See* 2 RICHARD D. POMP, STATE & LOCAL TAXATION ch. 10, §§ 108-09 (9th ed. 2019).

262 For example, Alabama requires corporations to determine their federal taxable income on a separate-company basis, even if they file as part of a federal consolidated return. *See* ALA. ADMIN. CODE r. 810-3-1.1-.01(3) (2025).

example, Large-co, Inc. manufacturers, sells, and services computers under warranty. Because they provide services unrelated to solicitation, they must file taxes in every state where they service computers—presumably in the same states where the computers were sold. To limit their tax liabilities, Large-co, Inc. decides to create two wholly owned subsidiaries: Sales, Inc. and Services, Inc. They place their entire sales and shipping activities into Sales, Inc., which suddenly protects Sales, Inc. from taxation in separate entity reporting states. Services, Inc., in contrast, has nexus in every state where they fix computers, as this is not protected by P.L. 86-272. Sales, Inc. then enters into a contract with Services, Inc., with Services, Inc. agreeing to repair computers for $25 each plus repair costs. So, while Services, Inc. will have some taxable income, it is miniscule compared to income generated by Sales, Inc. This strategy insulates Large-co, Inc.'s primary income stream from the separate entity reporting states. In a combined reporting state, this strategy has no effect as the parent and two subsidiaries still file a combined tax return.

To some degree, separate entity states are responsible for this result. After all, they can revise their statutes and adopt combined reporting. And business isn't to blame, as in the words of Learned Hand: "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."[263] However, Congress must take the lion's share of responsibility for not repealing P.L. 86-272. Assuming compliance burden was the rationale for the statute, it is hard to see how entity isolation advances that rationale—businesses are filing tax returns for some entities and not for others, demonstrating compliance costs are not the problem. This manipulation is another sign of statutory obsolescence, as the statute is used in a manner not contemplated by Congress. In the Constitutional debates, one writer noted "[n]othing can be more ruinous to a state or oppressive to individuals than a partial and dilatory collection of taxes."[264]

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[263] Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934).

[264] THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

CONCLUSION

> Well, it just so happens that your friend here is only mostly dead. There's a big difference between mostly dead and all dead.
>
> – Miracle Max[265]

Businesses litigating modern nexus issues must do so in state court—the federal courts are closed to them under the Tax Injunction Act.[266] State courts, beholden to in-state interests, are more likely to rule against a foreign business contesting nexus. After all, an out-of-state business is asking to not pay a tax with which in-state businesses must comply, creating an unlevel playing field. That is a hard sell for state court judges, many of whom are elected. This leaves the United States Supreme Court as the only federal court which can hear these cases, which is highly unlikely because of the number of cases they are asked to review each year.[267] Also, there is a view on tax law held by many courts:

> [T]ax law is less interesting or important than other areas of law pervades even the Supreme Court. . . . For example, when asked why he sings along with the Chief Justice at the

[265] THE PRINCESS BRIDE, Disney Plus, at 1:12:11 (20th Century Fox 1987). One well respected tax practitioner noted, partially in jest: "OK, [m]aybe 86-272 [i]s [d]ead." David Brunori, *Another Crack in the Shield: SALT in Review*, LAW360: TAX AUTH. (July 12, 2024, at 16:57 ET), https://www.law360.com/tax-authority/articles/1857071 [https://perma.cc/M76J-8WMS].

[266] California v. Grace Brethren Church, 457 U.S. 393, 407-08 (1982) ("The Tax Injunction Act states simply that the district courts 'shall not enjoin, suspend or restrain the . . . collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.' It is plain from this language that the Tax Injunction Act prohibits a federal district court, in most circumstances, from issuing an injunction enjoining the collection of state taxes. . . . [T]he Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional.").

[267] The Court receives over 7,000 *certiorari* petitions a year, accepting 100-150. *Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures [https://perma.cc/QW5Q-Z9HL] (last visited Mar. 19, 2025).

> Court's annual Christmas party, Justice Souter replied, "I have to. Otherwise I get all the tax cases."[268]

It would take a concerted effort by businesses to get the Court interested in an income tax nexus case, with litigation costs far outweighing compliance costs in most instances.[269]

P.L. 86-272 is a statute on life support, protecting an ever-shrinking percentage of businesses that limit their activities to soliciting orders of tangible personal property, shipping orders from out of state, and using common carriers for delivery. At least the statute doesn't require that the common carrier use horse-drawn wagons. It's not archaic yet but is certainly becoming more obsolete with each technological advance. Unfortunately, it continues to act as a trap for the unwary small or new business, which expands beyond solicitation activities to inadvertently create income tax nexus. Without any realistic means of revision, we are left watching P.L. 86-272 move from the autumn to winter of life. Congress should step in and let it retire.

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[268] Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 525 (1994).

[269] A law firm will charge between $100,000 and $500,000 for handling a Supreme Court matter. George Khoury, *How Much Do Lawyers Get Paid to Argue at SCOTUS?*, FINDLAW (Mar. 21, 2019), https://www.findlaw.com/legalblogs/greedy-associates/how-much-do-lawyers-get-paid-to-argue-at-scotus [https://perma.cc/2YDP-BAN7].