Inequity in the Market: Traditional Cable Television Versus "Streaming Cable"

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I. INTRODUCTION

The Internet Tax Freedom Act (ITFA) has promoted and enabled American internet usage to grow since 1998.[1] This growth is attributed, in large part, to the ITFA's prohibition on state taxation of internet access and discriminatory taxes against electronic commerce.[2] While such growth is good for the U.S. economy and the American public at large, questions arise over whether the states' inherent constitutional power of taxation should be completely prohibited by the ITFA. In a world dominated by technology and internet use, when is the internet, and corporations who conduct their business over it, insulated enough by our federal government against state and non-internet-based corporations? And at what point do the state governments and non-internet-based corporations need a helping hand through the restoration of their inherent power to tax?

The ITFA touches nearly everything in today's online world—for better or worse. This Note discusses its application to state cable franchisee laws. Due to preference shifts towards corporations that provide streaming services in the past decade,[3] states have experienced decreasing tax revenues due to dwindling cable television viewership.[4] To recoup these losses, states have begun the process of taxing streaming service corporations, much like they do to corporations that provide cable television.[5] Legal scholars have come to the same conclusion: state taxation of streaming services that provide a variety of different content facially violates the ITFA.[6]

While the rationale for these findings is well established in scholarship, the narrow question this Note will attempt to answer is not as clear. That is, are streaming service corporations that provide a direct substitute to traditional cable television afforded the same protections from the ITFA as those streaming service corporations that provide a variety of content? These substitute services have become abundant in recent years—the most notable examples include YouTube TV and Hulu Live.[7] This recent innovation has created two categories of streaming services: traditional streaming and streaming cable. Streaming cable provides content extremely similar to that of traditional cable, such as television

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1. *See* Erik Cederwall, *The Internet Tax Freedom Act and the Internet Economy*, TAX FOUND. (Oct. 27, 2014), https://taxfoundation.org/internet-tax-freedom-act-and-internet-economy [https://perma.cc/63BG-4WZ7] (explaining that during the moratorium years of 1997 to 2021, internet access increased from 18% to 74.8%).

2. Internet Tax Freedom Act, Pub. L. No. 105–277, 112 Stat. 719 (1998).

3. *See* Lee Rainie, *Cable and Satellite TV Use Has Dropped Dramatically in the U.S. Since 2015*, PEW RSCH. CTR. (Mar. 17, 2021), https://www.pewresearch.org/fact-tank/2021/03/17/cable-and-satellite-tv-use-has-dropped-dramatically-in-the-u-s-since-2015 [https://perma.cc/4BP9-AQHV] (stating how the percentage of Americans using cable or satellite television decreased from 76% in 2015 to 56% in 2021, contributing to the decline of the average American's ability to receive the same content online).

4. *See* Elaine S. Povich, *Cities and States Find New Ways to Tax Streaming Services*, PEW STATELINE (Jan. 18, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/01/18/cities-and-states-find-new-ways-to-tax-streaming-services [https://perma.cc/Z5ZM-AAPE] (detailing the large losses incurred by states and their efforts to recoup those losses through different initiatives).

5. *Id.*

6. *See* Wallace, *infra* note 27, at 189 (pointing to the congressional record that the ITFA drafters, with the proposed legislation in mind, desired an environment for the internet to grow); Conti, *infra* note 35, at 1695 ("[N]o court should hold that taxing video and streaming services is permissible.").

7. *See generally* YOUTUBE TV HELP, https://support.google.com/youtubetv/answer/7370552?hl=en [https://perma.cc/5WQ9-C6CR]; HULU, https://www.hulu.com/live-tv [https://perma.cc/6VE9-J8XS].

guides, channels, and local news and sports.[8] This Note hypothesizes that the ITFA does not provide the same protections to streaming cable as traditional streaming services. This is due to the similarities between the two, their participation in the same market, the less than direct application of the ITFA to streaming cable, and the constitutional issues inherently associated with federal government actions restricting a state's taxation powers.

II. BACKGROUND

A. Statutory Background

1. The Internet Tax Freedom Act

Congress enacted the ITFA on October 21, 1998, to protect the growth of the internet and its usage.[9] The ITFA has tremendously impacted internet-based technology and its ability to grow.[10] The ITFA prohibits states from taxing the internet in two distinct ways: (1) prohibiting the taxation of internet access, and (2) prohibiting the imposition of discriminatory taxes on electronic commerce.[11] Internet access is defined as "a service that enables users to access . . . services offered over the Internet . . . ."[12] Further, the ITFA defines a discriminatory tax as:

> any tax imposed by a State . . . on electronic commerce that— (i) is not generally imposed and legally collectible by such State . . . on transactions involving similar property, goods, services, or information accomplished through other means; (ii) is not generally imposed and legally collectible at the same rate by such State . . . on transactions involving similar property, goods, services, or information accomplished through other means . . . (iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.[13]

This means a state cannot tax electronic commerce differently than traditional commerce. The ITFA further clarifies that its contents shall not "be construed to modify, impair, or supersede, or authorize the modification, impairment, or superseding of, any State or local law pertaining to taxation that is otherwise permissible by or under the Constitution of the United States or other Federal law."[14]

The prohibition on state taxation of electronic commerce was not intended to be permanent, as evidenced by the limited three-year period chosen by Congress in 1998.[15]

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8. *See* YOUTUBE TV HELP, *supra* note 7 (providing access to local news and describing its available networks as "channels"); HULU, *supra* note 7 (providing local news and sports and advertising its ability to avoid local broadcast and sports fees that traditional cable cannot).

9. Internet Tax Freedom Act, 47 U.S.C. § 151.

10. *See* Cederwall, *supra* note 1 (explaining how, during the moratorium years 1997–2021, internet access has increased from 18% to 74.8%).

11. 47 U.S.C. § 151.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*; *see also* MILAN N. BALL, CONG. RSCH. SERV., IF11947, THE INTERNET TAX FREEDOM ACT AND FEDERAL PREEMPTION 1 (2021), https://crsreports.congress.gov/product/pdf/IF/IF11947

However, the prohibition has not been temporary. Since 1998, Congress extended the ITFA's moratorium consistently[16] until President Obama granted it permanent status in 2015.[17] The ITFA was granted its permanent status by striking the moratorium end date from its original provision and leaving the two prohibitions on state taxation in place.[18]

2. *State Cable Television & Video Service Laws*

A growing concern with the ITFA is its applicability to state cable television and video service franchisee laws and regulations.[19] Traditionally, states have held the power to tax and regulate cable television providers through franchisee licenses and annual fee collection.[20] Before the innovation of streaming service corporations and large preference shifts toward providers like Netflix and Hulu,[21] states and municipalities benefited from the franchisee tax revenue.[22] Today, the allocation of tax revenue from cable franchisee laws has greatly diminished.[23] This forces municipalities to find alternative ways to raise revenue.[24] The prominent alternative among municipalities is their attempts to apply their cable television and video service franchisee laws to these streaming service corporations.[25] The municipalities' attempts have led to less than desirable results in a variety of state and federal courts, mostly due to the lack of a right of action among the municipalities.[26]

[https://perma.cc/5WZK-CDCA] (stating that Congress's goal was to create a "uniform taxing scheme" and to "prevent . . . unpredictable and overly burdensome" state taxation schemes on electronic commerce).

16. BALL, *supra* note 15, at 1.

17. Trade Facilitation and Trade Enforcement Act, Pub. L. No. 114-125, 130 Stat. 281 (2015).

18. *Id.*

19. *See infra* notes 22–26 and accompanying text.

20. *See, e.g.*, N.J. REV. STAT. § 48:5A (2023) (requiring cable television services to seek municipality consent or New Jersey state-wide license to conduct business); KAN. STAT. ANN. § 12-2006 (2023) (allowing Kansas municipalities the power to "permit or prohibit the operation of all businesses furnishing cable television").

21. *See* Rainie, *supra* note 3 (stating that the percentage of Americans using cable or satellite television has decreased from 76% in 2015 to 56% in 2021, attributing this decline to the average consumer's ability to receive the same content online).

22. *See* Povich, *supra* note 4 (detailing the large losses incurred by states and their efforts to recoup those losses through different initiatives).

23. *See id.* (explaining how television revenues declined "from $116.9 billion in 2016 to $91.1 billion in 2021" because of consumers' preference shifts toward internet-based streaming services).

24. *See id.* (pointing to numerous states and adding the term "streaming services" into their cable television franchisee laws).

25. *Id.*

26. *See* City of E. St. Louis v. Netflix, Inc., 630 F. Supp. 3d 1003, 1013 (S.D. Ill. 2022) (finding the municipality had no right of action because Illinois law granted enforcement powers with the Illinois Attorney General, not the municipality itself, by pointing to case precedent that stated there is no cause of action when enforcement powers are vested with a specific entity in the statute).

B. Case History & Court Hesitancy

1. ITFA's Impact on Cable & Video Service Corporations

Congress originally passed the ITFA to foster an environment where internet usage and electronic commerce would flourish.[27] The success of the ITFA is clear. In 2021, the internet was used daily by 93% of Americans[28] with an increased number of consumers preferring electronic commerce to that of traditional commerce.[29] This is especially true in the market for television providers with more viewers preferring a streaming service than traditional cable.[30] These numbers are even more favorable for streaming services with younger populations. This younger population preference indicates that market conditions for cable television providers may deteriorate over time.[31] The ITFA has played no small role in the promotion of streaming services by allowing them to flourish against their competition through a prohibition on state taxation and regulation.[32]

2. Streaming Service Corporations and the ITFA

Shifts in viewer preference and losses of tax revenue have caused municipalities to initiate suits against streaming service corporations. These suits often reflect the plaintiff-municipality's belief that their inherent right to tax should reach those streaming service corporations—whether or not that content is similar or different to traditional cable.[33] The streaming services' defense to these suits often rests with the ITFA's anti-discrimination tax clause.[34] While there is no court ruling on this issue, legal scholars agree that the ITFA

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27. *See* Michael Wallace, *Taxing the Nontaxable: Are State and Local Governments Allowed to Tax Internet Streaming Service Providers?*, 70 FED. COMMC'NS L.J. 179, 189 (2018) (pointing to the congressional record to support the claim that its drafters, with the proposed legislation in mind, desired an environment for the internet to grow).

28. Olivia Sidoti et al., *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Jan. 31, 2024), https://www.pewresearch.org/internet/fact-sheet/internet-broadband [https://perma.cc/2AQT-9FKT].

29. Aaron Smith & Monica Anderson, *Online Shopping and E-Commerce*, PEW RSCH. CTR. (Dec. 19, 2016), https://www.pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce [https://perma.cc/L8TL-UTE5] (reporting that, today, roughly 80% of Americans are online shoppers, with only "64% . . . prefer[ing] . . . physical stores to buying online").

30. Hayden Rutledge, *The High Seas of Television: How Should Streaming Television Be Regulated?*, ISSUE SPOTTER (Apr. 17, 2020), https://jlpp.org/blogzine/the-high-seas-of-television-how-should-streaming-television-be-regulated/ [https://perma.cc/KNF8-TASR]. In 2019, Americans who subscribed to streaming services (69%) surpassed those who subscribed to traditional cable (65%). *Id.*

31. *Id.* In 2019, 88% of people aged 22–35 subscribed to a form of streaming service. *Id.*

32. *Compare* Internet Tax Freedom Act, 47 U.S.C. § 151 (prohibiting taxes and regulations on internet access and in discriminatory ways), *with* N.J. REV. STAT. § 48:5A (2023) (requiring state authorization for corporation wanting to conduct television service within state).

33. *See generally* Borough of Longport v. Netflix, Inc., No. 21-CV-15303, 2022 WL 1617740 (D.N.J. May 20, 2022) (ruling on a motion to dismiss in a lawsuit involving Netflix and Hulu); City of E. St. Louis v. Netflix, Inc., 630 F. Supp. 3d 1003, 1013 (S.D. Ill. 2022) (ruling on a case involving Netflix, Disney, Apple, Hulu, and many others).

34. *See* City of Lancaster v. Netflix, No. 21ST-CV-01881, 2021 WL 4470939, at *21 (Cal. Super. Ct. Sept. 20, 2021) (relying on ITFA as a defense); City of Fishers v. DIRECTV, 5 F.4th 750, 756 (7th Cir. 2021) (holding that the Indiana law in question violated the ITFA by discriminating against e-commerce).

would most likely bar a suit against streaming services by invoking the anti-discrimination tax clause.[35]

These legal scholars base their hypotheses on the inherent differences between streaming services that provide a variety of content and traditional cable.[36] While research on the ITFA and streaming services is developed, research on the new wave of streaming services (i.e., streaming cable) is not.[37] The format of streaming cable directly mirrors that of traditional cable—with channels, television guides, and identical content—to the point you must provide your physical location to access local news stations.[38] Due to these similarities, the ITFA's anti-discrimination tax clause may have less of an effect on streaming cable than it is predicted to have compared to streaming services which provide a variety of content.[39] If a state imposes a tax on streaming cable, the issues surrounding the ITFA's anti-discrimination tax clause and other potential constitutional issues are still very much prevalent; however, the rationale behind imposing such a prohibition seems less intuitive.

3. Issues of Private Right of Action

Only municipalities have thus far enacted suits against corporations providing streaming services with the intent to collect franchisee fees.[40] Courts have overwhelmingly ruled against these municipalities because the municipality lacked a right of action in the state franchisee law it sought to enforce.[41] This Note found only one court that allowed a municipality to sue under its state's cable television and video service law, but its recency prevents this Note from inquiring any further.[42] More fully developed cases provide more guidance. In *Borough of Longport v. Netflix, Inc.*, a federal district court held that New Jersey's cable television and video service franchise laws provided municipalities no private right of action.[43] The court stated, "[w]here a statute's legislative scheme provides

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35. *See* Wallace, *supra* note 27, at 198 (predicting that courts will "strik[e] down state and local tax regulations that violate" the ITFA); Genna Autumn Conti, *Tapping the Netflix Binge: Cities Binging on Taxing Streaming Services Violate Federal Law*, 69 RUTGERS U. L. REV. 1653, 1695 (2017) (arguing that "no court should hold that taxing video and streaming services is permissible").

36. *See* Wallace, *supra* note 27, at 186–87 (studying the ITFA's applicability to Netflix which allows "[m]embers [to] watch as much [videos] as they want, anytime, anywhere, on nearly any Internet-connected screen"); Conti, *supra* note 35, at 1670 (analyzing *Label v. City of Chicago*, and the ITFA's applicability on Netflix, X-box Live, and Amazon Prime).

37. Examples include YouTube TV and Hulu Live.

38. YOUTUBE TV HELP, *supra* note 7.

39. Internet Tax Freedom Act, 47 U.S.C. § 151.

40. *See* Alan Poole, *Streaming and Franchise Fees: Implications for Communications Infrastructure*, JDSUPRA (Feb. 28, 2022), https://www.jdsupra.com/legalnews/streaming-and-franchise-fees-5531867 [https://perma.cc/L5QV-LR9M] (highlighting the key cases initiated by municipalities and providing a recommendation when a state legislature should act).

41. *See* Borough of Longport v. Netflix, Inc., No. 21-CV-15303, 2022 WL 1617740, at *3 (D.N.J. May 20, 2022) (finding the right of action to rest with the New Jersey Board of Public Utilities); City of E. St. Louis v. Netflix, Inc., 630 F. Supp. 3d 1003, 1012 (S.D. Ill. 2022) (finding the right of action to rest with the Attorney General of Illinois).

42. *See* Netflix, Inc. v. City of Fishers, 212 N.E.3d 188, 194 (Ind. Ct. App. 2023) (holding the municipality that initiated suit had a right of action because it fell under the definition of "person" under the Indiana video service statute).

43. *Borough of Longport*, 2022 WL 1617740, at *3.

mechanisms for enforcement, a plaintiffs' need for a private cause of action is obviate[d]."[44] Because New Jersey's cable television and video service franchisee laws appointed a special regulatory body to enforce the specific statute, the court held the municipality must go through the regulatory body to initiate a suit.[45] Instead, the municipalities chose to skirt around the regulatory body's authority and, by doing so, lacked any semblance of a right of action.[46]

Another federal district court reached a similar outcome in *City of East St. Louis v. Netflix, Inc.*[47] There, the court ruled that the Illinois statute requiring state authorization for cable or video service gave no right of action to the municipality party to the suit.[48] The court rested its holding on a long line of cases that established that a local government has no right of action to initiate a suit when the statute in question explicitly delegated the enforcement power to an entity other than the municipality.[49] The Illinois statute rested its enforcement with the Attorney General of Illinois, so the attorney general was the only party with a right of action in that particular suit.[50] In both holdings, the courts hinted at the possibility of a more favorable ruling for the plaintiffs if it was initiated by the entity or person who was delegated the statute's enforcement power.[51] While such a scenario may be possible, lobbying groups consisting of large streaming service corporations make this reality an afterthought.[52]

C. *Constitutional Issues &* Murphy v. NCAA

The application of the ITFA on streaming cable versus traditional cable—which are near or perfect substitutes to each other in the same market—has not been analyzed as thoroughly as those forms of streaming that materially deviate from the content and format of traditional cable.[53] Because of this lacking analysis, questions arise over whether the ITFA's anti-discrimination tax clause truly applies to streaming cable in the same fashion as it is predicted to apply to streaming services which provide a variety of content. While the answer may not be readily available in the text of the ITFA, caselaw concerning the

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44. *Id.*

45. *Id.* at *3–4.

46. *Id.* at *3.

47. City of E. St. Louis v. Netflix, Inc., 630 F. Supp. 3d 1003, 1013 (S.D. Ill. 2022).

48. *Id.* at 1012–13.

49. *Id.* at 1020–21. To analyze the court's holding and precedent on this issue, see City of Reno v. Netflix, Inc., 558 F. Supp. 3d 991 (D. Nev. 2021); City of Ashdown v. Netflix, Inc., 565 F. Supp. 3d 1111 (W.D. Ark. 2021); City of New Bos., Tex. v. Netflix, Inc., 565 F. Supp. 3d 865 (E.D. Tex. 2021); City of Lancaster v. Netflix, No. 21ST-CV-01881, 2021 WL 4470939 (Cal. Super. Ct. Sept. 20, 2021); Gwinnett Cnty., Ga. v. Netflix, Inc., No. 20-A-07909-10, 2022 WL 678784 (Ga. Super. Ct., Feb. 18, 2022).

50. *City of E. St. Louis,* 630 F. Supp. 3d at 1011–12.

51. *Id.* at 1012.

52. *See* Todd Sangler, *Netflix, Disney, Max and More Team to Form Streaming Innovation Alliance Lobbying Group*, VARIETY (Sept. 26, 2023) https://variety.com/2023/biz/news/streaming-innovation-alliance-netflix-disney-max-1235735932 [https://perma.cc/SXG3-7SNT] (describing the powerful lobbying group created by some of the biggest players in the streaming service market).

53. *See supra* notes 35–36 and accompanying text.

Dormant Commerce Clause and the Anti-Commandeering Doctrine may play a significant role in providing that answer.[54]

The Dormant Commerce Clause is "the implicit corollary that if Congress is to regulate commerce between the states and with foreign nations, then state governments may not . . . impede the free flow of trade between states."[55] When this impediment is in the form of a tax, courts will look to see if "[the state] taxes a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State."[56] A state-levied tax may discriminate against interstate commerce in three ways: facial discrimination, discriminatory intent, or undue burden on interstate commerce.[57] A party seeking to enforce the Dormant Commerce Clause against a state does not do so automatically by distributing their goods interstate—the clause protects access to interstate commerce, not how it is regulated in its particular markets.[58] Thus, when two substitute goods in the same market are taxed evenly, the fact that one good occurs fully within the state and the other transacts interstate does not automatically indicate that the state has taxed in some discriminatory way in violation of the Dormant Commerce Clause.[59]

The other constitutional doctrine applicable to the ITFA is the Anti-Commandeering Doctrine. The doctrine is rooted in the Tenth Amendment and states "Congress may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.'"[60] The doctrine is historically rooted in three rationales: (1) it maintains a healthy balance between state and the federal government; (2) it promotes political accountability; and (3) it prevents cost-shifting of regulations to the states.[61] The doctrine prohibits Congress from commandeering a state legislature by prohibiting it from enacting or enforcing a state statute.[62] Either Congress directly regulates the issue or states may decide to enact policy themselves.[63]

In *Murphy v. NCAA*, the Court held that Congress overstepped its authority when it directly prohibited the states from authorizing or regulating sports gambling via the Professional and Amateur Sports Protection Act (PAPSA).[64] The Court held that Congress violated the Anti-Commandeering Doctrine by not regulating sports gambling directly but through state legislatures themselves.[65] PAPSA prohibited the states from authorizing sports gambling rather than making the act of sports gambling itself a federal crime.[66] *Murphy*'s importance lies in its holding and how it may be interpreted to affect the ITFA.

54. U.S. CONST. art. 1, § 8, cl. 3; New York v. United States, 505 U.S. 144, 202 (1992) (citing Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).

55. DIRECTV, Inc. v. Levin, 907 N.E.2d 1242, 1247 (Ohio Ct. App. 2010) (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 (1977)); U.S. CONST. art. 1, § 8, cl. 3.

56. Armco Inc. v. Hardesty, 467 U.S. 638, 642 (1984).

57. Amerada Hess Corp. v. Dir., Div. of Tax'n, N.J. Dep't Treas., 490 U.S. 66, 75 (1989).

58. *DIRECTV, Inc*., 907 N.E.2d at 103.

59. *Id.*

60. New York v. United States, 505 U.S. 144, 202 (1992) (citing Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).

61. Murphy v. NCAA, 584 U.S. 453 (2018).

62. *Id.* at 484–85.

63. *Id.*

64. *Id.*

65. *Id.* at 445.

66. *Murphy*, 584 U.S. at 445.

The Court's holding may be read as possibly extending the Anti-Commandeering Doctrine to those statutes that prevent a state legislature "from taking a specific action."[67] If true, this may invalidate the ITFA and other similar statutes, allowing states to tax internet streaming services, absent Dormant Commerce Clause violations.[68]

III. ANALYSIS

The benefits of the ITFA are apparent from the above statistics,[69] but its deficiencies, while less apparent, still create negative externalities that impact various actors: state and local governments, the federal government, and corporations competing in the television content provider market.[70] Congress, through the ITFA, prohibits states and their municipalities from benefiting from a major source of revenue in an already established market: television franchisee fees.[71] This prohibition creates a situation in today's technologically advanced world where two corporations that produce goods that are close substitutes in the same market may be taxed at extremely different rates.[72] This source of market inequity calls into question the ITFA's appropriateness in the market for substitute goods and whether states truly violate the discriminatory tax clause in particular circumstances. The implications it creates for different players, the concerns surrounding some constitutional doctrines, and the recent holding in *Murphy* demonstrate that the answers to these questions are not as clear as they once were.

A. The ITFA Is Ill-Suited for "Streaming Cable" Corporations

1. The Inapplicability of the Discriminatory Tax Clause

Congress's original goal was that the IFTA would facilitate growth for a new type of innovation—the internet.[73] At the time, business conducted via electronic commerce was much different than that of traditional commerce and was not comparable to another good the state already taxed.[74] Thus, satisfying the discriminatory tax clause of the ITFA was

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67. BALL, *supra* note 15, at 2.

68. *See* JAY B. SYKES, CONG. RSCH. SERV., LSB10133, THE SUPREME COURT BETS AGAINST COMMANDEERING: *MURPHY V. NCAA*, SPORTS GAMBLING, AND FEDERALISM 4 (2018), https://crsreports.congress.gov/product/pdf/LSB/LSB10133 [https://perma.cc/LN3L-XK4B] (noting the potential impact the Court's ruling may play on federal statutes that limit a state's power to tax).

69. *See supra* notes 1, 3, 5, 9 (detailing significant increases in internet use since 1998 and the large preference shifts from traditional forms of commerce and television to those over the internet).

70. Povich, *supra* note 4 (highlighting states' loss in tax revenue because of preference shifts from cable television to streaming services).

71. *Id.*

72. *Compare* Internet Tax Freedom Act, 47 U.S.C. § 151 (prohibiting taxes and regulations on internet access and in discriminatory ways), *with* N.J. REV. STAT. § 48:5A (2023) (requiring cable television services to seek municipality consent or New Jersey state-wide license to conduct business).

73. Internet Tax Freedom Act, 47 U.S.C. § 151.

74. *See* Patrick Temple-West, *States' Online 'Amazon Tax' Fight May Land in U.S. Supreme Court—Lawyers*, REUTERS (Oct. 21, 2013), https://www.reuters.com/article/usa-tax-amazon/states-online-amazon-tax-fight-may-land-in-u-s-supreme-court-lawyers-idUSL1N0I818T20131021 (on file with the *Journal of Corporation Law*) (identifying the challenges associated with state taxation of Amazon, which provides goods one would ordinarily find in the traditional commerce marketplace).

not an issue at its inception. However, as technology and the internet rapidly expanded, the line between a discriminatory and non-discriminatory tax became less clear.

The discriminatory tax clause of the ITFA prohibits a state tax which (1) "is not generally imposed and legally collectible . . . on transactions involving similar . . . services," (2) "is not generally imposed and legally collectible at the same rate on . . . services," and (3) "imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar . . . services . . . ."[75] Therefore, a tax is discriminatory if it "exists only when similar property, goods, services, or information are taxed when purchased electronically but not when purchased offline."[76] When a corporation provides a streaming service that provides a variety of content in a more distinct mode than traditional cable, the state tax would violate the ITFA's discriminatory tax clause, and a court may invalidate it because the goods or services are only provided over the internet (rather than traditional commerce). Video rentals may be an acceptable traditional commerce form that meets the ITFA standard for traditional streaming services in this situation.[77] However, this solution is inadequate for the states or municipalities initiating the suit because the market for traditional video rentals has significantly decreased due to the advent of streaming services[78] and because states that initiate suits against streaming service corporations seek relief under the state's cable television and video service franchise laws, which do not affect traditional video rentals.[79]

When the good or service provided over the internet is comparable to that of a good or service provided through traditional means of commerce, the above analysis must be taken a step further. Here, the innovation of streaming cable has created a perfect or near-perfect substitute for traditional cable.[80] Both services provide the same content and format including channels, television guides, and local news stations.[81] One must analyze these two separate goods—traditional cable and streaming cable—to see if a tax of equal rates imposed on streaming cable would truly violate the three subsections of the discriminatory tax clause. This analysis shows it would not. The proposed tax would be generally imposed on like services at the same rate and would not impose any different obligations than the state would impose on other taxed goods and services.[82] The state will not violate the discriminatory tax clause of the ITFA by taxing streaming cable and traditional cable at the

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75. *Id.*

76. Labell v. City of Chicago, 147 N.E.3d 732, 748 (Ill. App. Ct. 2019).

77. Andrew Wilford, *The Latest Form of Discriminatory Digital Tax—Streaming Taxes*, NAT'L TAXPAYERS UNION FOUND. (Aug. 9, 2022), https://www.ntu.org/foundation/detail/the-latest-form-of-discriminatory-digital-tax-streaming-taxes [https://perma.cc/P4CD-XLRU].

78. *See* Brian Stelter, *Internet Kills the Video Store*, N.Y. TIMES (Nov. 6, 2014), https://www.nytimes.com/2013/11/07/business/media/internet-kills-the-video-store.html (on file with the *Journal of Corporation Law*) (describing the demand for video services over the internet has all but killed the physical video rental industry).

79. *See generally* City of E. St. Louis v. Netflix, Inc., 630 F. Supp. 3d 1003 (S.D. Ill. 2022) (deciding a case where a municipality sued to recover loss fees against Netflix under the Illinois Cable and Video Competition Law); Borough of Longport v. Netflix, Inc., No. 21-CV-15303, 2022 WL 1617740 (D.N.J. May 20, 2022) (deciding a case where a municipality sued Netflix and Hulu to recover loss fees under New Jersey's Cable Television Act).

80. *See* Part II.B (describing the similarities between streaming cable and traditional cable).

81. YOUTUBE TV HELP, *supra* note 7.

82. Internet Tax Freedom Act, 47 U.S.C. § 151 (noting the three different subsections of the definition for discriminatory taxes).

same rate. This would allow the state to recoup the tax or licensing fee revenue lost via preference shifts to streaming cable platforms such as YouTube TV and Hulu Live.

2. *Promotion of Market Inequities: Cable Television Versus Streaming Cable Corporations*

As it currently stands, the ITFA promotes market inequities between corporations that provide traditional cable and those that provide streaming cable. States may tax traditional cable television and video services if those services provide their content via the state's television franchisee license and fee.[83] Streaming cable, on the other hand, cannot be taxed by the states due to the protections under the ITFA.[84] The fact that one substitute good or service is allowed to be taxed while the other is not creates an enormous disadvantage for the former. Paired with recent preference shifts favoring streaming cable and streaming services in general, cable television could be the next victim at the hands of internet streaming services.[85] Eventually, this could lead to a monopoly in the television provider market.[86]

U.S. policy on market competition promotes fair competition and the ability to prevent large companies or corporations from dominating a certain market.[87] The ITFA, in its current form, directly contradicts this policy by effectively blindfolding traditional cable television providers, tying both their hands behind their backs, and forcing them into a knock-out brawl against streaming cable corporations in a competition for viewership.[88] The ITFA also severely limits states through disadvantageous secondary effects of shrinking viewership among traditional cable television.[89] Congress should address this issue by carving out a narrow exception to the ITFA for this specific issue—i.e., streaming

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83. *See supra* note 20 (describing Kansas's and New Jersey's laws on this issue).

84. Internet Tax Freedom Act, 47 U.S.C. § 151; Rutledge, *supra* note 30 (explaining how cable television regulations do not apply to streaming services who provide multi-channel content).

85. *See* Stelter, *supra* note 78 (highlighting the business casualties created due to preference shifts towards internet-based television and video providers); Povich, *supra* note 4 (detailing the large losses suffered by traditional cable at the hands of streaming services).

86. Rob Miraldi, Opinion, *How Do the Cable Giants Get Away with It? Americans Deserve Better*, POUGHKEEPSIE J. (Oct. 1, 2021), https://www.poughkeepsiejournal.com/story/opinion/2021/10/01/how-do-cable-giants-get-away-their-monopoly/5930006001 [https://perma.cc/E5UV-2V3D] (explaining how, today, cable and tech giants nearly have monopoly power over their respective markets and that a recent large drop in cable television viewership can be attributed to those switching to streaming services); Emily Stewart, *America's Monopoly Problem, Explained by Your Internet Bill*, VOX (Feb. 18, 2020), https://www.vox.com/the-goods/2020/2/18/21126347/antitrust-monopolies-internet-telecommunications-cheerleading [https://perma.cc/U4Q7-XVZN] (explaining that, because the cable television market is so concentrated in a limited number of companies, they are more likely to be able to gradually raise their prices without much push back from their customers).

87. *See* Thomas J. Horton, *Restoring American Antitrust's Moral Arc*, 62 S.D. L. REV. 11, 17 (2017) ("America's antitrust laws are consequently 'rooted in a preference for pluralism, freedom of trade, access to markets, and freedom of choice. All of these values contribute to the law's summarizing norm—commitment to the maintenance of the competitive process.'").

88. *See supra* Part III.A.1 (describing the State's right to tax traditional cable versus prior content describing the prohibition on the State from taxing electronic commerce—i.e., streaming services).

89. *See* Rutledge, *supra* note 30 (explaining how streaming service viewership has steadily increased, surpassing the declining viewership of traditional cable); Povich, *supra* note 4 (explaining how states have lost out on tax revenue via preference shifts to traditional streaming and streaming cable).

cable versus other streaming services. The same result may be reached by Congress making the proper distinction between streaming cable and other streaming services that are not a direct substitute to traditional cable television services. This exception to the ITFA or a statutory distinction may be unnecessary if the discriminatory tax clause of the ITFA does not apply to the equal taxation of streaming cable and traditional cable, as is argued above. If the discriminatory tax clause does apply to this situation and Congress takes no initiative, states will continue to lose tax revenue from cable television provider corporations as they are increasingly knocked out of the competition, allowing streaming service corporations to continue monopolizing the market.[90]

B. Constitutional Analysis of Taxing "Streaming Cable" Corporations and Its Implications

Two constitutional doctrines are integral when exploring whether a state may tax streaming cable at the same rate it taxes traditional cable: the Dormant Commerce Clause and the Anti-Commandeering Doctrine. Extrapolating both will further this Note's argument that the ITFA's discrimination tax clause is inapplicable to streaming cable (Dormant Commerce Clause) and, if applicable, will show that the ITFA is unconstitutional in this specific circumstance (Anti-Commandeering Doctrine). Lastly, the ruling in *Murphy* provides insight into how today's Supreme Court may rule on a matter involving statutes like the ITFA and how the ITFA may unconstitutionally commandeer the states' inherent power of taxation.

1. Dormant Commerce Clause

The Dormant Commerce Clause is "the implicit corollary that if Congress is to regulate commerce between the states and with foreign nations, then state governments may not . . . impede the free flow of trade between states."[91] The Supreme Court has established a four-part test to determine if a state imposed tax violates the Clause.[92] A court will determine if the activity the state desires to tax (1) has a "substantial nexus" to the state; (2) is "fairly apportioned," (3) "does not discriminate against interstate commerce", and (4) is "fairly related to the services provided by the [s]tate."[93]

In order for a state tax to have a substantial nexus to the taxing state, it must show a connection between taxed entity's interstate activities and the state.[94] The nexus requirement is met if the corporation "avails itself of the 'substantial privilege of carrying on business' within the State."[95] This standard does not require the taxed corporation be physically present in the state.[96] Specifically for internet-based corporations, simple online marketing targeted at the residents of the taxing state may be enough to satisfy the nexus

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90. Povich, *supra* note 4.

91. DIRECTV, Inc., 907 N.E.2d 1242, 1247 (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 (1977)); *see also* U.S. Const. art. 1, § 8, cl. 3 (granting Congress the power to regulate commerce).

92. Complete Auto Transit, Inc., 430 U.S. at 279; *see also* Amerada Hess Corp. v. Dir., Div. of Tax'n N.J. Dep't Treas., 490 U.S. 66, 72 (1989) (applying test to a New Jersey windfall profit tax).

93. *Complete Auto Transit, Inc.*, 430 U.S. at 279.

94. Exxon Corp. v. Wisconsin Dept. of Rev., 447 U.S. 207, 219–20 (1980).

95. *Id.* (citing Mobil Oil Corp. v. Comm'r of Taxes of Vermont, 445 U.S. 425, 437 (1980).

96. S. Dakota v. Wayfair, Inc., 585 U.S. 162, 178 (2018).

prong.[97] The Court's recent jurisprudence on this issue points in favor of state taxation of stream cable corporations. In fact, it provides a clearer example of substantial nexus than the corporation did in *Wayfair*. Unlike Wayfair's limited reach, the large streaming cable corporations which have been at issue in this Note target nearly every household with its persistent marketing and other virtual presence.[98]

Second, the tax must be "fairly apportioned" i.e., it must "not undertake to tax any interstate activities carried on outside the state's borders; and cannot be repeated by any other state."[99] A state may meet this standard depending on the structure of its cable franchisee and license law. The taxing state will meet the fairly apportioned standard as long as its law only taxes the streaming cable corporation's customers who reside in the taxing state. Under this formula, the tax is limited to intrastate activities which are not at a risk of being taxed again by another state.[100]

Third, the tax must not discriminate against interstate commerce. A tax imposed on streaming cable corporations would not discriminate against interstate commerce if the tax equally applied to similar goods or services intrastate as it would interstate.[101] This analysis is the same for the discriminatory tax clause of the ITFA—the state would generally impose the tax on similar transactions, at a similar rate, and would not require a corporation providing a good or service that is different than traditional cable television to pay the different tax.[102] The tax imposed on streaming cable corporations would not be proposed with discriminatory intent either. When courts evaluate "whether a state statute was motivated by an intent to discriminate against interstate commerce," they often look to "statutory text, context, and legislative history" and whether the statute was created to achieve some legitimate legislative purpose.[103] The cases cited above demonstrate the municipalities' clear and non-discriminatory purpose of taxing streaming service corporations—even though the previously initiated suits failed due to their application on all streaming services and not streaming cable specifically.[104] The municipalities do not initiate suits to punish streaming cable services; rather, it is the municipalities' desire to modernize its taxation law.[105] If a clear legislative purpose is present and there is no

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97. *Id.* at 188 (finding Wayfair's "extensive virtual presence" met the substantial nexus requirement).

98. *See About YouTube TV Ads*, GOOGLE ADS HELP, https://support.google.com/google-ads/answer/10651730?hl=en#:~:text=YouTube%20TV%20uses%20Google's%20powerful%20signals%20combined%20with%20Dynamic%20Ad,and%20digital%20video%20recorded%20content [https://perma.cc/EY3H-LLYJ] ("YouTube TV uses Google's *powerful* signals combined with Dynamic Ad Insertion (DAI) technology to insert custom and targeted ads in both live and digital video recorded content.") (emphasis added).

99. Memphis Nat. Gas Co. v. Stone, 335 U.S. 80, 96–97 (1948) (Rutledge, J., concurring).

100. Many states have established "apportionment formulas" which calculate the amount of services which were provided in-state, and which were provided out-of-state for state taxation purposes. *See generally* Exxon Corp. v. Wisconsin Dept. of Rev., 447 U.S. 207 (1980) (upholding Wisconsin's apportionment statute for income tax as constitutional).

101. *See supra* notes 36–39 and accompanying text (explaining why this tax would not violate the face of the anti-discriminatory tax clause).

102. Internet Tax Freedom Act, 47 U.S.C. § 151.

103. Am. Trucking Assoc., Inc. v. Alviti, 14 F.4th 76, 90 (1st Cir. 2021).

104. *See generally* Borough of Longport v. Netflix, Inc., No. 21-CV-15303, 2022 WL 1617740 (D.N.J. May 20, 2022) (involving a municipality attempting to enforce state utility law against streaming services); City of E. St. Louis v. Netflix, Inc., 630 F. Supp. 3d 1003 (S.D. Ill. 2022) (involving a municipality attempting to enforce state cable television law against streaming services).

105. *Id.*

discriminatory intent in the "statutory text, context, and legislative history," a statute which includes taxes on streaming cable corporations may satisfy the discriminatory intent prong.[106]

Fourth, a proposed tax on streaming cable corporations must be fairly related to the services provided by the state. This is a simple inquiry, and the court will ask "[i]f the tax is in fact a legitimate general revenue measure identical or roughly comparable to taxes imposed upon similar industries."[107] This, again, will be dependent on the structure of the state statute which imposes such a tax on streaming cable corporations. As this Note has repeatedly asserted, the analysis included is limited to those goods which provide a near or direct substitute to cable television. Nowhere is this limitation more important than here: a state law which limits its scope in such a manner may easily be said to fairly relate to the services provided by the state.

2. *Anti-Commandeering Doctrine &* Murphy v. NCAA

If a court held that the ITFA and its discriminatory tax clause protect streaming cable, states should still have the right to tax these entities because the ITFA unconstitutionally commandeers a state's inherent power to tax. The Anti-Commandeering Doctrine states: "Congress may not simply 'commandeer the legislative process of the [s]tates by directly compelling them to enact and enforce a federal regulatory program.'"[108] Here, the ITFA directly prohibits a state from taxing electronic commerce.[109] By doing so, the federal government has supplanted the state's legislative process with its own. Supreme Court precedent shows this is the exact circumstance the Anti-Commandeering Doctrine is meant to prohibit.[110]

The ITFA is similar to PAPSA, which laid the foundation for the ruling in *Murphy*. First, the two statutes both strictly prohibit states from acting in a constitutional manner.[111] Both the ITFA and the PAPSA directly prohibited the states from enacting a piece of legislation, one that they have the constitutional authority to do so.[112] Even though the federal government did not require some affirmative action by the states, the act of prohibiting state governments from enacting legislation still violates the Anti-

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106. *Am. Trucking Associations, Inc.*, 14 F.4th at 90.

107. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 651 (1981). Satisfaction of the "substantial nexus" factor may also be held to satisfy this factor which makes the analysis even simpler. See State Taxation and Regulation: The Modern Law, Justia US Law, https://law.justia.com/constitution/us/article-1/41-the-modern-law.html#tc-1095 [https://perma.cc/X5D5-6NW8] ("The validity of general business taxes on interstate enterprises may also be determined by the nexus standard.").

108. New York v. United States, 505 U.S. 144, 202 (1992).

109. Internet Tax Freedom Act, 47 U.S.C. § 151.

110. *See generally* Murphy v. NCAA, 584 U.S. 453 (2018) (finding a federal law prohibiting states from legalizing sports gambling to be unconstitutional under the doctrine); *New York*, 505 U.S. at 144 (finding a federal law forcing states to take title to toxic waste to violate the doctrine); Printz v. United States, 521 U.S. 898 (1997) (finding a federal law that requires state law enforcement to act in the stead of federal law enforcement violates the doctrine).

111. *See* Internet Tax Freedom Act, 47 U.S.C. § 151 (prohibiting taxation on electronic commerce); Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (prohibiting sports gambling).

112. *See* sources cited *supra* note 104.

Commandeering Doctrine.[113] In both cases, "[i]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals."[114] Justice Alito further stated, "[a] more direct affront to state sovereignty is not easy to imagine."[115]

Second, like the ruling in *Murphy*, the ITFA is not a valid exercise of the federal government's preemption power. For the federal government to preempt state law, two requirements must be met: (1) "[i]t must represent the exercise of a power conferred on Congress by the Constitution"; and (2) "it must be best read as one that regulates private actors."[116] The second requirement is directly related to the first requirement in that Congress' preemption powers entail "Congress [must] enact[] a law that imposes restrictions or confers rights on private actors . . . ."[117] In *Murphy*, the provision in question stated, "[i]t shall be unlawful for . . . a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact."[118] The Court stated that this provision cannot be read to regulate private actors, because PAPSA did not constitutionally preempt state law.[119] Similarly, the ITFA states, "[n]o [s]tate or political subdivision thereof shall impose any of the following taxes during the period . . . ."[120] The ITFA does not constitutionally preempt state law because one cannot read it to regulate private actors. A court may rule the ITFA unconstitutional under the doctrine as it was applied in *Murphy* because the ITFA directly compels the states to not take affirmative action and there is no constitutional preemption.

IV. RECOMMENDATIONS

This Note demonstrates the issues inherently associated with the ITFA's application to corporations that provide streaming cable versus streaming services that provide a variety of content. These issues range from disadvantageous market effects on corporations that provide traditional cable,[121] lower tax revenue for local and state governments,[122] and questions of the constitutionality of the ITFA for the federal government.[123] This Note proposes recommendations for the following: one for local and state governments; one for traditional cable television provider corporations; and one for Congress and the federal government generally. Each recommendation is meant to address the issue of unequal taxation of substitute goods and services and how each party may best position themselves. Each recommendation is made to promote fair market participation among similar

113. *Murphy*, 584 U.S. at 475.
114. *Id.*
115. *Id.*
116. *Id.* at 455.
117. *Id.* at 477.
118. Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702.
119. *Murphy*, 584 U.S. at 478.
120. Internet Tax Freedom Act, 47 U.S.C. § 151.
121. *See supra* Part III.A.2 (detailing the inequities of cable and streaming services within the marketplace).
122. *See* Povich, *supra* note 4 (discussing the taxation of online streaming services by various cities and states).
123. *See supra* Part II (explaining the legislative history and case law surrounding corporations involved in the streaming industry).

corporations. This will allow local and state governments to recoup their losses in tax revenue while respecting Congress' original intent in enacting the ITFA.

A. Positioning Local and State Governments to Be Successful Litigants

For a municipality or state to successfully initiate a suit to enforce its cable or other similar television statutes, it must complete the following steps. First, the proper party must bring the suit as stipulated in the municipality or state's governing statute. This will most likely be the state itself or a political subdivision (e.g., attorney general or state television board).[124] Second, the party bringing the suit must specifically tailor the adversarial party. The adversarial party must be a corporation that provides a service that mirrors traditional cable, not a wide range of streaming services. If the party does not provide streaming cable, the party initiating the suit will face the same outcome as the parties referenced above. Third, the party should frame its argument based on economics and market competition. A properly framed argument may lead to potential secondary arguments against the constitutionality of the ITFA.

1. The State Should Bring the Suit, Not a Municipality

The private right of action procedural hurdle discussed above is of extreme importance when discussing what a state or political entity must do to successfully litigate against corporations providing streaming cable. This is the step that most parties fail to achieve because the party bringing the suit—most often a municipality—has no private right of action to bring the suit.[125] This allows a court to easily dismiss the municipalities' claim. This Note recommends a municipality, or another aggrieved party, follow the specific state statute they wish to enforce to pass this procedural hurdle and allow a court to properly address the issue presented in this Note.[126] The party initiating the suit must go through the specified enforcement body. This is, most often, the state attorney general, the state cable television regulatory board, or simply the state or a political subdivision itself.[127] Not only will a suit on behalf of one of the parties listed above pass the right of action procedural hurdle, but it will also support a claim based on a state's inherent right of taxation.

Individual states may, as an alternative, decide to alter their cable television and video service laws to allow municipalities to enact such suits and avoid the right of action question altogether. This alternative may work just the same but in order to meet the goals of this Note, the quality (not the quantity) of the suits are of utmost importance. This Note recommends that the state or the statute-specified regulatory body initiates the suit against corporations providing streaming cable. Either party will meet the procedural hurdle that has hampered most of the suits involving municipalities suing streaming service

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124. *See* Borough of Longport v. Netflix, Inc., No. 21-CV-15303, 2022 WL 1617740, at *3 (D.N.J. May 20, 2022) (resting enforcement powers with special regulatory body); *see also* City of E. St. Louis v. Netflix, Inc., 630 F. Supp. 3d 1003, 1016 (S.D. Ill. 2022) (resting enforcement powers with Illinois attorney general).

125. *See Borough of Longport*, 2022 WL 1617740, at *3 (finding that the municipality lacked a right of action); *City of E. St. Louis*, 630 F. Supp. 3d at 1015 (same).

126. *City of E. St. Louis*, 630 F. Supp. 3d at 1016 (stating that, to enforce the specified statute, the suit must be initiated by applicable "state enforcement authorities").

127. *Id.*

corporations. A state is the most appropriate party to initiate a suit, so they may claim that the ITFA unconstitutionally commandeers its inherent power of taxation. The party initiating the suit may be well on its way to recoup lost tax revenue under its cable television and video service governing statute if it completes this step.

2. The State Should Narrowly Tailor Its Adversarial Party

Now that the state or one of its political subdivisions has brought the suit, this Note recommends that the initiating party tailor the suit to the appropriate adversarial party limits described above. The state cannot simply sue a host of streaming services. Municipalities have done this in the past to little effect.[128] The state must tailor its suit narrowly to encompass only those corporations whose streaming cable services dodged taxes and fees under its cable television and video service laws. The ITFA will most likely bar any declaratory injunction or monetary relief if a state does not tailor its adversarial parties to these prescribed limits because the taxing of streaming services that provide a variety of content will violate the ITFA's anti-discriminatory tax clause.[129] This proper tailoring will allow the court to address the ITFA's application to this specific situation and not rule it a *per se* violation of the anti-discriminatory tax clause. Proper tailoring will also allow the court to address and potentially remedy the issues inherent in the ITFA that this Note has discussed—e.g., market inequity, infringement of constitutional doctrines, and the Supreme Court's ruling in *Murphy*.

3. The State Should Phrase Its Arguments in Economic Terms

This Note recommends that states should support their initiated suit analytically with theories on the above constitutional doctrines and the Supreme Court's holding in *Murphy*. States may accomplish this by presenting different tax rates between traditional cable and streaming cable[130] and how that difference affects states' tax revenue.[131] A proper presentation may highlight and support the more pertinent information (including the issues brought up in *Murphy*)[132] and bring a real-world example to the issues inherent in the ITFA. With economic and factual support, a court may see how federal action has caused market inequity issues and infringed upon the states' inherent power to tax a substitute good or service in the same market through the ITFA.

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128. *See generally Borough of Longport*, 2022 WL 1617740 (involving a municipality initiating a suit against Netflix and Hulu); *City of E. St. Louis*, 630 F. Supp. 3d (involving a municipality initiating a suit against Netflix, Disney, Apple, Hulu, and many others).

129. *See* Wallace, *supra* note 27 (explaining that taxing of streaming services violates the ITFA's Anti-Commandeering Doctrine).

130. *Compare* Internet Tax Freedom Act, 47 U.S.C. § 151 (prohibiting taxes and regulations on internet access and in discriminatory ways), *with* N.J. REV. STAT § 48:5A (2023) (requiring cable television services to seek municipality consent or a New Jersey state-wide license to conduct business).

131. *See* Povich, *supra* note 4 (detailing the large losses incurred by states and their efforts to recoup those losses through different initiatives).

132. *See supra* Parts II.C, III.B.2.

B. Corporations Must Take Affirmative Steps to Protect Their Own Interests

The issue of taxation on streaming services—streaming cable specifically—will continue to intensify, especially if states and municipalities take the recommendations this Note has so far introduced.[133] Those corporations providing cable television and those providing streaming services must effectively represent their interests to the appropriate bodies. If a cable television provider corporation does not, the inequity in the market will continue to hamper the traditional cable television industry to a point of no practical return, similar to that of video rentals.[134] If streaming service corporations, especially those providing streaming cable, do not effectively represent their interests, they could see the advantage taken away through an amendment to the ITFA or similar regulation. This Note recommends cable television provider corporations look at the following options to place themselves in the best market position.

A cable television provider corporation may either initiate their own suit and claim the ITFA is unconstitutional or lobby Congress to amend the current ITFA. The initiated suit must be against the federal government, and it must allege that the ITFA, in its current form, is unconstitutional and that the corporation has been harmed through its unconstitutional design. The cable television provider corporation initiating this suit must make arguments similar to the arguments made in this Note. For example, the cable television provider corporation must argue: (1) that the taxing of streaming cable corporations does not trigger the discriminatory tax clause of the ITFA;[135] and (2) that even if a tax on streaming cable would trigger the clause, the ITFA is unconstitutional.[136] A cable television provider corporation may also seek the same objective through lobbying efforts. In those efforts, cable television provider corporations may persuade members of Congress to amend the ITFA to provide an exception to the tax prohibition on streaming cable. This may be unnecessary if the discriminatory tax clause does not apply to the equal taxation of streaming cable and traditional cable. The ITFA may provide equity into the television provider market if streaming cable provider corporations persuade members of Congress to take these steps.

C. Congress Should Not Wait for Corporations to Address the Market Inequalities Created by the ITFA

This Note recommends that Congress and the federal government in general proactively address this market inequality for cable television providers instead of merely reacting to corporate suits or lobbying measures. The ITFA has created market inequality, and Congress must properly address the inequality before more harm is done to traditional cable corporations. Congress must also actively avoid constitutionality arguments that may invalidate the ITFA, especially after the Supreme Court's holding in *Murphy*. If Congress wishes to keep the ITFA in place, albeit modified for this Note's issue, it must take the following steps.

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133. The recency of the cases cited above show this intensification. *See supra* notes 40, 49 (citing to cases involving this issue brought in the last three years).

134. *See* Stelter, *supra* note 78 (explaining the decline of the video rental industry).

135. *See supra* Part III.A.

136. *See supra* Part III.B.

First, Congress must carve out a narrow exception in the ITFA or create a distinction between streaming cable and other streaming services. This exception may state something along the lines of: this Act shall not apply to those corporations who engage in electronic commerce which provides a direct substitute to the same commerce in its traditional form. A proper distinction will foster a more equitable market between the two—as is introduced above. This exception or distinction may or may not be necessary, depending on the ITFA's discriminatory tax clause and its application to streaming cable and traditional cable being taxed at the same rate. If the clause doesn't apply to streaming cable, an exception or distinction would keep the thrust of the ITFA in place. An exception could effectively allow these perfect or near-perfect substitutes to properly compete against each other with similar tax obligations.

Second, Congress should carefully craft a law that will avoid the Supreme Court's Judicial scrutiny in Murphy. As previously addressed, the ITFA has produced significant effects on the U.S. economy, most of which are positive.[137] This Note does not argue the ITFA should be completely disregarded. This Note only argues for fair and equitable market competition. To keep the ITFA in place, Congress will need to learn its lessons from *Murphy*. It may do so by amending the ITFA to regulate private actors and by properly preempting state law. This may be done by regulating the taxation of electronic commerce itself.[138] These amendments do not prevent Congress from creating a favorable environment for electronic commerce for those that do not have a direct substitute for traditional commerce. Even if the Supreme Court found the ITFA unconstitutional, Congress may still obtain its objective for the ITFA through the Dormant Commerce Clause.[139] There, Congress would be still able to promote a favorable environment for electronic commerce.

V. CONCLUSION

The ITFA creates benefits for corporations participating in electronic commerce to the detriment of state and local governments and corporations participating in traditional commerce. This Note identified one area where the ITFA has created disastrous effects: state tax revenue from state television franchisee fees and licenses. Due to its protectionist measures, the ITFA has lowered tax revenue collected by the individual states and their local governments and created an egregious discrepancy in the taxation of two, direct substitute goods, competing in the same market. Not only has the ITFA created these revenue and market-based issues, but it has also created constitutional issues. Plainly, this Note's tailored focus strongly argues the costs of the current ITFA outweigh its benefits, and without action taken by Congress or the courts, its costs will continue to mount, and the individual states and corporations participating in non-electronic commerce, specifically those providing traditional cable television, will continue to pay the price.

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137. Cederwall, *supra* note 1.

138. *See supra* Part III.B.II (explaining that Congress must not direct the states from taking some sort of action or inaction and must use its preemption powers properly—i.e., regulate private actors).

139. *See supra* notes 53–57.