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The Federal Taxing Power: A Primer

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SUMMARY

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The Federal Taxing Power: A Primer

The Taxing and Spending Clause of the U.S. Constitution provides Congress with the power to tax. The U.S. Supreme Court has interpreted Congress's power to tax broadly, except for a few cases decided in the 1920s and 1930s in which the Court invalidated taxes that were functionally regulatory penalties on the ground that they exceeded Congress's legislative authority. But while the Taxing and Spending Clause grants Congress broad authority to lay and collect taxes, the Constitution also contains clauses that expressly circumscribe the taxing power.

The meanings of some of these express limitations appear evident, and thus are less subject to dispute. The Origination Clause requires legislation imposing taxes to begin in the U.S. House of Representatives. The Taxing and Spending Clause authorizes Congress to lay taxes for federal debts, the common defense, and the general welfare. Under the Export Clause, Congress may not tax articles exported from any state.

Much less clear are the meaning of, and distinction between, direct and indirect taxes. Pursuant to Article I, Section 2, clause 3 and Article I, Section 9, clause 4 of the U.S. Constitution, direct taxes are subject to the rule of apportionment, meaning Congress must set the total amount to be raised by the direct tax, then divide that amount among the states according to each state's population. The lack of clarity surrounding the meaning of a direct tax ultimately led to the adoption of the Sixteenth Amendment, which authorizes Congress to impose taxes on income without regard to the rule of apportionment. Article I, Section 8, clause 1 of the U.S. Constitution subjects duties, imposts, and excise taxes—collectively referred to as indirect taxes—to the rule of uniformity. The rule of uniformity requires an indirect tax to operate in the same manner throughout the United States. The Supreme Court has not fully explained what, in its view, distinguishes direct taxes from indirect taxes.

In addition to raising revenue, Congress also uses its taxing power to regulate private conduct. When Congress has enacted a "tax" to compel adherence to a regulatory scheme that it could not impose directly using its other enumerated powers, the question of whether the Supreme Court will uphold a "tax" under the taxing power turns on whether the Court views the "tax" as the functional equivalent of a regulatory penalty. In a few cases, the Court has invalidated penalties disguised as taxes because, in its view, they exceeded the scope of Congress's taxing power. Central to this analysis is whether the characteristics of the "tax" are similar to traditional taxes and whether the "tax" is similar to a regulatory penalty in that it inflicts punishment for an unlawful act or omission.

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Introduction

The Framers' principal motivation for granting Congress the power to tax in the U.S. Constitution was to provide the national government with a mechanism to raise a "regular and adequate supply"[1] of revenue and pay its debts.[2] Under the predecessor Articles of Confederation, the national government had no power to tax and could not compel states to raise revenue for national expenditures.[3] The national government could requisition funds from states to place in the common treasury, but, under the Articles of Confederation, state requisitions were "mandatory in theory" only.[4] State governments resisted these calls for funds.[5] As a result, the national government raised "very little" revenue through state requisitions,[6] inhibiting its ability to resolve immediate fiscal problems, such as repaying its Revolutionary War debts.[7]

By contrast, the Constitution provides Congress with broad authority to lay and collect taxes. Article I, Section 8, clause 1 of the Constitution—commonly known as the Taxing and Spending Clause[8]—empowers Congress "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all

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1 The FEDERALIST NO. 30 (Alexander Hamilton).

2 Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 89 (2012); *see* Veazie Bank v. Fenno, 75 U.S. 533, 540 (1869) ("The [national government] had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the States, and it was a leading object in the adoption of the Constitution to relieve the government, to be organized under it, from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property."); Bruce Ackerman, *Taxation and the Constitution*, COLUM. L. REV. 1, 6 (1999) ("The [Federalists] would never have launched their campaign against America's first Constitution, the Articles of Confederation, had it not been for its failure to provide adequate fiscal powers for the national government."); *see generally* THE FEDERALIST NO. 30 (Alexander Hamilton) (advocating for a "General Power of Taxation").

3 *See* ARTICLES OF CONFEDERATION OF 1777, arts. II, VIII; Ackerman, *supra* note 2, at 7 n.16 ("The Articles of Confederation stated that the 'common treasury . . . shall be supplied by the several States, in proportion to the value of all land within each State,' Articles of Confederation art. VIII (1781), but did not explicitly authorize the Continental Congress to impose any sanctions when a state failed to comply. This silence was especially eloquent in light of the second Article's pronouncement: 'Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by the confederation expressly delegated to the United States, in Congress assembled.'").

4 CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION, 15 (Cambridge University Press) (2005); *see* ARTICLES OF CONFEDERATION OF 1777, art. VIII.

5 Johnson, *supra* note 4, at 16 ("Some states simply ignored the requisitions. Some sent them back to Congress for amendment, more to the states' liking. New Jersey said it had paid enough tax by paying the tariffs or 'imposts' on goods imported through New York or Philadelphia and it repudiated the requisition in full.").

6 Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1202 (2012); *see, e.g.*, Johnson, *supra* note 4, at 15 ("In the requisition of 1786 - the last before the Constitution—Congress mandated that states pay $3,800,000, but it collected only $663."); *see* Metzger, *supra* note 2, at 89 ("Under the Articles of Confederation, states had failed to meet congressional requisitions on a massive scale and Congress was bankrupt.").

7 Johnson, *supra* note 4, at 16–17 ("Congress's Board of Treasury had concluded in June 1786 that there was 'no reasonable hope' that the requisitions would yield enough to allow Congress to make payments on the foreign debts, even assuming that nothing would be paid on the domestic war debt. . . . Almost all of the money called for by the 1786 requisition would have gone to payments on the Revolutionary War debt. French and Dutch creditors were due payments of $1.7 million, including interest and some payment on the principal. Domestic creditors were due to be paid $1.6 million for interest only. Express advocacy of repudiation of the federal debt was rare, but with the failure of requisitions, payment was not possible. . . . Beyond the repayment of war debts, the federal goals were quite modest. The operating budget was only about $450,000 . . . . Without money, however, the handful of troops on the frontier would have to be disbanded and the Congress' offices shut." (footnotes omitted)); *see* Cooter & Siegel, *supra* note 6 at 1204.

8 *See, e.g.*, United States v. Richardson, 418 U.S. 166, 169–70 (1974).

Duties, Imposts and Excises shall be uniform throughout the United States."[9] The U.S. Supreme Court has described Congress's power to tax as "very extensive."[10]

Supreme Court Chief Justice Salmon P. Chase famously described the taxing power in the *License Tax Cases*:

> It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.[11]

The Constitution provides several express limits on the manner in which taxes may be imposed. First, legislation imposing taxes must originate in the House of Representatives.[12] Second, the Constitution precludes Congress from taxing articles exported from any state.[13] Third, while Congress may impose "Capitation, or other direct[] Tax[es],"[14] the Constitution requires such taxes to be "apportioned among the several States . . . according to their respective" populations.[15] Fourth, Congress may impose other "Taxes, Duties, Imposts and Excises," collectively referred to as *indirect* taxes, but they must "be uniform throughout the United States."[16] Fifth, the Constitution authorizes taxes for debts, defense and the general welfare.[17]

The Supreme Court has also examined the scope of Congress's taxing power in the context of cases challenging Congress's ability to regulate private conduct.[18] The Court has held that taxes that are functionally regulatory penalties exceed the scope of Congress's taxing power.[19] In determining whether a tax is the functional equivalent of a regulatory penalty, the Court has

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[9] U.S. CONST. art. I, § 8, cl. 1; *see also id.* art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[10] License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867); *see also* United States v. Kahriger, 345 U.S. 22, 28 (1953) ("It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect . . . . As is well known, the constitutional restraints on taxing are few."); Brushaber v. Union Pac. R. Co., 240 U.S. 1, 12 (1916) ("That the authority conferred upon Congress by § 8 of Article 1 'to lay and collect taxes, duties, imposts and excises' is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine."); Austin v. Aldermen, 74 U.S. (7 Wall.) 694, 699 (1869) ("The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."); *see generally* Veazie Bank v. Fenno, 75 U.S. 533, 540 (1869) (explaining "[N]othing is clearer, from the discussions in the [Constitutional] Convention and the discussions which preceded final ratification [of the Constitution] by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent.").

[11] *License Tax Cases*, 72 U.S. at 471.

[12] U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

[13] *Id*. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

[14] *Id*. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.").

[15] *Id*. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .").

[16] *Id*. art. I, § 8, cl. 1; *see also* Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911) ("[T]he terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution.").

[17] *Id*. art. I, § 8, cl. 1.

[18] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563–74 (2012) [hereinafter *NFIB*].

[19] *See, e.g.*, Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 37 (1922).

looked to whether the "tax" has characteristics similar to traditional taxes and whether the "tax," like a regulatory penalty, inflicts punishment for an unlawful act or omission.[20]

This report summarizes express constitutional limits on Congress's taxing power and discusses the scope of Congress's taxing power in the context of cases challenging regulatory taxes.

The Origination Clause

Article I, Section 7, clause 1 of the U.S. Constitution provides, "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."[21] This clause is known as the Origination Clause.[22] It requires revenue measures to originate in the U.S. House of Representatives, not the U.S. Senate.[23]

Federal courts' Origination Clause jurisprudence is based on two principal interpretations. First, the phrase "All Bills for raising Revenue" refers to all legislation with the primary purpose of raising revenue to support the government generally—"meeting the expenses or obligations of the Government"[24]—rather than legislation for the specific purpose of creating and funding a discrete government program.[25] Second, when referring to tax legislation, the phrase "raising Revenue" encompasses all tax legislation regardless of whether the estimated net revenue effect of the legislation is an increase or decrease in revenue.[26]

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[20] *NFIB*, 567 U.S. at 563–68.

[21] U.S. CONST. art. I, § 7, cl. 1; *see, e.g.*, Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911) (holding the Senate's substitution of an inheritance tax for a tax on corporate income did not violate the Origination Clause because the Senate's amendment to the House of Representative's bill for raising revenue was germane to the subject matter).

[22] *See, e.g.*, United States v. Munoz-Flores, 495 U.S. 385, 387 (1990).

[23] *See, e.g*., Hubbard v. Lowe, 226 F. 135, 141 (S.D.N.Y. 1915) (holding the Cotton Futures Act, Pub. L. No. 63-174, 38 Stat. 693 (1914), was unconstitutional because the act did not originate in the House of Representatives), *appeal dismissed*, 242 U.S. 654 (1917). The Supreme Court dismissed the government's appeal after "Congress mooted the issue by simply passing the same tax bill again in proper order." United States v. Madison, 712 F. Supp. 1379, 1380 (W.D. Wis. 1989); *see* Lowe v. Hubbard, 242 U.S. 654 (1917).

[24] Twin City Nat. Bank of New Brighton v. Nebeker, 167 U.S. 196, 203 (1897).

[25] *Munoz-Flores*, 495 U.S. at 398–401; *see, e.g.*, Millard v. Roberts, 202 U.S. 429, 436–37 (1906) (holding legislation levying property taxes in the District of Columbia for the express purpose of financing railroad projects was not a "Bill[] for raising Revenue" within the meaning of the Origination Clause because the legislation raised revenue for a specific purpose, railroad projects.); *Twin City Nat. Bank of New Brighton*, 167 U.S. at 202 (holding "a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking associations organized under the statute, is clearly not a revenue bill which the Constitution declares must originate in the House of Representatives."); *see also id.* at 202–03 ("Mr. Justice Story has well said that the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." (citing 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 880)). The House's primary method of enforcing the Origination Clause is called "blue-slipping," the act of the House returning a measure to the Senate that the House has determined violates the Origination Clause. *See* CRS Report R46556, *Blue-Slipping: Enforcing the Origination Clause in the House of Representatives*, by James V. Saturno (2024).

[26] *See, e.g.*, Armstrong v. United States, 759 F.2d 1378, 1381 (9th Cir. 1985) ("The term 'Bills for raising Revenue' does not refer only to laws *increasing* taxes, but instead refers in general to all laws *relating* to taxes."); Wardell v. United States, 757 F.2d 203, 205 (8th Cir. 1985) (per curiam) ("We cannot agree that 'revenue-raising' means only bills that increase taxes."); *but c.f.* Bertelsen v. White, 65 F.2d 719, 722 (1st Cir. 1933) (holding a provision did not fall within the meaning of the phrase "Bill[] for raising Revenue" as the provision's "primary object [was] 'to establish the American merchant marine upon a sound and permanent basis,'" but also noting it was not a "bill to raise revenue" as "it diminishe[d] the revenue of the government.").

In *United States v. Munoz-Flores*, the Supreme Court upheld a monetary special assessment in the Victims of Crime Act of 1984[27] that had originated in the Senate and created revenue for the U.S. Treasury's general fund incidental to its primary purpose, because it was not a "Bill[] for raising Revenue" under the Origination Clause.[28] The act contained several measures to provide income to the Crime Victims Fund, including the monetary special assessment.[29] The act specified that once the total income of the fund exceeded $100 million, the excess would be placed in Treasury's general fund.[30]

In reaching its decision, the Supreme Court restated the rule for determining when a bill constitutes a "Bill[] for raising Revenue."[31] Specifically, "a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause."[32] Applying this rule, the Court determined that the monetary special assessment provision was not a "Bill[] for raising Revenue."[33] The fact that funds in excess of $100 million would, under the statute, be deposited in the Treasury's general fund did not alter the Court's conclusion.[34] Only a small percentage of that excess would be attributable to the special assessment.[35] Moreover, the act's legislative history showed that Congress did not expect that the Treasury's general fund would receive a substantial amount of revenue from the Crime Victims Fund's surpluses.[36] The Court found that "[a]ny revenue for the general Treasury that [the monetary special assessment] creates is thus 'incidenta[l]' to that provision's primary purpose."[37]

Several lower courts in the 1980s heard cases in which taxpayers challenged the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) on the ground that TEFRA's passage violated the Origination Clause.[38] The tax bill introduced by the House of Representatives would have yielded an estimated net loss of almost $1 billion over five years.[39] Upon arrival in the Senate, the Senate struck out all of the provisions except for the enacting clause and added provisions estimated to provide a net revenue increase of about $100 billion over three years.[40] Because only the Senate version of TEFRA would have yielded a net revenue

[27] 42 U.S.C. §§ 10601–04 (1984).

[28] *Munoz-Flores*, 495 U.S. at 398–401; *see generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 3 (2005) (defining "General Fund Accounts" as "Accounts in the U.S. Treasury holding all federal money not allocated by law to any other fund account.").

[29] *Munoz-Flores*, 495 U.S. at 398.

[30] *Id.*

[31] *Id.*

[32] *Id.* (alteration in original).

[33] *Id.* at 401.

[34] *Id.* at 398–400.

[35] *Id.* at 399.

[36] *Id.*

[37] *Id.* (third alteration in original).

[38] *See, e.g.*, Tex. Ass'n. of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163, 165 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 2265 (1986); Armstrong v. United States, 759 F.2d 1378, 1380–81 (9th Cir. 1985); Wardell v. United States, 757 F.2d 203, 205 (8th Cir. 1985) (per curiam); Heitman v. United States, 753 F.2d 33, 35 (6th Cir. 1984) (per curiam); Rowe v. United States, 583 F. Supp. 1516, 1519 (D. Del. 1984), *aff'd without opinion*, 749 F.2d 27 (3d Cir. 1984).

[39] H.R. REP. No. 97-404, at 38 (1981).

[40] S. REP. NO. 97-494, pt. 2, at 79 (1982); *Tex. Ass'n. of Concerned Taxpayers*, 772 F.2d at 164; *Armstrong*, 759 F.2d at 1381; *see also* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; *but the Senate may propose or concur with Amendments* as on other Bills." (emphasis added)); Flint v. (continued...)

increase, the taxpayers challenging the statute argued that TEFRA originated in the Senate as a bill to raise revenue, in violation of the Origination Clause.[41] The courts hearing these challenges to TEFRA embraced an expansive interpretation of the phrase "raising Revenue," concluding that all legislation relating to taxes was legislation that raised revenue within the meaning of the Origination Clause and upheld TEFRA as constitutional.[42]

The Export Clause

Article 1, Section 9, clause 5 of the U.S. Constitution prohibits Congress from laying taxes and duties on articles exported from any state.[43] This clause is known as the Export Clause.[44] The Export Clause applies to taxes and duties, not user fees.[45] The U.S. Supreme Court has interpreted the Export Clause to address shipments only to foreign countries, not shipments to unincorporated

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Stone Tracy Co., 220 U.S. 107, 143 (1911) ("In the Senate the proposed [inheritance] tax was removed from the [House] bill, and the corporation tax, in a measure, substituted therefor. The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case. The amendment was germane to the subject-matter of the bill and not beyond the power of the Senate to propose.").

[41] *Tex. Ass'n. of Concerned Taxpayers*, 772 F.2d at 165, *Armstrong*, 759 F.2d at 1381; *Wardell*, 757 F.2d at 205.

[42] *See, e.g.*, *Armstrong*, 759 F.2d at 1380; *Wardell*, 757 F.2d at 205; *see also Tex. Ass'n. of Concerned Taxpayers*, 772 F.2d at 166–67 (recognizing "all contemporary courts have adopted the construction apparently given it by Congress, i.e. 'relating to revenue'" as opposed to increasing revenue, but ruling that the challenge raised a "nonjusticiable political question."); *Heitman*, 753 F.2d at 35 ("The Senate may amend bills originating in the House as long as the bill remains germane to the subject matter of the bill. Flint v. Stone Tracy Co., 220 U.S. 107 (1911). TEFRA was not passed in violation of this principle as it remained a revenue bill after the Senate amended the Act."); *Rowe*, 583 F. Supp. at 1519 ("Once a bill has passed the House, the Court perceives no constitutional reason why the Senate may not make amendments germane to the subject matter of the legislation.").

[43] U.S. CONST. art. I, § 9, cl. 5; *see, e.g.*, United States v. U.S. Shoe Corp., 523 U.S. 360 (1998) (holding an ad valoreum tax directly imposed on the value of cargo loaded at U.S. ports for export violated the Export Clause); *see* Carnival Cruise Lines, Inc. v. United States, 200 F.3d 1361, 1364 (Fed. Cir. 2000) (holding the Export Clause did not preclude a tax on passengers because they were not "articles" for the purposes of the Export Clause), *cert. denied*, 530 U.S. 1274 (2000).

[44] *See, e.g.*, *U.S. Shoe*, 523 U.S. at 362.

[45] *Id.* at 363 ("The [Export] Clause, however, does not rule out a 'user fee,' provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for government-supplied services, facilities, or benefits." (citing Pace v. Burgess, 92 U.S. 372 (1876))). In general, a user fee is a charge imposed on the user of a government service with the primary purpose of offsetting the costs of that government service. *See, e.g.*, *Pace*, 92 U.S. 375–76 ("The stamp [tax] was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimited, except by the discretion of the exporter or the convenience of handling. . . . We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned . . . . The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. . . . [W]e cannot say that the charge imposed is excessive, or that it amounts to an infringement of the [Export Clause]. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government."); *c.f.* Trafigura Trading LLC v. United States, 29 F.4th 286, 293 (5th Cir. 2022) (holding Internal Revenue Code (IRC) Section 4611(b) imposes a tax in violation of the Export Clause) ("Section 4611(b) saddles exporters with the cost of anti-pollution measures that generally benefit society at large, and not specifically the exporter who pays the charge."), *action on dec.*, 2023-01 (Mar. 6, 2023) ("[T]he Service will no longer seek to collect the tax imposed by § 4611(b)(1)(A) on domestic crude oil that is exported.").

territories, such as Puerto Rico and the Northern Mariana Islands.[46] The Court has also construed the Export Clause as requiring "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens" the process of exporting.[47]

For example, in *United States v. IBM*, the Supreme Court held that an excise tax[48] on insurance premiums paid to foreign insurers for policies insuring exported goods was unconstitutional under the Export Clause.[49] In *IBM*, the parties agreed that the facts and issue before the Court were largely indistinguishable from an earlier case, *Thames & Mersey Marine Insurance Co. v United States*,[50] in which the Court held that a tax on insuring exports was "functionally the same" as a tax on exports.[51] Applying stare decisis principles, the Court declined to overrule *Thames & Mersey Marine Insurance* absent additional briefing from the parties on whether the insurance policies subject to the excise were "so closely connected to the goods that the tax is, in essence, a tax on exports."[52]

The Supreme Court has ruled that the Export Clause's restriction on the taxing power does not extend to several taxes, such as a tax on all property alike, including property intended for export but not in the "course of exportation";[53] a nondiscriminatory tax on an exporter's income;[54] and a stamp tax to identify goods intended for export.[55]

[46] Dooley v. United States, 183 U.S. 151, 153–54 (1901); *see also* Swan & Finch Co. v. United States, 190 U.S. 143, 144–45 (1903) (explaining "'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country."); *see generally* Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 800 (2005) (explaining the Supreme Court's doctrine of territorial incorporation "divided domestic territory . . . into two categories: those places 'incorporated' into the United States and forming an integral part thereof (including the states, the District of Columbia, and the 'incorporated territories'); and those places not incorporated into the United States, but merely 'belonging' to it (which came to be known as the 'unincorporated territories')").

[47] Fairbank v. United States, 181 U.S. 283, 293 (1901); *see* William E. Peck & Co. v. Lowe, 247 U.S. 165, 173 (1918) ("And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance a tax on the exportation." (quoting Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 25 (1915)).

[48] Fernandez v. Wiener, 326 U.S. 340, 352 (1945) (expressing that "without apportionment [Congress] may tax an excise upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property.").

[49] United States v. IBM, 517 U.S. 843, 854–56 (1996).

[50] 237 U.S. at 27 (holding "proper insurance during the voyage is one of the necessities of exportation" and that "the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves.").

[51] *IBM*, 517 U.S. at 850, 854.

[52] *Id*. at 855–56; *see id.* at 855 ("[T]he marine insurance policies in *Thames & Mersey* arguably 'had a value apart from the value of the goods.' Nevertheless, the Government apparently has chosen not to challenge that aspect of *Thames & Mersey* in this case. When questioned on that implicit concession at oral argument, the Government admitted that it 'chose not to' argue that [the excise] does not impose a tax on the goods themselves." (citations omitted)).

[53] Turpin v. Burgess, 117 U.S. 504, 507 (1886) ("But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. . . . In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer."); *see, e.g.*, Ranger Fuel Corp. v. United States, 33 F. Supp. 2d 466 (E.D. Va. 1998) (holding that a taxpayer was entitled to a refund for the Coal Excise Tax paid under IRC Section 4221 after government conceded that coal subject to tax was placed in the stream of export "when loaded on export vessels and title was transferred from the [taxpayer] to the foreign customers").

[54] William E. Peck & Co. v. Lowe, 247 U.S. 165, 174–75 (1918) (holding the Export Clause did not shield an exporter from an income tax laid generally on net incomes because the tax was laid on the exporter's income from exportation).

[55] Pace v. Burgess, 92 U.S. 372, 376 (1876) (finding that the stamp tax imposed was not a tax or duty, but a fee).

Direct Taxes and the Rule of Apportionment

The U.S. Constitution subjects direct taxes to the rule of apportionment.[56] Though the U.S. Supreme Court has not clearly distinguished direct taxes from indirect taxes, the Court has identified capitation taxes—a tax "paid by every person, 'without regard to property, profession, or any other circumstance'" [57]—and taxes on real and personal property as direct taxes.[58] Under the rule of apportionment, Congress sets the total amount to be raised by a direct tax, then divides that amount among the states according to each state's population.[59] Thus, a state with one-tenth of the nation's population would be responsible for one-tenth of the total amount of direct tax without regard to that state's income or wealth levels.[60]

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[56] U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."); *id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .").

[57] NFIB, 567 U.S. at 571 (emphasis omitted) (quoting Hylton v. United States, 3 U.S. 171, 175 (1796) (opinion of Chase, J.)).

[58] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); *Hylton*, 3 U.S. 171; *see* Moore v. United States, 602 U.S. 572, 582 (2024) ("Generally speaking, *direct* taxes are those imposed on persons or property."); *NFIB*, 567 U.S. at 571 (holding that the individual mandate provision in the Patient Protection and Affordable Care Act was not a direct tax because it did "not fall within" any of the "recognized categor[ies]" of direct taxes, capitation taxes, and taxes on real or personal property); Springer v. United States, 102 U.S. 586, 599 (1880) ("[W]henever the government has imposed a tax which it recognized as a *direct tax*, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: 1. In some of the States slaves were regarded as real estate; and, 2, [sic] such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the national treasury was the same, whether the slaves were omitted or included." (citations omitted)); Veazie Bank v. Feno, 75 U.S. 533, 543–44 (1869) ("[S]ubjects, in 1798, 1813, 1815, 1816, were lands, improvements, dwelling-houses, and slaves; and in 1861, lands, improvements, and dwelling houses only. . . . The fact, then, that slaves were valued, under the acts referred to, far from showing, as some have supposed, that Congress regarded personal property as a proper object of direct taxation under the Constitution, shows only that Congress, after 1798, regarded slaves, for the purposes of taxation, as realty." (footnotes omitted)); Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUMBIA L. REV. 2334, 2355 n.110. (1997) ("Nearly all congressional debate about the first direct tax assumed the tax would be on real estate, with questions about how slaves fit into the picture."); *see also* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 350 (Max Farrand ed., 1911) ("Mr. King asked what was the precise meaning of *direct* taxation? No one answd [sic]."); 6 ANNALS OF CONG. 1933–41 (1849) (including debates about whether the first direct tax, which would be enacted in 1798, should apply to different types of personal property, including horses, cattle, carriages, and public securities); John K. Bush and A.J. Jefferies, *The Horseless Carriage of Constitutional Interpretation: Corpus Linguistics and the Meaning of "Direct Taxes" in Hylton v. United States*, 45 HARV. J.L. & PUB. POL'Y 523, 567 (2022) (discussing unapportioned taxes on personal property following the War of 1812, including the Act of Jan. 18, 1815, ch. 23, 3 Stat. 186, and Framer Gouverneur Morris's letter published in response declaring that a tax on furniture is a direct tax subject to the rule of apportionment); Act of January 18, 1815, ch. 23, 3 Stat. 186–87 (imposing an annual "duty" on household furniture "kept for use" and an annual "duty" on gold and silver watches "kept for use"), *repealed by* Act of Apr. 9, 1816, ch. 41, 3 Stat. 264.

[59] *See, e.g.*, Act of Aug. 5, 1861, ch. 45, §§ 8–48, 12 Stat. 292, 294–309 (providing for the annual imposition of a direct tax); Act of Mar. 5, 1816, ch. 24, 3 Stat. 255; Act of Feb. 27, 1815, ch. 60, 3 Stat. 216; Act of Jan. 9, 1815, ch. 21, 3 Stat. 164; Act of Aug. 2, 1813, ch. 37, 3 Stat. 53; Act of July 14, 1798, ch. 75, 1 Stat. 597; *see also Veazie Bank*, 75 U.S. 533, 543 (1869) ("In each instance, the total sum was apportioned among the States, by the constitutional rule, and was assessed at prescribed rates, on the subjects of the tax. . . . Under the act of 1798, slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors."); Act of July 1, 1862, ch. 119, § 119, 12 Stat. 432, 489 (suspending the annual imposition of a direct tax until April 1, 1865); Act of June 30, 1864, ch. 173, § 173, 13 Stat. 223, 304 (suspending the annual imposition of a direct tax); *see also Moore*, 602 U.S. at 582.

[60] Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes"*, 33 ARIZ. ST. L.J. 1057, 1067 (2001); *see Moore*, 602 U.S. at 582 (explaining direct taxes are difficult to enact due to "complicated and politically unpalatable result[s]"); Charles F. Dunbar, *The Direct Tax of 1861*, 3 Q. J. OF ECON. 436, 445 (1889) ("The (continued...)

The Supreme Court first interpreted the Constitution's "direct tax" language shortly after the nation's founding, in *Hylton v. United States*.[61] *Hylton* presented the question of whether an unapportioned tax on carriages was a "direct tax," and therefore unconstitutional.[62] In three separate opinions, the deciding justices[63] each held that the tax was not "direct" within the meaning of the Constitution and suggested that the term "direct taxes" applied only to a narrow class of taxes that includes (1) capitation taxes[64] and (2) taxes on "land."[65]

In *Hylton*, the Supreme Court adopted a functional approach to determine whether a tax is direct, focusing on whether the tax at issue can be apportioned and, if so, whether apportionment would produce significant inequities among taxpayers.[66] As Justice Samuel Chase stated in his opinion, "If [a tax] is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule."[67] In 2012, the Court explained, "This Court upheld the tax [at issue in *Hylton*], in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State."[68] The *Hylton* Court did not, however, offer a comprehensive definition of the types of taxes that are "direct."[69]

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direct tax had, in fact, far less to recommend it in 1861 than at the beginning of the century. The inequality of apportionment according to population, serious enough at first, had been increased by the concentration of wealth in the commercial and manufacturing States. Only the smallness of the sum to be raised made a special assessment upon one species of property tolerable, in a country where personal property had multiplied so greatly. And, finally, the slowness of the method, amply shown by four trials, unfitted it for an occasion when promptness of supply was of the last consequence.").

[61] *Hylton*, 3 U.S. 171.

[62] 3 U.S. at 172. The tax at issue in *Hylton* imposed a specific yearly sum on carriages. Act of June 5, 1794, ch. 45, 1 Stat. 373, 374 (1794). The amount varied between one and ten dollars, depending on the type of carriage. *Id*. The tax exempted carriages used in husbandry or for the transportation of goods, wares, merchandise, produce, or commodities. *Id*.

[63] Only four of the six Justices who comprised the Supreme Court at the time participated in the *Hylton* argument—Associate Justices Chase, Paterson, Iredell, and Wilson. Consistent with the Court's practice during that period, Justices Chase, Paterson, and Iredell each wrote a separate, or "seriatim," opinion holding the tax to be constitutional. *See Hylton*, 3 U.S. at 172–83; M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 303–11 (2007). Justice Wilson abstained from voting on the case because he had expressed an opinion on the issue while serving as a circuit court judge and because the unanimity of the remaining three participating Justices made his opinion unnecessary. *Hylton*, 3 U.S. at 183–84 (opinion of Wilson J.) ("[T]he unanimity of the other three Judges, relieve me from the necessity [of joining the decision]. I shall now, however, only add, that my sentiments, in favor of the constitutionality of the tax in question, have not been changed"). Associate Justices Chase, Paterson, Iredell, and Wilson all "played central roles at the Founding," and Associate Justices Paterson and Wilson were Framers. Ackerman, *supra* note 2, at 21; U.S. CONST.; *but see* Jensen, *supra* note 58 at 2361 (explaining "while the *Hylton* Court was made up of founders, the Court did not have available the notes on the Philadelphia convention and the records of the ratifying conventions that we have today. . . . Even more important, the significant founders were not unanimous on this point.").

[64] *See NFIB*, 567 U.S. at 571 (citing *Hylton*, 3 U.S. at 175 (opinion of Chase, J.)).

[65] *Hylton*, 3 U.S. at 174–75 (opinion of Chase, J.); *id*. at 176–77 (opinion of Paterson, J.); *id*. at 183 (opinion of Iredell, J.).

[66] 3 U.S. at 174 (opinion of Chase, J.); *id*. at 179–80 (opinion of Paterson, J.); *id*. at 181–83 (opinion of Iredell, J.).

[67] *Id*. at 174.

[68] *NFIB*, 567 U.S. at 570; *see Hylton*, 3 U.S. at 179 (opinion of Paterson, J.) ("A tax on carriages, if apportioned, would be oppressive and pernicious. How would it work? In some states there are many carriages, and in others but few. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? The thing would be absurd, and inequitable.").

[69] *Hylton*, 3 U.S. 171; *contra* Springer v. United States, 102 U.S. 586, 602 (1880) ("Our conclusions are, that *direct*
(continued...)

The Supreme Court expanded on its interpretation of direct taxes in its two decisions in *Pollock v. Farmers' Loan & Trust Co.*,[70] holding that taxes on real *and* personal property, and income derived from them, were direct taxes.[71] These decisions significantly altered the Court's direct tax jurisprudence.[72] In *Pollock*, the Court considered whether provisions in the Tariff of 1894 that imposed unapportioned taxes on income derived from both real and personal property were direct taxes.[73] The Court adopted two primary holdings regarding the scope of the Constitution's "direct tax" clause. First, the Court held that taxes on real estate and personal property are direct taxes.[74]

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taxes, within the meaning of the Constitution, *are only* capitation taxes, as expressed in that instrument, and taxes on real estate." (second emphasis added)); *but see* Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895) (holding taxes on personal property are also direct taxes).

[70] 158 U.S. 601 (1895) [hereinafter *Pollock II*]; 157 U.S. 429 [hereinafter *Pollock I*]. *Pollock* came to the Court twice. In *Pollock I*, the Court invalidated the tax at issue insofar as it was a tax upon income derived from real property, but the Court was equally divided on whether income derived from personal property was a direct tax. 157 U.S. at 583, 586. In *Pollock II*, on petitions for rehearing, the Court held that a tax on income derived from personal property was also a direct tax. 158 U.S. at 637. For simplicity, the main body of this report refers to the two decisions collectively as the "*Pollock*" decision.

[71] *Pollock II*, 158 U.S. 601; *Pollock I*, 157 U.S. 429.

[72] In 1861, more than 20 years before the Supreme Court's decisions in *Pollock*, Congress passed the first income tax to meet the financial needs of the Civil War. Act of Aug. 5, 1861, ch. 45, §§ 49–51, 12 Stat. 292, 309–11 (1894); Moore v. United States, 602 U.S. 572, 583 (2024); Joseph A. Hill, *The Civil War Income Tax*, 8 Q. J. OF ECON. 416 (1894). The Civil War income tax was not operable until after the Act of July 1, 1862's modifications. Act of July 1, 1862, ch. 119, § 89–93, 12 Stat. 432, 473–75; Hill, *supra*, at 420–23. The tax applied to the "annual gains, profits, or income of every person residing in the United States, whether derived from any kind of property, rents, interest, dividends, salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, except as hereinafter mentioned . . . ." Act of July 1, 1862, ch. 119, § 90, 12 Stat. at 432, 473. The rate was 3% on persons residing in the United States with "annual gains, profits, or income" exceeding $600 and 6% on persons residing in the United States with "annual gains, profits, or income" exceeding $10,000. *Id.* The Act of July 1, 1862, version of the Civil War income tax also imposed a 5% tax on the "annual gains, profits, or income, rents, and dividends accruing upon any property, securities, and stocks owned in the United States" of U.S. citizens residing abroad who were not employed by the U.S. government. *Id*. Along with the Civil War income tax, Congress imposed a 5% special tax on U.S. citizens' and residents' incomes that exceeded $600 in 1863 to finance bounties paid to Civil War volunteers. Act of July 4, 1864, 13 Stat. 417; Hill, *supra*, at 426. By 1864, the Civil War income tax no longer distinguished between persons residing in the United States and U.S. citizens abroad—both were subject to tax on their "annual gains, profits, or income" from "any [] source whatever, except as hereinafter mentioned" if those amounts exceeded $600. Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281; *see* Hill, *supra*, at 426. Congress modified the Civil War income tax several times, often adjusting the rates and the thresholds. *See, e.g.*, Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281 (imposing a tax of 5% on incomes above $600 to $5,000, 7.5% on incomes above $5,000 to $10,000, and 10% on incomes above $10,000); Act of Mar. 3, 1865, ch. 78, 13 Stat. 469, 479 (imposing a tax of 5% on income above $600 to $5,000 and a tax of 10% on incomes above $5,000); Act of Mar. 2, 1867, ch. 169, § 13, 14 Stat. 471, 477–78 (imposing a tax of 5% on incomes above $1,000 and the incomes of "every business, trade, or profession carried on in the United States" by persons that were not U.S. citizens or residents); Act of July 14, 1870, ch. 255, §§ 6-11, 16 Stat. 256, 256–58 (imposing a tax of 2.5% on incomes above $2,000, including income "derived from any business, trade, or profession carried on in the United States" by persons who were not U.S. citizens or residents and income from rents from U.S. real estate owned by persons who were not U.S. citizens or residents). The Act of June 30, 1864, version of the Civil War income tax, as amended by the Act of March 3, 1865, was at issue in *Springer v. United States*. Springer v. United States, 102 U.S. 586, 593 (1880); *see* Act of June 30, 1864, ch. 173, §§ 116–23, 13 Stat. 223, 281–85; Act of Mar. 3, 1865, ch. 78, 13 Stat. 469, 479. In *Springer,* the Court heavily relied on the *Hylton* Court's analysis and held "that the tax of which the plaintiff in error complains is within the category of an excise or duty," not an unapportioned direct tax in violation the Constitution. *Springer*, 102 U.S. at 602. The Civil War income tax expired in 1872. Act of July 14, 1870, ch. 255, § 6, 16 Stat. 256, 257; *see* Jensen, *supra* note 60, at 1094 ("Whatever its intellectual justification, the Civil War tax expired because by the early 1870s there was no longer an urgent need for revenue; tariffs were bringing in enough to keep the country going."); Hill, *supra*, at 436–42. The income tax provisions in the Tariff Act of 1894 that were at issue in *Pollock* were modeled on the Civil War income tax, which the Court unanimously upheld just 13 years earlier in *Springer*. Ackerman, *supra* note 2, at 28.

[73] *Pollock II*, 158 U.S. at 618; *Pollock I*, 157 U.S. at 558; *see* Tariff of 1894, ch. 349, §§ 27–37, 28 Stat. 509, 553–560.

[74] *Pollock II*, 158 U.S. at 628; *Pollock I*, 157 U.S. at 580–81.

Second, the Court held that a tax on income *derived from* real or personal property—rather than income derived from employment or some other source[75]—is, in effect, a tax imposed directly on the property itself and is also a direct tax.[76] Applying these holdings, the Court held that the provisions before it were unconstitutional because they were unapportioned taxes on income derived from real and personal property.[77]

The *Pollock* Court concluded that its holding did not conflict with the Court's prior decisions interpreting the direct tax language.[78] The Court reasoned that each of those decisions had sustained unapportioned taxes as either "excises" or "duties" imposed on a particular use of, or privilege associated with, the property in question, not as a tax on the property itself.[79] As to *Hylton* specifically, the Court determined that it had upheld the unapportioned carriage tax as an

[75] The Court stated that its holding did not extend to income, gains, or profits derived from business, privileges, or employment. *Pollock II*, 158 U.S. at 635 ("We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business privileges or employments has assumed the guise of an excise tax and been sustained as such."); *see* Helvering v. Indep. Life Ins. Co., 292 U.S. 371, 381 (1934) (upholding a statutory scheme that only permitted insurance companies to take certain real estate deductions when they included their otherwise nontaxable rental value of owner-occupied space in gross income as not a direct tax) ("It is clear that the provisions under consideration do not lay a tax upon respondent's building or the rental value of the space occupied by it or upon any part of either."); Stratton's Indep., Ltd. v. Howbert, 231 U.S. 399, 416–17 (1913) (upholding the application of a tax on corporate income of a mining corporation before the ratification of the Sixteenth Amendment) ("Evidently Congress adopted the income as the measure of the tax to be imposed with respect to the doing of business in corporate form because it desired that the excise should be imposed, approximately at least, with regard to the amount of benefit presumably derived by such corporations from the current operations of the Government. . . . Moreover, Congress evidently intended to adopt a measure of the tax that should be easy of ascertainment and simply and readily applied in practice."); Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911) (holding a tax on corporate income was an excise tax after the Court's decisions in *Pollock* and before the ratification of the Sixteenth Amendment) ("The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i.e.*, with the advantages which arise from corporate or quasi-corporate organization; or when applied to insurance companies, for doing the business of such companies."); Spreckels Sugar Refin. Co. v. McClain, 192 U.S. 397, 411 (1904) (holding a tax on the gross receipts of sugar refining businesses was an excise tax) ("Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of gross annual receipts."); Veazie Bank v. Fenno, 75 U.S. 533, 546–47 (1869) (holding that a provision subjecting state banks and state and national banking associations to a 10% tax on state bank notes paid out by them and used for circulation was not a direct tax) ("The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties."); Pacific Ins. Co. v. Soule, 74 U.S. 433, 445 (1868) (holding a tax on insurance companies' premiums, dividends, undistributed sums, and income was not a direct tax) ("If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges.").

[76] *Pollock I*, 157 U.S. at 581 ("An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."); *Pollock II*, 158 U.S. at 628 (applying "the same reasoning . . . to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom").

[77] *Pollock II*, 158 U.S. at 637; *Pollock I*, 157 U.S. at 583.

[78] *Pollock II*, 158 U.S. at 626–27; *Pollock I*, 157 U.S. at 574–80.

[79] *Pollock II*, 158 U.S. at 626–27; *Pollock I*, 157 U.S. at 574–80. In *Pollock I*, the Supreme Court explained that the record in *Springer v. United States*, 102 U.S. 586 (1881), revealed that the income at issue in *Springer* was from professional earnings and U.S. bond interest, not from real estate. *Pollock I*, 157 U.S. at 578–79. While the *Pollock I* Court concluded that *Springer's* holding, classifying the tax as an excise or a duty, was "broad enough to cover the interest as well as the professional earnings," it remarked that *Springer* "would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct." *Id.*

"excise" on the "expense" or "consumption" of carriages, rather than as a tax on carriage ownership.[80]

Pollock's holding and rationale were later limited in several respects.[81] Most prominently, Congress passed and the states ratified the Sixteenth Amendment in direct response to *Pollock*'s prohibition on the unapportioned taxation of income derived from real or personal property.[82] The Sixteenth Amendment authorized Congress "to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several states."[83] Further, while the Court in *Pollock* held that a tax on income derived from property was indistinguishable from a tax on the property itself, the Court later rejected that reasoning in *Stanton v. Baltic Mining Company.*[84] The *Stanton* Court upheld an unapportioned tax on a mine's income as being "not a tax upon property as such . . . , but a true excise levied on the results of the business of carrying on mining operations."[85] The Court opined:

> [T]he Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, that is by testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed.[86]

Despite these developments, it does not appear that the Supreme Court has overruled *Pollock*'s central holding that a tax on real or personal property solely because of its ownership is a direct tax.[87] In 1920, the Court relied on *Pollock* in *Eisner v. Macomber* to hold unconstitutional an unapportioned tax on shares issued in a pro rata stock dividend.[88] There, the Court addressed whether Standard Oil Company of California's issuance of additional shares to a stockholder as stock dividends was "income" under the Sixteenth Amendment and, if not, whether a tax on any

[80] *Pollock II*, 158 U.S. at 626–27 ("What was decided in the *Hylton* Case was, then, that a tax on carriages was an excise, and, therefore, an indirect tax."); *see also* Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 CASE W. RSRV. L. REV. 297, 325–328 (2015) (explaining that, before the Constitution was written, states had been imposing "excises" outside the point of sale (e.g., an annual tax on coaches and chariots, a tax on the total annual production of cider mills)).

[81] Jensen, *supra* note 60, at 1073.

[82] *Id.*; Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW. 3 (1987); *see* Moore v. United States, 602 U.S. 572, 583 (2024).

[83] U.S. CONST. amend. XVI (emphasis added).

[84] Stanton v. Baltic Mining Co., 240 U.S. 103 (1916).

[85] *Id.* at 112–14 (citing *Stratton's Indep*., Ltd. v. Howbert, 231 U.S. 399 (1913)). In *Stratton's Independence,* the Court rejected the mining corporation's argument that it was not engaged in a business because it was "merely occupied in converting its capital assets from one form into another." 231 U.S. at 414–15.

[86] *Id.* at 112–13 (citing Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916)); *see also Moore*, 602 U.S. at 583 ("[T]he Sixteenth Amendment expressly confirmed what had been the understanding of the Constitution before *Pollock*: Taxes on income—including taxes on income from property—are indirect taxes that need not be apportioned.").

[87] *See* Union Elec. Co. v. United States, 363 F.3d 1292, 1299 (Fed. Cir. 2004) ("We agree that *Pollock* has never been overruled, though its reasoning appears to have been discredited."); *see also* NFIB, 567 U.S. 519, 571 (2012) ("In 1895, [in *Pollock II*,] we expanded our interpretation [of direct taxes] to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes" (citation omitted)).

[88] Eisner v. Macomber, 252 U.S. 189, 219 (1920).

unrealized gain was a direct tax.[89] After concluding that the corporation's pro rata stock dividend did not result in "income"[90] to the stockholder because there was no change in the value of the stockholder's total shares in the corporation,[91] the Court relied on *Pollock* to conclude that the tax was a direct tax.[92]

The Court determined that the limitation on Congress's taxing power identified in *Pollock* "still has an appropriate and important function . . . not to be overridden by Congress or disregarded by the courts."[93] The Court observed that the Sixteenth Amendment must be "construed in connection with the taxing clauses of the original Constitution and the effect attributed to them," including *Pollock*'s holding that "taxes upon property, real and personal," are direct taxes.[94]

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[89] *Id*. at 201–19. In *Macomber*, the Supreme Court observed that the stock dividend altered the corporation's balance sheet but did "not alter the preexisting proportionate interest of any stockholder or increase the intrinsic value of his holding or of the aggregate holdings of the other stockholders as they stood before." *Id.* at 211; *cf*. United States v. Phellis, 257 U.S. 156, 173–75 (1921) (holding a stock dividend resulted in income to stockholders when the stockholders received stock in a new Delaware corporation as a dividend upon their stock in a New Jersey corporation as part of a 1915 corporate reorganization to reincorporate in Delaware because the stockholders acquired new stock with "property rights and interests materially different from those incident to ownership of stock in the old company.").

[90] *Id*. at 201–17. In *Macomber*, the Supreme Court defined "income" as "the gain derived from capital, labor, or from both combined." *Id*. at 207 (internal quotation marks omitted) (quoting *Stratton's Indep.,* 231 U.S. at 415). However, in subsequent cases, the Court has taken a more expansive view. Comm'r v. Glenshaw Glass, 348 U.S. 426, 431 (1955) (holding money received as exemplary damages for fraud and as the punitive two-thirds portion of a treble-damage antitrust recovery were gross income under a predecessor to IRC Section 61 because they were "instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers ha[d] complete dominion."); *see also* 26 U.S.C. § 61 ("Except as otherwise provided in this subtitle, gross income means all income from whatever source derived."). Recently, in *Moore v. United States*, the Supreme Court revisited *Macomber* and reiterated the *Macomber* Court concluded that "income requires realization." Moore v. United States, 602 U.S. 572, 588 (2024) (majority opinion) (citing *Macomber*, 252 U.S. at 207, 211–12); *see* CRS Legal Sidebar LSB11100, *Supreme Court Considers Scope of Congress's Sixteenth Amendment Income Taxing Power in Moore v. United States*, by Justin C. Chung (2024); *see, e.g.*, *Macomber*, 252 U.S. at 207 ("Here we have the essential matter: *not* a gain *accruing to* capital; not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being '*derived,'* that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal—*that* is income derived from property. Nothing else answers the description. The same fundamental conception is clearly set forth in the Sixteenth Amendment . . . ."). In *Moore*, the Court held that Congress's taxing power encompassed a tax that attributed the "undistributed income realized" by an entity to the entity's owners and then subjected the owners to the tax. 602 U.S. at 598. Because the entity at issue in *Moore* had realized the income that was attributed to its owners and the entity had not been subject to tax on that income, the Court did not need to resolve the disagreement between the parties over whether income required realization. *Id*. Nonetheless, Justices Thomas, Alito, Gorsuch, and Barrett expressed support for a realization requirement. *Id.* at 606–07 (Barrett, J., joined by Alito, J., concurring) ("The Sixteenth Amendment's reference to income 'derived' from any source encompasses a requirement that income, to be taxed without apportionment, must be *realized*. . . . Regardless of whether one uses the term 'derived' or 'realized,' the important point is this: The Sixteenth Amendment and the Direct Tax Clause distinguish between taxes on property, which are subject to apportionment, and taxes on income derived or realized from that property, which are not."), 644 (Thomas, J. joined by Gorsuch, J., dissenting) ("The text of the Sixteenth Amendment, read against the background of its adoption, confirms that the 'incomes' that the Sixteenth Amendment allows Congress to tax without apportionment are only *realized* incomes."). Only Justice Jackson expressed that there was no realization requirement. *Id*. at 1698 (Jackson, J., concurring) ("[T]here is no constitutional requirement, from *Macomber* or otherwise, that a taxpayer 'be able to sever . . . the gain from his original capital' in order to be taxed on it." (quoting Helvering v. Bruun, 309 U. S. 461, 469 (1940)).).

[91] 252 U.S. at 210–11.

[92] *Id*. at 218–19.

[93] *Id*. at 206.

[94] *Id*. at 205–06; *id.* at 218–19.

Applying that limitation, the Court held that the tax before it was unconstitutional because it was an unapportioned tax on personal property.[95]

In practical terms, the rule of apportionment for direct taxes means that Congress sets the amount to be raised by the direct tax, then divides that amount among the states by reference to each state's population.[96] An 1861 federal tax on real property illustrates the operation of the rule of apportionment.[97] Congress enacted a direct tax of $20 million.[98] After apportioning the direct tax among the states, territories, and the District of Columbia, the State of New York was liable for the largest portion of the tax, $2,603,918.67,[99] and the Territory of Dakota was liable for the least, $3,241.33.[100] The act called for the President to divide states, territories, and the District of Columbia into collection districts, appoint assessors to apportion the proper quota of direct tax for such districts, and appoint collectors to collect the tax due in each district.[101] States, territories, and the District of Columbia could assume the payment of their portion of the direct tax, relieving their taxpayers of the liability.[102]

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[95] *Id*. at 219.

[96] *See* Hylton v. United States, 3 U.S. 171, 174 (1796).

[97] Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, 294; *see also* Act of Jan. 9, 1815, ch. 21, 3 Stat. 164.

[98] Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, 294.

[99] *Id*. at 295 ("To the State of New York, two million six hundred and three thousand nine hundred and eighteen and two-third dollars.").

[100] *Id*. at 296 ("To the Territory of Dakota, three thousand two hundred and forty-one and one-third dollars.").

[101] *Id*. at 296-303 ("That, for the purpose of assessing the above tax and collecting the same, the President of the United States be, and he is hereby authorized, to divide, respectively, the States and Territories of the United States and the District of Columbia into convenient collection districts, and to nominate and, by and with the advice of the Senate, to appoint an assessor and a collector for each such district . . . . That the assessors shall . . . make out correct lists of the valuation and enumeration in each collection district, and deliver the same to the board of assessors hereinafter constituted in and for the States respectively. And it shall be the duty of the assessors in each State to convene in general meeting at such time and place as shall be appointed and .directed [sic] by the Secretary of the Treasury. And the said assessors, or a majority of them, so convened, shall constitute, and they are hereby constituted, a board of assessors for the purposes of this act . . . . That as soon as the said board of assessors shall have completed the adjustment and equalization of the valuation aforesaid, they shall proceed to apportion to each county and State district its proper quota of direct tax. . . . [S]aid assessors, respectively, shall make out lists containing the sums payable according to the provisions of this act upon every object of taxation in and for each collection district; which lists shall contain the name of each person residing within the said district, owning or having the care or superintendence of property lying within the said district which is liable to the said tax, when such person or persons are known, together with the sums payable by each; and where there is any property within any collection liable to the payment of the said tax, not owned or occupied by or under the superintendence of any person resident therein, there shall be a separate list of such property, specifying the sum payable, and the names of the respective proprietors, where known. And the said assessors shall furnish to the collectors of the several collection districts, respectively, . . . after the apportionment is completed . . . . That each of the said collectors shall, within ten days after receiving his collection list from the assessors, . . . advertise in one newspaper printed in his collection district, if any there be, and by notifications, to be posted up . . . in his collection district, that the said tax has become due and payable, and state the times and places at which he or they will attend to receive the same . . . ; and with respect to persons who shall not attend, according to such notifications . . . ; and if the said taxes shall not be then paid, . . . it shall be lawful for such collector, or his deputies, to proceed to collect the said taxes by distraint and sale of the goods, chattels, or effects of the persons delinquent as aforesaid.").

[102] *Id.* at 311 ("That any State or Territory and the District of Columbia may lawfully assume, assess, collect, and pay into the Treasury of the United States the direct tax, or its quota thereof, imposed by this act upon the State, Territory, or the District of Columbia, in its own way and manner, by and through its own officers, assessors, and collectors; . . . and any such State, Territory or District which shall give notice by the Governor, or other proper officer thereof, to the Secretary of the Treasury of the United States . . . of its intention to assume and pay, or to assess, collect, and pay into the Treasury of the United States, the direct tax imposed by this act, shall be entitled . . . to a deduction of fifteen per centum on the quota of direct tax apportioned to such State, Territory or the District of Columbia levied and collected by said State, Territory, and District of Columbia through its said officers . . . ."); *see* Dunbar, *supra* note 60, at 446–49 (continued...)

Indirect Taxes and the Rule of Uniformity

The U.S. Constitution requires that duties, imposts, or excise taxes—collectively referred to as *indirect* taxes—be "uniform throughout the United States."[103] The terms *duties* and *imposts* are generally associated with customs and are commonly applied to government levies on the exportation and importation of goods.[104] The U.S. Supreme Court has construed the term *excises* to include levies on the manufacture, sale, or consumption of goods; licenses; privileges; business transactions; a particular use or enjoyment of property; and the shifting of a power or a privilege

("The results of the levy for 1861 can be considered more conveniently if we separate the loyal States and Territories from those in insurrection. Of the former, all except Delaware and Colorado Territory assumed the payment of their quotas. . . . In Delaware and Colorado, the tax was collected, after some delay, by the internal revenue officers of the United States; and thus, except some trifling amounts from the Territories, the accounts of the loyal States and Territories for the direct tax were cleared. . . . There remain the eleven States which were in insurrection when the tax was laid and the Territory of Utah. . . . Under the act of June 7, 1862, commissioners from time to time made assessments for the direct tax in about one-half of the counties in the eleven States, and made collections in all those States, except Alabama.[] Assessments were enforced by sales of lands for taxes in districts occupied by the federal forces until the order of the Secretary of the Treasury, on May 17, 1865, suspending all such proceedings." (footnote omitted)); *see also id.* at 443–44 (explaining that provisions providing for states to assume their direct tax quotas began with the direct tax of 1813 with seven states assuming their quotas and then four states assuming their quotas in 1815 and 1816) ("The option thus allowed to the States did not, however, change the character of the tax as a tax upon individuals, or make it a tax upon States."). Thirty years later, Congress directed money collected from the direct tax of 1861 be refunded to the states, territories, and the District of Columbia and unpaid quotas be remitted. Act of March 6, 1891, ch. 496, 26 Stat. 822. Sums collected from citizens, inhabitants, or "any other person" were to be held in trust by a state, territory, or the District of Columbia on behalf of those persons or their legal representatives. *Id.* Citizens, inhabitants, and other persons had to file a claim under the trust within six years of the act or the money attributable to the claim would escheat. *Id.* at 822–23.

[103] U.S. CONST. art. I, § 8, cl. 1; *see* Thomas v. United States, 192 U.S. 363, 369–70 (1904) ("The division of taxation into two classes is recognized throughout the Constitution. . . . And these two classes, taxes so-called [direct], and 'duties, imposts, and excises,' apparently embrace all forms of taxation contemplated by the Constitution."); Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911) ("[T]he terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution."); Pollock I, 157 U.S. 429, 557 (1895) ("[A]lthough there have been from time to time intimations that there might be some tax which was not a direct tax, nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.").

[104] *Flint*, 220 U.S. at 151; *see* Pollock II, 158 U.S. 601, 622 (1895); *see generally* Natelson, *supra* note 80, at 319–23 (2015).

incidental to the ownership or enjoyment of property from one to another.[105] The Court has declined to "confine the words duties, imposts, and excises to the limits of precise definition."[106]

An indirect tax satisfies the Uniformity Clause "only when the tax 'operates with the same force and effect in every place where the subject of it is found.'"[107] In general, an indirect tax does not violate the Uniformity Clause where the subject of the indirect tax is described in nongeographical terms.[108] If Congress uses geographical terms to describe the subject of the indirect tax, then the Supreme Court "will examine the classification closely to see if there is actual geographic discrimination."[109]

In the Supreme Court's first hearing of *Pollock*, the Court was divided on whether the statutes enacting the federal income tax[110] violated the Uniformity Clause.[111] Among other things, the

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[105] Fernandez v. Wiener, 326 U.S. 340, 352–54 (1945); *Flint*, 220 U.S. at 151 (quoting Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 680 (7th ed. 1903)); *see* Steward Mach. Co. v. Davis, 301 U.S. 548, 582 (1937) ("At times taxpayers have contended that the Congress is without power to lay an excise on the enjoyment of a privilege created by state law. The contention has been put aside as baseless."); *see, e.g.*, Billings v. United States, 232 U.S. 261, 277–79 (1914) (explaining that a provision that was adopted in light of *Pollock* was intended to be an annual excise tax upon the "use" of foreign-built yachts, pleasure boats, and vessels owned or chartered for more than six months by U.S. citizens "equivalent to [the] tonnage tax of seven dollars per gross ton" from Section 37 of the Tariff of 1909, Pub. L. No. 61-5, § 37, 36 Stat. 11, 112); Patton v. Brady, 184 U.S. 608 (1902) (holding that a tax to meet the expenditures of the Spanish-American War on already-taxed tobacco held for sale was an excise tax when the tax was intended to subject the already-taxed tobacco to a tax rate that was closer to the new higher excise tax rate on tobacco before the ownership of the tobacco passed to the consumer); Nicol v. Ames, 173 U.S. 509, 519 (1899) (holding a tax on sales and sales agreements taking place at boards of trade or exchanges was not a direct tax even though the tax was measured by the value of the item sold) ("We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act.").

[106] *Thomas*, 192 U.S. at 370. In *Thomas*, the Supreme Court viewed duties, imposts, and excises as a class. *Id.* ("We think that [duties, imposts, and excises] were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."). In *Brushaber v. Union Pacific Railroad Company*, the Court explained "various acts taxing incomes derived from property of every kind and nature which were enacted beginning in 1861 and lasting during what may be termed the Civil War period" had been "classed under the head of excises, duties and imposts." 240 U.S. 1, 15 (1916); *see* Moore v. United States, 602 U.S. 572, 582–83 (2024) (citing Article 1, Section 8, clause 1 of the U.S. Constitution and the Sixteenth Amendment to include income taxes in the category of indirect taxes). In *Moore*, the Court reiterated that a tax that attributes an entity's undistributed income to the entity's owners and then subjects the owners to tax on that income "remains a tax on income—and thus an indirect tax that need not be apportioned." 602 U.S. at 585.

[107] United States v. Ptasynski, 462 U.S. 74, 82 (1983) (quoting Head Money Cases (Edye v. Robertson), 112 U.S. 580, 594 (1884)).

[108] *Ptasynski*, 462 U.S. at 84; *see, e.g.*, Knowlton v. Moore, 178 U.S. 41, 106 (1900).

[109] *Ptasynski*, 462 U.S. at 85.

[110] Tariff of 1894, ch. 349, §§ 27–37, 28 Stat. 509, 553–560.

[111] Pollock I, 157 U.S. 429, 586 (1895); *compare* Tariff of 1894, ch. 349, § 27, 28 Stat. 509, 553 ("That from and after the first day of January, eighteen hundred and ninety-five, and until the first day of January, nineteen hundred, there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, *a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied*, collected, and paid *annually upon the gains, profits, and income from all property owned* and of every business, trade, or profession carried on in the United States by persons residing without the United States." (emphasis added)), *with id.* § 32, 28 Stat. at 556 ("That there shall be assessed, levied, and collected, except as herein otherwise provided, *a tax of two per centum annually on the net profits or income* above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest (continued...)

complainant argued that the federal income tax violated the rule of uniformity by effectively taxing certain corporations at a higher rate than individuals and partnerships on income "from precisely similar property or business."[112] However, the issue became moot on rehearing after the Court held that provisions in the act imposing the federal income tax were unapportioned direct taxes.[113]

Five years later, in *Knowlton v. Moore*, the Supreme Court examined how the rule of uniformity applied to indirect taxes.[114] In *Knowlton,* the Court adopted a less restrictive reading of the Uniformity Clause,[115] holding that, in selecting the subject of an indirect tax, Congress could define the class of objects subject to the tax and make distinctions between similar classes.[116] The *Knowlton* Court ruled that an inheritance tax that exempted legacies and distributive shares of personal property under $10,000, imposed a primary tax rate that varied based on the beneficiary's degree of relationship to the decedent, and progressively raised tax rates on legacies and distributive shares as they increased in size did not violate the Uniformity Clause.[117] The Court held that the Uniformity Clause merely requires "geographical uniformity," meaning indirect taxes must operate in the same manner throughout the United States.[118]

The Supreme Court further clarified the meaning of the Uniformity Clause in *United States v. Ptasynski*.[119] In *Ptasynski*, the Court ruled that the Crude Oil Windfall Profit Tax Act of 1980,[120] which made the windfall profit tax inapplicable to "exempt Alaskan oil,"[121] did not violate the Uniformity Clause despite the act's inclusion of favorable treatment for a geographically defined classification.[122] The Court explained, "Where Congress defines the subject of a tax in

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on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, *but not including partnerships*." (emphasis added)).

112 *Pollock I,* 157 U.S. at 555.

113 *See* Pollock II, 158 U.S. 601, 637 (1895).

114 178 U.S. 41 (1900).

115 *Id*. at 84–106; *see id*. at 96 ("The proceedings of the Continental Congress also make it clear that the words 'uniform throughout the United States,' which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression, 'to operate generally throughout the United States.' The foregoing situation so thoroughly permeated all the proceedings of the Continental Congress that we might well rest content with their mere statement. . . . The view that intrinsic uniformity was not then conceived is well shown . . . .").

116 *Id.* at 83–110; *see also* United States v. Ptasynski, 462 U.S. 74, 82 (1983).

117 *Knowlton,* 178 U.S. at 110; *see id*. at 83–84.

118 *Id.* at 84 (explaining geographical uniformity "requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate.").

119 462 U.S. 74.

120 Pub. L. No. 96-223, § 101, 94 Stat. 229, 244 (1980).

121 *Ptasynski*, 462 U.S. at 77; *see id*. at 77–78 ("[Exempt Alaskan oil] is defined as: 'any crude oil (other than Sadlerochit oil) which is produced—(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.' [26 U.S.C.] § 4994(e). Although the Act refers to this class of oil as 'exempt Alaskan oil,' the reference is not entirely accurate. The Act exempts only certain oil produced in Alaska from the windfall profit tax. Indeed, less than 20% of current Alaskan production is exempt. Nor is the exemption limited to the State of Alaska. Oil produced in certain offshore territorial waters—beyond the limits of any State—is included within the exemption." (footnote omitted)).

122 *Id.* at 85.

nongeographic terms, the Uniformity Clause is satisfied. . . . But where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination."[123] The Court held that the geographically defined classification was constitutional because Congress used "neutral factors" relating to the ecology, environment, and the remoteness of the location to conclude the exempt Alaskan oil classification merited favorable treatment.[124] Moreover, in the Court's view, Congress did not intend to grant Alaska "an undue preference at the expense of other oil producing States."[125]

Taxes for Federal Debts, Defense, or the General Welfare

The U.S. Constitution authorizes Congress to levy taxes "to pay the Debts and provide for the common Defence and general Welfare of the United States."[126] The U.S. Supreme Court has interpreted the term "debts" to include debts "of a strictly legal character" and "debts or claims which rest upon a merely equitable or honorary obligation."[127] The Court has generally left it to Congress to determine whether a tax advances the "general welfare."[128] However, the Supreme Court has ruled that a tax will not cease to be valid solely because the amount of revenue it raises is negligible.[129]

[123] *Id*. at 84–85.

[124] *Id.* at 85 ("Congress clearly viewed 'exempt Alaskan oil' as a unique class of oil that, consistent with the scheme of the Act, merited favorable treatment. It had before it ample evidence of the disproportionate costs and difficulties—the fragile ecology, the harsh environment, and the remote location—associated with extracting oil from this region. We cannot fault its determination, based on neutral factors, that this oil required separate treatment." (footnote omitted)).

[125] *Id*. at 85–86 ("Nor is there any indication that Congress sought to benefit Alaska for reasons that would offend the purpose of the [Uniformity] Clause. Nothing in the Act's legislative history suggests that Congress intended to grant Alaska an undue preference at the expense of other oil-producing States. This is especially clear because the windfall profit tax itself falls heavily on the State of Alaska. . . . Where, as here, Congress has exercised its considered judgment with respect to an enormously complex problem, we are reluctant to disturb its determination.").

[126] U.S. CONST. art. I, § 8, cl. 1.

[127] United States v. Realty Co., 163 U.S. 427, 440 (1896); *see, e.g.*, Cincinnati Soap Co. v. United States, 301 U.S. 308, 315 (1937) (holding that an act of Congress that set apart revenue from a processing tax on coconut oil of Philippine production for the use of the Philippine Islands fell within the meaning of "debt" under Article I, Section 8, clause 1 of the U.S. Constitution).

[128] Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 997 (2011); *see, e.g.*, Helvering v. Davis, 301 U.S. 619, 640–41 (1937) ("The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. *The discretion, however, is not confided to the courts. The discretion belongs to Congress*, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. 'When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.' . . . Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times." (emphasis added) (citations omitted) (quoting United States v. Butler, 297 U.S. 1, 67 (1936))); *see also* NFIB, 567 U.S. 519, 674 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("Since [*Helvering v. Davis*], the Court has never held that a federal expenditure was not for 'the general welfare.'"); South Dakota v. Dole, 483 U.S. 203, 207 n.2 (1987) (reviewing Congress's spending power) ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." (citing Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam))).

[129] United States v. Sanchez, 340 U.S. 42, 44 (1950) (explaining a tax does not cease to be valid "even though the revenue obtained is obviously negligible, Sonzinsky v. United States, [300 U.S. 506 (1937)] or the revenue purpose of the tax may be secondary, Hampton & Co. v. United States, [] 276 U.S. 394 [(1928)]."); *see also* United States v. (continued...)

Taxes to Regulate Conduct

Congress uses the taxing power for more than just raising revenue. Congress also uses the taxing power to regulate conduct. Congress uses tax expenditures and tax penalties to accomplish its policy goals and to influence private behavior.[130] The U.S. Supreme Court has not invalidated a tax with a clear regulatory effect solely because Congress was motivated by a regulatory purpose.[131] In *National Federation of Independent Business v. Sebelius (NFIB)*, the Court reaffirmed that it construes the U.S. Constitution to prohibit Congress from using the taxing power to enact taxes that are functionally regulatory penalties as a means of regulating in areas that Congress cannot regulate directly through its other enumerated powers.[132] In a few cases decided in the 1920s and 1930s, the Court invalidated federal taxes that were functionally regulatory penalties on this basis.[133]

In *Bailey v. Drexel Furniture Co.* (commonly referred to as the *Child Labor Tax Case*), decided in 1922, the Supreme Court struck down a ten percent tax on the net profits of specified employers who knowingly employed child labor.[134] The Court invalidated the child labor tax as a penalty exceeding the scope of Congress's enumerated powers and aiming to achieve a regulatory purpose "plainly within" the exclusive powers reserved to the states under the Tenth Amendment.[135] Four characteristics of the tax led the Court to conclude the tax was a penalty: (1)

Kahriger, 345 U.S. 22, 28 n.4 (1953) ("The figure of $ 4,371,869 [raised by the wagering tax], however, is relatively large when it is compared with [other taxes declared valid including] the $ 3,501 collected under the tax on adulterated and process [sic] or renovated butter and filled cheese, the $ 914,910 collected under the tax on narcotics, including marihuana and special taxes, and the $ 28,911 collected under the tax on firearms, transfer and occupational taxes. (Summary of Internal Revenue Collections, released by Bureau of Internal Revenue, October 3, 1952.)").

[130] Mason, *supra* note 128, at 977–78 ("Congress uses two kinds of tax incentives to regulate private actors. Tax subsidies or 'tax expenditures' are tax laws that offer special tax deductions, credits, and other tax benefits designed to accomplish public policy goals. . . . Tax penalties are special tax code provisions that increase the normal tax burden. Like tax expenditures, Congress designs tax penalties to influence taxpayer behavior." (footnote omitted)); *see* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3(a)(3), 88 Stat. 297, 299 (1974) (defining the term "tax expenditures" for the purpose of the act as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability"); *NFIB*, 567 U.S. at 544 (noting the difference between tax statutes describing exactions as penalties and penalties for constitutional purposes—taxes that are functionally regulatory penalties that are impermissible when solely relying on Congress's authority to regulate under the taxing power).

[131] *See, e.g.*, United States v. Doremus, 249 U.S. 86, 93 (1919) ("[F]rom an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it."); Flint v. Stone Tracy Co., 220 U.S. 107, 167 (1911) ("[T]he right to select the measure and objects of taxation devolves upon the Congress and not upon the courts, and such selections are valid unless constitutional limitations are overstepped."); McCray v. United States, 195 U.S. 27, 59 (1904) ("[T]he motive or purpose of Congress in adopting acts in question may not be inquired into."); *see* Metzger, *supra* note 2, at 90.

[132] 567 U.S. at 572–73.

[133] *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

[134] 259 U.S. at 37; *see also* Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding Congress lacked authority to regulate child labor under the Commerce Clause).

[135] *Drexel Furniture*, 259 U.S. at 39–43; *see* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also* *Drexel Furniture*, 259 U.S. at 37–38 ("Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that (continued...)

the tax was conditioned on noncompliance with a specific and detailed course of conduct regarding the use of child labor; (2) the tax was not commensurate with the degree of the infraction—i.e., a small departure from the prescribed course of conduct could feasibly lead to the ten percent tax on net profits; (3) there was a scienter requirement—the tax was conditioned on an employer knowing he employed an underage laborer; and (4) the Department of Labor, an agency traditionally responsible for enforcing labor laws as opposed to tax laws, could enforce the course of conduct prescribed by the tax.[136] The Court distinguished the child labor tax from acceptable regulatory taxes by emphasizing that in those cases Congress had authority outside the taxing power to regulate those activities.[137]

In 1935, in *United States v. Constantine*, a divided Supreme Court struck down a federal excise tax on liquor dealers selling liquor in violation of state laws.[138] The Court read the Constitution to prohibit Congress from imposing an excise tax on liquor dealers when the purpose of the tax was to punish rather than raise revenue, because Congress lacked authority to impose a penalty on liquor dealers following the repeal of the Eighteenth Amendment.[139] The Court emphasized the following features of the excise as evidence that its purpose was to impose a penalty rather than raise revenue: (1) the $1,000 excise was "highly exorbitant" and "grossly disproportionate" to the $25 normal tax on retail liquor dealers; and (2) the tax was conditioned on the commission of a crime.[140] The majority concluded that Congress exceeded its authority by penalizing liquor

Congress would need to do, hereafter, in seeking to take over to its control and one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.").

[136] *Drexel Furniture*, 259 U.S. at 36–37 ("[T]his act is more [than a tax]. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years, and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the Government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienter is associated with penalties not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed.").

[137] *Id*. at 40–44.

[138] 296 U.S. 287 (1935).

[139] *Id*. at 293–94 ("The repeal of the Eighteenth Amendment renders it necessary to determine whether the exaction is in fact a tax or a penalty. If it was laid to raise revenue its validity is beyond question, notwithstanding the fact that the conduct of the business taxed was in violation of law. The United States has the power to levy excises upon occupations, and to classify them for this purpose . . . . The question is whether the exaction of $1,000 in addition, by reason solely of his violation of state law, is a tax or a penalty? If, as the court below thought, [the excise tax] was part of the enforcing machinery under the Amendment, it automatically fell at the moment of repeal. But even though the statute was not adopted to penalize violations of the Amendment, it ceased to be enforceable at the date of repeal, if, in fact, its purpose is to punish rather than to tax. The only color for the assertion of congressional power to ordain a penalty for violation of state liquor laws is the Eighteenth Amendment, which gave to the federal government power to enforce nation-wide prohibition."); *see also* U.S. CONST. amend. XVIII ("After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.").

[140] *Constantine*, 296 U.S. at 295.

dealers for violating state law, because such regulation was reserved, under the Tenth Amendment, to the states.[141] The majority expressed that allowing the federal government to impose penalties for violating state law would "obliterate the distinction between the delegated powers of the federal government and those reserved to the states . . . ."[142]

The next year, in *United States v. Butler*, the Supreme Court struck down another federal tax because the tax infringed on powers reserved to the states under the Tenth Amendment.[143] In *Butler*, the act at issue included a tax on agricultural producers to raise funds to subsidize certain crops and control agricultural commodity prices.[144] The Court ruled that Congress did not hold the power to regulate the "purely local activity"[145] of controlling agricultural production, because the power to regulate local activity was reserved to the states.[146]

The Supreme Court has limited the applicability of these approximately 100-year-old decisions.[147] In later cases, the Court upheld regulatory taxes without specifying whether Congress had authority to regulate the activity subject to tax under its other enumerated powers.[148] For instance, in *Sonzinsky v. United States*, the Court rejected a challenge to a federal license tax on dealers, importers, and manufacturers of certain firearms.[149] The petitioner alleged that the tax was "a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states . . . ."[150] The Court explained:

> Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect; and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.

[141] *Id*. at 295–96.

[142] *Id*. at 296.

[143] 297 U.S. 1 (1936).

[144] *Id*. at 56; Mason, *supra* note 128, at 1000. In reaching its decision, the Court's analysis highlighted the tax's departure from the general understanding of the term "tax" as used in the Constitution. *Butler*, 297 U.S. at 61; *see id*. at 67. The Court explained the term "tax" connotes an "exaction for the support of the Government" as opposed to an "expropriation of money from one group for the benefit of another." *Id*. at 61. The Court conceded such a tax may be constitutional "when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation." *Id*.

[145] *Butler*, 297 U.S. at 63–64 ("[The act's] stated purpose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. *Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause*, which, for the purpose of the present case, may be put aside as irrelevant." (emphasis added)).

[146] *Id*. at 68–69.

[147] *See* NFIB, 567 U.S. 519, 572–73 (2012) ("Congress's ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise *regarded at the time as beyond federal authority*. More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. We have nonetheless maintained that 'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'" (emphasis added) (citations omitted) (quoting Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922))).

[148] Mason, *supra* note 128, at 1002; *see NFIB*, 567 U.S. at 567 ("Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns." (citing Sonzinsky v. United States, 300 U.S. 506 (1937) and United States v. Sanchez, 340 U.S. 42 (1950)).

[149] 300 U.S. at 512.

[150] *Id*.

> Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.[151]

Similarly, in *United States v. Sanchez*, the Supreme Court upheld a tax on unregistered transfers of marijuana that was challenged based on its penal nature.[152] In upholding the tax, the Court remarked, "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed."[153] Moreover, the Court stated, "Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate."[154]

In *NFIB*, the Supreme Court confirmed that the taxing power provides Congress with the authority to use taxes to carry out regulatory measures that might be impermissible if Congress enacted them under its other legislative powers.[155] In *NFIB*, the Court upheld the constitutionality of a provision in the Patient Protection and Affordable Care Act[156] requiring individuals to either purchase minimum health insurance (commonly referred to as the "individual mandate") or pay a "penalty" in lieu of purchasing minimum health insurance.[157] Despite being labeled a penalty in the statute, the Court held the payment due in lieu of purchasing minimum health insurance (the exaction) was a constitutionally permissible use of Congress's authority under the taxing power.[158] More specifically, the Court ruled the exaction was a tax, not a penalty, for constitutional purposes, and thus the exaction was not impermissibly regulatory under the taxing power.[159]

The Court applied a functional approach that looked at the exaction's "substance and application" to conclude the exaction was not a penalty for constitutional purposes.[160] The Court found that the

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[151] *Id*. at 513–14 (citations omitted).

[152] 340 U.S. at 44.

[153] *Id*. at 44 (citing *Sonzinsky*. 300 U.S. at 513–14).

[154] *Sanchez*, 340 U.S. at 44.

[155] 567 U.S. 519, 571–72 (2012) (majority opinion) (casting doubt on Congress's authority to enact the individual mandate provision under the Commerce Clause); *see id.* at 546–61(opinion of Roberts, C.J.) (finding neither the Commerce Clause nor the Necessary and Proper Clause provides Congress with the authority to enact the individual mandate); *id.* at 647–61 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (finding the Commerce Clause does not provide Congress with the authority to enact the individual mandate).

[156] 26 U.S.C. § 5000A.

[157] *NFIB*, 567 U.S. at 574.

[158] *Id.*; *see* 26 U.S.C. § 5000A(b)(1) ("[T]here is hereby imposed on the taxpayer a penalty with respect to such failures."). The penalty in lieu of purchasing health insurance is currently zero. Whether the penalty in lieu of purchasing minimum health insurance remains a tax for constitutional purposes, and accordingly, whether the individual mandate remains constitutional were questions before the Supreme Court in *California v. Texas*. 593 U.S. 659 (2021). However, the Court did not rule on these issues because the plaintiffs lacked standing to sue. *Id.* at 680; *but see id.* at 708–09 (Alito and Gorsuch JJ., dissenting) ("Given this text, history, and precedent, it is no longer defensible to argue that the individual mandate can be construed as a lawful exercise of Congress's taxing power, for as it now stands, the mandate will never 'produc[e] at least some revenue for the Government.' *NFIB*, 567 U.S., at 564 (opinion of the Court). . . . Congress cannot supplement its powers through the two-step process of passing a tax and then removing the tax but leaving in place a provision that is otherwise beyond its enumerated powers."); *see generally* CRS Legal Sidebar LSB10610, *Supreme Court Dismisses Challenge to the Affordable Care Act in California v. Texas*, by Edward C. Liu, Wen W. Shen, and Jennifer A. Staman (2021).

[159] *NFIB*, 567 U.S. at 572–74.

[160] *Id*. at 565 (quoting United States v. Constantine, 296 U.S. 287, 294 (1935)).

exaction "look[ed] like a tax in many respects."[161] The Court observed that the exaction is located in the Internal Revenue Code (IRC); the requirement to pay the exaction is located in the IRC; the Internal Revenue Service (IRS) enforces the exaction; the IRS assesses and collects the exaction "in the same manner as taxes"[162]; the exaction does not apply to individuals who do not owe federal income taxes because their income is less than the filing threshold; taxpayers pay the exaction to the Treasury's general fund when they file their tax returns; the exaction is based on "such familiar factors" as taxable income, filing status, and the number of dependents; and the exaction "yields the essential factor of any tax: [i]t produces at least some revenue for the government."[163]

The Court distinguished the exaction in *NFIB* from its past precedent in which it held Congress lacked authority under the taxing power to use penalties disguised as taxes to regulate activities that it could not regulate directly through its other enumerated powers.[164] The case mainly discussed in the majority opinion is *Bailey v. Drexel Furniture Co*.[165] The Court found that three of the four characteristics that it had used in *Drexel Furniture Co.* to conclude the child labor tax was a penalty for constitutional purposes were not present with respect to the individual mandate provision at issue in *NFIB*.[166] Unlike *Drexel Furniture Co.*, the Court found: (1) the exaction was not "prohibitory" because the exaction was "far less" than the cost of insurance; (2) there was no scienter requirement—the exaction was not levied based on a taxpayer's knowledge of wrongdoing; and (3) the IRS collected the exaction and the IRS was prohibited from using "those means most suggestive of a punitive sanction, such as criminal prosecution."[167]

Additionally, in distinguishing penalties from taxes for constitutional purposes, the Court explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission."[168] While the Court acknowledged that the purpose of the individual mandate provision was to encourage the purchase of health insurance, the Court found the individual mandate provision "need not be read to" make the failure to purchase health insurance unlawful.[169] As evidence of this, the Court emphasized that, besides the exaction itself, there were no additional "negative legal consequences" for failure to purchase health insurance.[170]

[161] *NFIB*, 567 U.S. at 563.

[162] 26 U.S.C. § 5000A(g)(1) ("The penalty provided by this section . . . shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68."); *id.* § 6671(a) (providing rules for application of assessable penalties under "subchapter B of chapter 68") ("The penalties and liabilities provided by this subchapter . . . shall be assessed and collected *in the same manner as taxes*." (emphasis added)).

[163] *Id.* at 563–64.

[164] *Id.* at 564–68.

[165] 259 U.S. 20 (1922).

[166] *NFIB*, 567 U.S. at 565–66.

[167] *Id*. at 566.

[168] *Id*. at 567 (quoting United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996)).

[169] *NFIB*, 567 U.S. at 567–68.

[170] *Id*. at 568.

Conclusion

The Framers envisioned a broad taxing power to support the national government and formulated constitutional provisions to bring about that vision. Since the nation's founding, judicial precedents have sustained Congress's extensive power to tax. The U.S. Supreme Court has helped ensure the power to tax is subject to few limitations. Taxpayers have made constitutional challenges to the manner in which Congress has imposed taxes based on express limitations in the U.S. Constitution. At the same time, even where those challenges succeeded in invalidating taxes, Congress has found other ways to achieve similar results, whether Congress's aim is raising revenue or implementing a regulatory scheme.

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