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### Constitutional Review of Federal Tax Legislation

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Constitutional Review of Federal Tax Legislation

Reuven S. Avi-Yonah<sup>1</sup>

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ABSTRACT

What does the Constitution mean when it says that “*The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States*” (US Const. Article I, Section 8, Clause 1)?

The definition of “tax” for constitutional purposes has become important in light of the Supreme Court’s 2012 decision in *NFIB v. Sebelius*, in which Chief Justice Roberts for the Court upheld the constitutionality of the individual mandate of the Affordable Care Act under the taxing power. This has led to commentators questioning the utility of Roberts’ distinction between a “tax” (where Congress’ power is almost unlimited) and a “regulation” (where Congress’ power under the Commerce Clause is limited).

We should make a very clear note at the outset: Tax law is a too broad term. It includes both provisions intended at raising revenue and provisions intended to regulate behavior. Personal income tax (PIT), corporate income tax (CIT) and even value added tax (VAT) laws include both type of provisions. Using the distinction that Prof. Stanley Surrey has proposed about 60 years ago, tax legislation includes both types of provisions; those that aimed at raising revenue in accordance with the tax base, and regulatory provisions as well (“tax expenditures”). In other words, almost any tax legislation includes both aspects. Hence referring to PIT means its base, and not necessarily all its code provisions. The purpose of this article is to draw this distinction and to use it for basic guidelines for constitutional judicial review over tax legislation.

We would propose a different distinction. A “tax” for purposes of the Taxing Clause is a **pure tax**, namely a tax implemented “*to pay the Debts and provide for the common Defence and general Welfare of the United States*”, i.e., a tax intended primarily to raise revenues in order to finance the elected government’s policy and its implementation. In addition, a progressive “income tax” for purposes of the Sixteenth Amendment is a tax intended for redistribution of wealth from the rich to the poor. We do not address redistributive tax provisions (like the progressivity feature of PIT or a wealth tax) further, beyond noting that they are inherently political and therefore their distributive function (reducing inequality) should not be subject to judicial review.

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<sup>1</sup> Irwin I. Cohn Professor of Law, the University of Michigan. We would like to thank Jack Cummings, Michael Dorf, Calvin Johnson, Kyle Logue, Fadi Shaheen...

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Even a pure tax has constitutional limits, but they are relatively few. It should be emphasized though, that the traditional bases for constitutional judicial review - such as discrimination on the basis of gender, race, or sexual orientation, are applied to tax legislation in a very limited way. As noted already, one could detect the Supreme Court's significant reluctance to review tax legislation in the US on constitutional grounds, although one could also argue that a tax provision that has disparate impact on racial or gender grounds (or other protected category) should be evaluated using strict scrutiny (as some provisions involving gender have in fact been evaluated by lower courts).

This should be distinguished from a **regulatory tax legislation**, i.e., tax legislation whose main purpose is not to raise revenue but to change taxpayer behavior. Regulatory taxes include Pigouvian taxes (e.g., tobacco taxes and carbon taxes) designed to reduce negative externalities and tax expenditures (deviations from a normative tax base, which we name negative Pigouvian taxes, since their purpose is to treat favorably taxpayers who create positive externalities). Regulatory Tax legislation should be subject to constitutional review under various clauses of the Constitution including the Due Process Clause, the Equal Protection Clause, the Establishment Clause, and the limits on the Commerce Clause.

The penalty imposed by the individual mandate of the ACA, which was repealed in 2017, was a regulatory tax (i.e., not a pure tax) and therefore (contrary to Chief Justice Roberts' view) subject to the limits on Congressional power under the Commerce Clause (although in our opinion the individual mandate should have been upheld as consistent with these limits, per Justice Ginsburg's dissenting opinion).

Any actual tax rule/legislation has more than one purpose. All tax rules influence behavior, and therefore come within our definition of regulatory taxes, and all taxes produce some revenue, and therefore come within our definition of pure taxes. But some taxes are primarily regulatory (e.g., Pigouvian taxes aimed to deal with negative externalities) and tax expenditures (deviation from a normative tax base which we name them Negative pigouvian taxes since their purpose is to treat favorably taxpayers who create positive externalities) while others are primarily for revenue (e.g., VAT). Other taxes have multiple purposes (e.g., corporate income tax, CIT, which has revenue and (as well as regulatory aims). Moreover, any given tax may have multiple provisions with different aims (e.g., the many tax expenditures embedded within PIT and CIT).

When evaluating the constitutionality of any given tax provision, a court should first classify it as either a pure tax provision or a regulatory tax provision. If it is the former, the court should generally hold that it is constitutional under the Taxing Clause. If it is the latter, the court should evaluate it against the limits imposed by the rest of the Constitution.

## 1. Introduction

The Constitution provides that “*The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States*”.<sup>3</sup> In *NFIB vs. Sebelius*, Chief Justice Roberts (for a 5-4 majority of the Court) relied on this “Taxing Clause” to uphold the constitutionality of the individual mandate of the Patient Protection and Affordable Care Act (ACA) because the ACA imposed a penalty on individuals who did not purchase health insurance, which in the Court’s opinion exceeded the limits of Congress’ Commerce Clause power to regulate interstate commerce.<sup>4</sup> As a result, when Congress in 2017 eliminated the penalty, this raised doubts on the constitutionality of the individual mandate (and potentially the ACA in its entirety) which are now again before the Court.<sup>5</sup>

Roberts held the penalty to be a “tax” because it was not coercive, was embedded in the tax code and enforced by the IRS.<sup>6</sup> But as many commentators have pointed out, this distinction between a tax and a penalty is not persuasive. Kyle Logue, for example, has suggested that every mandatory payment is a “tax” (even if paid to a private party, like an insurance premium, while regulatory taxes are not taxes but regulations).<sup>7</sup>

We do not agree with this classification, because in our opinion “tax” from a constitutional perspective must be restricted to payments to the government (as the Taxing Clause states, because only such payments can help “*to pay the Debts and provide for the common Defence and general Welfare of the United States.*”) But that still leaves unanswered the basic question

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<sup>3</sup> US Const. Article I, Section 8, Clause 1 (the “Taxing Clause”).

<sup>4</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012).

<sup>5</sup> *Texas v. California*, US Supreme Court Docket No. 10-1019 (argued Nov. 10, 2020).

<sup>6</sup> *NFIB v. Sebelius*, *supra*.

<sup>7</sup> Kyle D. Logue, *NFIB v. Sebelius and the Individual Mandate: Thoughts on the Tax/Regulation Distinction*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 173 (2016); see also Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 88 (2012) (citations omitted) (“To some, Chief Justice Roberts’s argument for sustaining the individual mandate as a tax seemed to come out of nowhere. The Court received a total of 156 briefs related to the case, but only ten contained more than a passing discussion of the tax power argument, and the government devoted only fifteen pages to it. Though raised throughout the litigation, the tax power argument was repeatedly rejected or not reached below and received only passing expressions of support. Nor did the Court itself seem to show much interest; the question of whether the mandate represented an exercise of the tax power received less than fourteen minutes of sustained discussion at oral argument.”) For early advocacy of the Taxing Clause as the basis for the constitutionality of the individual mandate see, e.g., Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L. J. ONLINE 27 (2010), <http://yalelawjournal.org/forum/conditional-taxation-and-the-constitutionality-of-health-care-reform>; Robert D. Cooter & Neil S. Seigel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

of how to distinguish a “tax” that is presumptively constitutional under the Taxing Clause from a “regulation” that is subject to limitation under the rest of the Constitution.

We would propose the following distinction.<sup>8</sup> A “tax” for purposes of the Taxing Clause is a **pure tax**, namely a tax implemented for raising revenue for the government “*to pay the Debts and provide for the common Defence and general Welfare of the United States*”. Even a pure tax has constitutional limits, but they are relatively few.<sup>9</sup> This should be distinguished from a **regulatory tax**, i.e., a tax whose main purpose is not to raise revenue but to change taxpayer behavior. Regulatory taxes include Pigouvian taxes (e.g., taxes on tobacco products or carbon taxes) designed to reduce negative externalities and tax expenditures (deviations from a normative tax base which in essence are negative Pigouvian taxes. Regulatory taxes should be subject to constitutional review under various clauses of the Constitution including the Due Process Clause, the Equal Protection Clause, and the limits on congressional power under the Commerce Clause, and the establishment clause.<sup>10</sup> The penalty imposed by the individual mandate of the ACA, which was repealed in 2017, was a regulatory tax and therefore (contrary to Chief Justice Roberts’ view) potentially subject to the limits of congressional power under the Commerce Clause.<sup>11</sup>

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<sup>8</sup> Admittedly, such a distinction has almost no basis in the Court’s existing precedents; as discussed *infra*, the Court has generally evaluated all payments labeled “taxes” that raise any revenue as subject only to the relatively weak limits of the Taxing Clause. But this approach raises its own problems because it encourages Congress to use the tax code for regulatory purposes, primarily through “tax expenditures” (i.e., deviations from a normative tax base). See discussion *infra*. For an excellent discussion of the Court’s existing precedents on federal taxes and the Constitution see generally Jasper L. Cummings, Jr., *The Supreme Court, Federal Taxation, and the Constitution* (ABA, 2013). As for the other terms in the Taxing Clause, imposts are taxes on exports (which are separately prohibited under Article I, Section 9, Clause 5), duties are taxes on imports, and excises are taxes on domestic products. Imposts, duties and excises were the main sources of federal revenue before 1913 and should be regarded primarily as pure taxes, not regulatory taxes, even if they had the effect of reducing the consumption of the items they were imposed on, as well as (in the case of duties) protecting domestic industries. They also had a strong regressive distributive effect. There is one clause of the Constitution, however, in which the Court does draw a distinction between taxes intended to raise revenue and other taxes, and that is the Origination Clause. See, e.g., *Millard v. Roberts*, 202 U.S. 429 (1906) (“Revenue bills, within the meaning of the constitutional provision that they must originate in the House of Representatives and not in the Senate, are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue”); *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

<sup>9</sup> For a discussion of the appropriate limits on pure taxes see part 3 *infra*. For a similar distinction in the tax treaty context see Fadi Shaheen, *Income Tax Treaty Aspects of Nonincome Taxes: The Importance of Residence*, 73 *Tax L Rev* 583, 606-609 (2018).

<sup>10</sup> For a discussion of the appropriate limits on regulatory taxes see part 4 *infra*.

<sup>11</sup> As far as the Internal Revenue Code (26 USC, IRC) is concerned, we would classify only part I, sections 1 (determining rates of tax for the PIT) and 61-63 (defining gross income, adjusted gross income, and taxable income) and the payroll tax as pure, while everything else is regulatory, including the entire CIT (because even the rate structure is regulatory and the revenue raised is incidental, while the distributive aspect is unclear). See Reuven Avi-Yonah, *Corporations, Society and the State: A Defense of the Corporate Tax*, 90 *Va. L. Rev.* 1193 (2004). We would also classify the rest of the IRC as regulatory, since the main purpose of the estate tax is not to raise revenue but to limit dynastic wealth because of its anti-democratic implications (a negative externality) and to incentivize the rich to donate to charity, and the other taxes are excises which are Pigouvian in nature. See also Reuven Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation* (Review of Slemrod, *Does Atlas Shrug? The Economic Consequences of Taxing the Rich*), 111 *Yale L J* 1391 (2002).

Any actual tax has more than one purpose.<sup>12</sup> All taxes influence behavior, and therefore come within our definition of regulatory taxes, and all taxes produce some revenue and effect some redistribution, and therefore come within our definition of pure taxes. But some taxes are primarily regulatory (e.g., Pigouvian taxes) while others are primarily for revenue (e.g., Value Added Tax, VAT). Other taxes have multiple purposes (e.g., corporate income tax, CIT, which has revenue as well as regulatory aims). Moreover, any given tax may have multiple provisions with different aims (e.g., the many tax expenditures embedded within PIT and CIT).<sup>13</sup>

When evaluating the constitutionality of any given tax provision, a court should first classify it as either a pure tax provision or a regulatory tax provision. If it is the former, the court should generally hold that it is constitutional under the Taxing Clause. If it is the latter, the court should evaluate it against the limits imposed by the rest of the Constitution.

We want to clarify up front that we are not envisaging this analysis as a practical proposal for adoption by the Supreme Court. As one of us concluded elsewhere, the current Court is not up to the task of constitutional review of tax legislation, since it botches even regular statutory review because it is dominated by textualists who refuse to consider legislative purpose.<sup>14</sup> Our goal instead is to try to imagine what constitutional limits might apply to tax legislation in an ideal world, and then consider how they might have some practical implication for example on how Congress approaches drafting such legislation. For example, if the Joint Committee on Taxation would evaluate tax proposals not just on revenue grounds, but in the case of regulatory taxes also in terms of their impact on horizontal equity (equal protection).

The same analysis should be used when it comes to tax incentives. Congress must make an effort and calculate what is the economic advantage the public gains from the activities the government seeks to encourage. If the tax relief rate is higher than the benefit that will be generated for the public, we will be in a situation where the firms which will be entitled to the incentives are treated favorably compared to other firms who do not enjoy the tax relief. Such a legislative process would surely serve the public's constitutional right to information, prevent distortion of the voter's will and lead to efficiency in the fiscal activity of the government. as a result, this may incline some lawmakers to be less receptive to the pressure from lobbyists to enact new tax expenditures to favor their special interests.

In what follows, we will first define pure taxes and regulatory taxes (part 2). We will then discuss the constitutional limits on pure taxes (part 3) and on regulatory taxes, including tax expenditures (part 4). Part 5 concludes.

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<sup>12</sup> See *Sonzinsky v. United States*, 300 US 506, 513 (1937): “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 less a tax because it has a regulatory effect.” See also *Bob Jones University v. Simon*, 416 US 725, 741 n. 12 (1974); *NFIB v. Sebelius*, *supra* at 2566 (“Every tax is to some extent regulatory”).

<sup>13</sup> See generally Avi-Yonah, *The Three Goals of Taxation*, 60 Tax L. Rev. 1 (2007).

<sup>14</sup> Reuven Avi-Yonah, SHOULD US TAX LAW BE CONSTITUTIONALIZED? CENTENNIAL REFLECTIONS ON EISNER V. MACOMBER (1920), Duke J. Con. L. Pub. Pol’y (2021).

## 2. Defining Pure vs. Regulatory Taxes

A pure tax is a tax imposed for the purpose of either raising revenue in order to finance the implantation of the elected government's fiscal policy.. A regulatory tax legislation is a tax imposed for the purpose of **changing individual behavior**.

In essence, regulatory tax legislation aims to improve the free market economy and regulate commercial activity by transferring the damages created by a particular activity (negative externality) from the injured party to the creator of the damage; or to transfer the benefits generated from a desirable activity (positive externality) from the beneficiary (usually the general public) to the firm who create the activity and causes the benefit.

For example: If Congress seeks to impose a Pigouvian tax on tobacco, it must receive a significant accurate evaluation of the amount of damage the public suffers from the smoking, and accordingly calculate the amount of tax/mandatory payment on cigarettes. In case the total amount to be collected from the manufacturers or smokers is higher than the total damage to the public, it means that it is discriminatory – nonsmokers do not pay this tax; or a penalty imposed without due process.

The same analysis should be use when it comes to tax incentives. Congress must make an effort and calculate what is the economic advantage the public gains from the activities the government seeks to encourage. If the tax relief rate is higher than the benefit that will be generated for the public, we will be in a situation where the firms which will be entitled to the incentives are treated favorably compared to other firms who do not enjoy the tax relief.

Such a legislative procedure would surely serve the public's constitutional right to information, prevent distortion of the voter's will and lead to efficiency in the fiscal activity of the government.

All tax expenditures, i.e., departures from a normative tax base such as the Haig-Simons definition of income as the sum of consumption and savings, are regulatory (negative) taxes.<sup>15</sup>

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<sup>15</sup> Tax expenditures are defined in the tax expenditure budget, see Congressional Budget Act of 1974 (Public Law 93–344). For the most recent tax expenditure budget see *See* Office of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures (2018) (for Fiscal Year 2020). The concept was invented by Stanley Surrey in the 1960s. See, e.g., Stanley S. Surrey, *Pathways to Tax Reform: The Concept of Tax Expenditures* (1973); Stanley S. Surrey & Paul R. McDaniel, *Tax Expenditures* (1978). *See also* Paul R. McDaniel & Stanley S. Surrey, *Tax Expenditures: How to Identify Them; How to Control Them*, 15 Tax Notes 595 (1982); Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 Harv. L. Rev. 352 (1970); Stanley S. Surrey, *Government Assistance: The Choice Between Direct Programs and Tax Expenditures*, 8 Tax Notes 507 (Apr. 30, 1979); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 Harv. L. Rev. 705 (1970); Stanley S. Surrey, *Tax Subsidies as a Device for Implementing Government Policy*, 3 Tax Adviser 196 (1972); Stanley S. Surrey & William F. Hellmuth, *The Tax Expenditure Budget – Response to Professor Bittker*, 22 Nat'l Tax J. 528, 537 (1969); Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. Indus. & Com. L. Rev. 679 (1976); Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Legislative Process*, in *The Economics of Taxation* 123 (Henry J. Aaron & Michael J. Boskin eds., 1980); Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging*

While it could be argued that tax expenditures are merely subsidies and therefore subject to minimal (rational basis) constitutional review, the decision to enact discriminatory legislation as a tax expenditure rather than a subsidy has significant implications for both congressional procedure and political salience that justify subjecting tax expenditure to a more rigorous constitutional review than subsidies.<sup>16</sup>

In reality, there is no such thing as a pure “pure tax” or a pure “regulatory tax.” All real taxes have elements of both. The “purest” tax is a head tax, imposed at the same rate on every individual member of a given society. Economists like head taxes because they arguably do not influence behavior and are therefore efficient (do not create deadweight loss). However, as long as we have more than one taxing jurisdiction, even a head tax can induce individuals to leave, thereby having an inadvertent regulatory element. At the other extreme, Pigouvian taxes, which are designed to reduce negative externalities from e.g. smoking or pollution, always produce some revenue (when they fail to sufficiently change. Tax expenditures by definition do not raise revenue. Our main taxes, the PIT and CIT, have a mixture of pure and regulatory elements in them. VAT, which is the most important tax outside the US, is primarily for revenue, but it also has regulatory effects (especially since real VATs always have exemptions and multiple rates). In general, the distinction between pure and regulatory taxes should be made provision by provision, and not for any given tax as a whole.

Despite the fact that any real tax has both pure and regulatory elements, it is important from a constitutional perspective to distinguish between pure and regulatory tax provisions, because the former should in our opinion be subject only to the Taxing Clause and therefore Congress’ power is relatively unlimited, while the latter should be subject to all the other limits of the Constitution, namely the ones established by the Commerce Clause but also potentially the Equal Protection, Establishment and other Clauses. In what follows, we will first discuss the constitutional limits on pure taxes and then on regulatory taxes.

### 3. The Constitutional Limits on Pure Taxes

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*Issues*, 20 B.C. L. Rev. 225 (1979). For the subsequent literature, see also Victor Thuronyi, *Tax Expenditures: A Reassessment*, Duke L.J. 1155 (1988); Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 Yale L.J. 1165 (1993). In particular, see J. Clifton Fleming & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimension*, 27 Va. Tax Rev. 437 (2008) [hereinafter Fleming & Peroni, *Reinvigorating Tax Expenditure Analysis*]; J. Clifton Fleming & Robert J. Peroni, *Can Tax Expenditure Analysis Be Divorced from a Normative Tax Base? A Critique of the “New Paradigm” and Its Denouement*, 30 Va. Tax Rev. 135 (2010). The concept has also drawn significant criticism. See, e.g., Staff of Joint Comm. on Taxation, 110th Cong., *A Reconsideration of Tax Expenditure Analysis* 39, 47 (Comm. Print 2008); Bruce Bartlett, *The End of Tax Expenditures as We Know Them?*, 92 Tax Notes 413, 414 (2001); Boris I. Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 Nat’l Tax J. 244 (1969); Douglas A. Kahn & Jeffrey S. Lehman, *Tax Expenditure Budgets: A Critical View*, 54 Tax Notes 1661, 1662–63 (1992); Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 Tax L. Rev. 187, 201–02 (2004); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 Yale L.J. 955, 976 (2004).

<sup>16</sup> Edward D. Kleinbard, *Tax Expenditure Framework Legislation* (USC Law, Legal Studies Paper No. 10-1, 2013).

The Constitution itself imposes very few limits on the taxing power, Unless it is clear that it is not possible to impose taxes that are not intended to pay the Debts and provide for the Common Defense and General Welfare of the United States ". Goods exported from a State may not be taxed.<sup>17</sup> Direct taxes must be apportioned among the states by population<sup>18</sup> and indirect taxes must be uniform.<sup>19</sup> The only significantly disputed item is the definition of "direct" tax, which in Pollock (1895) led to the Court striking down the second US income tax as unconstitutional, but this decision was reversed by the adoption of the Sixteenth Amendment in 1913.<sup>20</sup> There is still some debate among scholars about whether an unapportioned federal wealth tax would be constitutional.<sup>21</sup>

Nor has the Supreme Court<sup>22</sup> imposed significant limits on the power of Congress under the Taxing Clause. The Court has emphasized the sweeping character of this power by saying from time to time that it "reaches every subject,"<sup>23</sup> that it is "exhaustive"<sup>24</sup> or that it "embraces every conceivable power of taxation."<sup>25</sup> The few subject matter limitations imposed in the past have been overruled.<sup>26</sup> Most strikingly, since 1920 the Court has refused to rule any federal income tax statute unconstitutional.<sup>27</sup>

<sup>17</sup> US Const. Article I, Section 9, Clause 5: No Tax or Duty shall be laid on Articles exported from any State.

<sup>18</sup> US Const. Article I, Section 9, Clause 4: No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

<sup>19</sup> US Const. Article I, Section 8, Clause 1: all Duties, Imposts and Excises shall be uniform throughout the United States.

<sup>20</sup> *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895), *affirmed on rehearing*, 158 U.S. 601 (1895).

<sup>21</sup> See, e.g., Ari Glogower, A Constitutional Wealth Tax, 118 MICH. L. REV. 717 (2020); for supporters of constitutionality see, e.g., Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 56–58 (1999); Calvin H. Johnson, *Purging Out Pollock: The Constitutionality of Federal Wealth or Sales Taxes*, 97 TAX NOTES 1723, 1728–29, 1734 (2002). For opponents see, e.g., Miranda Perry Fleischer, *Not So Fast: The Hidden Difficulties of Taxing Wealth*, in WEALTH 261, 284–85 (Jack Knight & Melissa Schwartzberg eds., 2017); Erik M. Jensen, *The Constitution Matters in Taxation*, 100 TAX NOTES 821, 829 (2003). See also Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 270 (2000) ("A court might reasonably decide the issue either way, depending upon the theory of constitutional interpretation it embraced and its conception of the weight and point of relevant precedents."). Sebelius reaffirmed that the only "direct" taxes are poll taxes and taxes on land values. *NFIB v. Sebelius*, *supra*.

<sup>22</sup> Some lower courts contemplated constitutional rev – e.g. *Murphy v. IRS* in D.C. (before the rehearing...) See also Erik M. Jensen, "Taxation and the Constitution: How to Read the Direct Tax Clauses" **journal of Law & Politics** [Vol XV:687](2006

<sup>23</sup> *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867).

<sup>24</sup> *Brushaber v. Union Pac. R.R.*, 240 U.S. 1 (1916)

<sup>25</sup> 240 U.S. at 12.

<sup>26</sup> In *Evans v. Gore*, 253 U.S. 245 (1920) and *Miles v. Graham*, 268 U.S. 501 (1925), the Court held that the inclusion of the salaries received by federal judges in measuring the liability for a nondiscriminatory income tax violated the constitutional mandate that the compensation of such judges should not be diminished during their continuance in office, but this result was repudiated in *O'Malley v. Woodrough*, 307 U.S. 277 (1939). The ruling of *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871) that the salary of a state officer is immune to federal income taxation also has been overruled in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). Most limits on taxation of state interests have been overturned as well. See, e.g., *Snyder v. Bettman*, 190 U.S. 249, 254 (1903) and *South Carolina v. United States*, 199 U.S. 437 (1905).

<sup>27</sup> *Eisner v. Macomber*, 252 US 189 (1920). See Reuven Avi-Yonah, SHOULD US TAX LAW BE CONSTITUTIONALIZED? CENTENNIAL REFLECTIONS ON EISNER V. MACOMBER (1920), Duke J. Con. L. Pub. Pol'y (2021).  
What about Murphy?

In our opinion, even pure taxes should have some constitutional limits, derived from the combination of the Taxing Clause's admonition that taxes should be imposed only "*to pay the Debts and provide for the common Defence and general Welfare of the United States*" (for revenue) and the Sixteenth Amendment's approval of PIT (for redistribution, as was generally understood when the Amendment was adopted<sup>28</sup>). In addition, the understanding of the Taxing Clause should be informed by the fact that the American Revolution was fought under the slogan "no taxation without representation."

a. What is a Pure Tax?

In order to understand the limits of the taxing power, it is necessary to discuss the fundamental purposes of pure taxes.

Most of the definitions of the term "tax" share the following basic characteristics: "unrequited/not reciprocated mandatory payments collected primarily by the central government." Lawyers tend to emphasize the fact that the taxpayer does not receive **direct** and **equal** consideration in return for her payments. This insight reflects a slight confusion between the substance/fundamental role of taxes and the "technical" aspect of tax collection. From the substantive point of view taxes are justified by the benefit principle (i.e., that taxpayers benefit from the use of the revenues) and based on consent. The theoretical assumption must be, then, that taxpayers **do** receive full **quid pro quo** consideration through the public goods and services the elected government provides, such as law and order, national defense, a stable economic system, physical and social infrastructure, a civilized and organized society and a workable and enforceable legal system. Hence, taxes (from the Latin *taxare*= *to estimate*) are supposed to serve as the estimated price of such public goods and services consumed by taxpayers. The fact that tax is an enforced contribution exacted pursuant to legislative authority, is a reflection of the need to **collect** taxes efficiently, due to an unfortunate human phenomenon known as **free riders**, i.e., those members of the community who try to take advantage of the fact that they can enjoy public goods and services without sharing their cost.

As in the private market, any purchase of goods or services entails a legal obligation to pay their price. This basic rule should be applied for both private and public goods and services, bought either in the private market, or from the elected government. In other words, taxes are based on the benefit principle. This benefit we, the taxpayers, enjoy both as firms and as income producers, and as households who use the income and consume public goods and services. As firms and income producers, public goods and services enable us to produce income and wealth. Without government, which provides goods, services and enables **social capital** as a factor of production<sup>29</sup> we would not be able to function, to operate and to produce our income.

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<sup>29</sup> See inter alia [GARY S. BECKER](#), HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (1964); Robert M. Solow *A Contribution to the Theory of Economic Growth* 70 Q. J. ECON. 65 (1956) ; [Natalie Gochnour](#) Utah's Economic Exceptionalism, **American Affairs** Volume IV, Number 4 (Winter 2020): 46–62

In other words, our economic production is a common/joint activity of a *partnership* with the public. The public invests in physical and social infrastructure and through the government enables and maintains the domestic social capital, which provides the economic conditions that allow the partnership to function, operate successfully and achieve its economic goals. We refer to this concept as the “*joint project approach*”. As all the other "partners" of the "joint project" who own factors of production, the public, through its government, is entitled to its return on its investment. In other words, tax is a profit sharing mechanism between the public and the rest of the investors – fiscal, human and social capital.<sup>30</sup>

The other aspect of the benefit justification focuses on us as households, and the consumption side, which has two aspects; the current or future consumption of private goods and services, which is possible only in an organized and civilized society, with functional markets and regulated and efficient financial institutions. In addition, we also consume directly public good and services, such as national and domestic defense, recognition of private property and its protection, social and legal order, national pride etc. Those goods and services cost money and we have to pay for them. When the provider is the public/government, the payment goes to the public coffers through the tax system in order to cover the provider’s costs. In addition, as is discussed below, the pricing process in a free market of the private goods and services is not substantially different from the way the public goods’ prices are set in a democratic society.

Hence, from a philosophical, economic, and social point of view we define a pure tax under the Taxing Clause, in a democratic society as, ***a mandatory payment collected by law in exchange for goods and services the elected government provides to the public, directed to the general budget without pre-apportionment for a particular or specific purpose.***

Note that the “mandatory” aspect is part of the definition only for two reasons: The “free rider” phenomenon, and the fact that public goods and services are not bought by the taxpayers by individual decisions and choices. Such definition insists that a pure tax’s purpose is **just** to finance the elected government’ general budget in order to execute its stated policy while it is not designated in advance for any specific goal. Other mandatory payments, such as user fees and duties on the one hand, and regulatory taxes on the other hand, are not within such a definition. As is discussed above, the distinction between pure taxes and regulatory taxes has a significant meaning regarding constitutional judicial review and the public participation in democratic deliberation.

#### b. The Legal Definition

For practical reasons, the legal definition of taxation in a democratic society has a small but necessary addition: ***a mandatory payment collected by law, which is assumed to be in exchange for goods and services the elected government provides to the public, directed to the general budget without pre-apportionment for a particular or specific purpose.*** The

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<sup>30</sup>Yoseph M. Edrey “Constitutional Review and Tax Law: An Analytical Framework”, 56 American University Law Rev. Volume 56 (2007); Yoseph M. Edrey IBinyroduction to the theory of taxation (Hebrew, 2008).

rationale for this addition - the assumption - derives from the concept that the taxes are based on consent. Yet, it is quite difficult for the government to provide solid legal evidence that it provides a full consideration for each and every member of the society. Hence, we need the assumption that the consideration is fulfilled/provided by the government. The burden of proof is shifted to the taxpayers. In case a taxpayer - or a group - argue that they do not receive a quid pro quo for their tax payments and therefore, do not consent to pay the tax, they bear a very heavy burden. In rare cases, however, this burden is not impossible to bear.

Already in 1938 the Supreme Court offered the following concept:

“Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens” (Welch v. Henry et al, 305 US 134 at pp. 146-7).

A careful analysis of this language reveals three components. First, the purpose of a tax is to finance the elected government’s expenses according to the benefit principle. Second, the obligation to pay the tax is not based on a contractual relationship. Third, tax should not be used as a punishment.

The first and the third components go hand in hand with the definition of the term pure tax, as discussed above. The second one might be considered contradictory to our approach, which bases tax on consent, but we do not think it is fundamentally inconsistent with it since there is not a formal contract involved. Maybe we should add a short discussion re "Social contract", i.e. philosophical contractual non formal legal relationship?

Here it is worth noting a certain ambiguity. A common view is that personal tax - income tax - is imposed on economic capacity. As we have clarified above, this view is erroneous. The tax is levied on the enjoyment of public services. Economic capacity is an effective and useful measure of enjoyment. The explanation for this is already found in the words of Adam Smith

In other words, a person's degree of enjoyment of public services is measured in accordance with his economic capacity. The higher the economic capacity, the greater the degree of enjoyment. when the government provides security services, those taxpayers with higher ability are willing to pay, obviously, much more than those with low ability: The former have much more to lose in case there will be no security services that enable them to keep their property safe and secured. The latter are willing to pay much less because their property is small, if at all. The same goes with expenses paid for public education, transportation, national pride, sending rockets to the moon or the national team to the Olympic games.

c. Pure Tax Legislation, Constitutional Law and the threats to Human Rights

Pure tax legislation raises two major constitutional issues: 1) The power/authority to levy taxes. 2) The substance and the quality of the tax laws, their compliance with constitutional principles and the degree of possible infringement of such principles.

i. The Power to Lay Taxes

As stated above, Article 1, Section 8 of the U.S. Constitution describes the general power of the Congress in terms of tax laws as follows:

*The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide **for the common defense and general welfare of the United States...**(emphasis added).*

The traditional approach, expressed by the Supreme Court, is that "the public funds may be appropriated 'to provide for the general welfare of the United States.' ...While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it," [**United States v. Butler**]. A broad interpretation is that in practice, the power to tax is indeed unlimited; one may argue that it is impossible to provide evidence that a tax's revenue which is spent by the government, does not provide for the general welfare of the United States. (one may wonder if the Trump administration complies with such an assumption, as well as with Nethnyaue.....

However, based on some insights and doctrines, which were developed for the last half a century in the field of public finance – known as "optimal taxation"<sup>31</sup>:

"One of the major developments of the last fifty years is the widespread application of rigorous empirical methods to analyze the efficiency of the tax system. Empirical work not only assists the formation and analysis of economic policy but also plays a critical role in distinguishing important from less important theoretical considerations, thereby contributing to further theoretical development. Properly executed, empirical analysis is not only consistent with the welfare theory that underlies normative public finance, but also takes the theory further by testing its implications and offering reliable measurement of parameters that are critical to the assessment of tax systems".<sup>32</sup>

A most important corollary of this doctrine is that any tax has a deadweight loss, meaning that the amount of the loss of the general welfare is greater than the tax's revenue which the government collects. Hence, the government has to be efficient enough in order to provide a greater amount of welfare than the deadweight loss, otherwise the assumption regarding the

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<sup>31</sup> See, inter alia the corner stone of this doctrine: Peter A. Diamond and James A. Mirrlees Optimal Taxation and Public Production I: Production Efficiency 61 **The American Economic Review**, 8 (1971).

<sup>32</sup> Alan J. Auerbach and James R. Hines Jr., Taxation and Economic Efficiency **Handbook of Public Economics** (Volume 3, 2002), **Chapter 21** pp 1347-1421

public consent to pay taxes and the constitutional requirement of the **general welfare of the United States** does not hold. (Who consents to pay any price and receives in return a smaller amount of welfare? How can a court justify a tax that is not with accordance to one out of two goals set by the Constitution?). In other word, an inefficient government may levy un-constitutional taxes.

Section 9 of Article 1 of the U.S. Constitution states:

*"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken".*

Consequently, when Congress legislated the second income tax in the United States (after the civil war income tax, which was upheld as constitutional but expired in 1872), it was held invalid by the Supreme Court (***Pollock v. Farmers' Loan & Trust Company, 1895***). The Court ruled that a particular type of income tax (a tax on income derived from property) was actually a direct tax and had to be levied in proportion to each state's population. After a prolonged political debate, the response was the Sixteenth Amendment to the United States Constitution, approved by Congress in 1909 and ratified in 1913, which removed the requirement that taxes on income have to be apportioned by population and provided that:

*"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."*

Note that some scholars have argued that the power of the Congress to tax income derives from the Taxing Clause and not from the Sixteenth Amendment, which only removed the apportionment requirement from income tax (if it is a direct tax at all). The traditional belief is that the specific wording of the Amendment left the apportionment to apply to other direct taxes (including capitation and real-estate taxes, and maybe a wealth tax). Such a belief ignores economic analyses, which indicate that income, wealth, property and consumption have much more in common than envisioned in 1913 (or in 1787). Other scholars have argued strongly that the term "direct tax" in the Constitution does not preclude Congress from levying anything other than a head tax or a real estate tax, because the Supreme Court which was composed of drafters of the Constitution approved of Alexander Hamilton's tax on carriages in 1796.

## ii. Substantive Judicial Review of Pure Tax Legislation

### 1) *The Limitations on the Power to Tax*

Our approach is that a mere labeling of an act as "tax", or a receipt as "income", or a payment as a "penalty", should not change the standards of constitutional judicial review. Furthermore, if labeling a regulatory act as a "tax", which is under the umbrella of the Sixteenth Amendment, provides a quasi-immunity from judicial review, then policymakers, who prefer to avoid judicial review, would rather promote their policy by using tax expenditures (TE) as a regulatory tool

instead of using other – direct and more appropriate – means. Thus, the courts' reluctance to perform judicial review over tax legislation may produce two undesired consequences. First, discriminatory laws, which probably won't survive judicial review if enacted as non-fiscal legislation, enjoy the “quasi immunity” reserved for “tax law”. Second, such legislation causes the tax code to become complicated, obscure and detracts it from its true and designated goals - to finance the expenses of the elected government. As is discussed below, in most cases such situation serves the interests of the powerful groups and sectors and as a result the tax system becomes regressive; TE entail economic distortions, lack of public supervision on the government, a hidden process of privatization of the government chores, increased social gaps and eventually lead to inefficiency.<sup>33</sup>

Thus, our claim is that the term tax in the Taxing Clause should be very clear and narrow (i.e., limited to pure taxes) and, like any other legislation, pure taxes have to comply with the constitutional limitations imposed upon the legislature by the Constitution. Any statutory provision of Tax legislation (both primary and secondary) may be declared void, if it is used exclusively to punish or to ban an activity, or if it is too harsh and oppressive. However, even if the tax deprives taxpayers of their property, it is not a “taking” for Fifth Amendment purposes. The aggregate private property is the common-collective property of the community's members. Reality teaches that today, the real threat to private property is that small but influential groups that covet the collective private property more than the government might violate this constitutional right.

Note, however, that we do not argue that the courts should review and question the elected government's **policy** that underlies the reviewed tax law, but focus solely on making sure that while the elected government applies its policy it respects and obeys the constitutional guidelines. In particular, the tax rate schedule, which embodies the distributive aims of PIT and CIT, is subject to democratic debate in every US election, and should therefore be immune from constitutional review even if the tax rate is very high (e.g., the 94% top PIT rate in the 1940s-50s, and the 80% CIT excess profits tax rate in the 1940s). Unless the consent assumption is inconceivable under certain circumstances.

Tax legislation may violate constitutional principles in various ways: If a tax is not for **the common defense and general welfare**; If it violates the basic principles of equal rights; If it represents an arbitrary system that cannot be based on a presumed consent; If income tax tries to tax income which does not contain the most essential component – accession to wealth. In such cases, the courts should be called upon to review the tax's constitutionality.

The Taxing Clause contains much more than it appears at first glance. First, it means that **only** the Congress has the power to lay taxes. The Congress represents, of course, the people. As mentioned already, “no taxation without representation” is not a formal requirement or demand. It signifies the idea of freedom, and personal property. No citizen will be asked to pay for the public goods and services without consent. Hence, any tax should be levied only if the

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<sup>33</sup> See inter alia Y. Margalioth, E. Sulganik, R. Eldor, **Y. M. Edrey**. "A Cost of Tax Planning, 5 **Review of Law & Economics**, (1) 155 (2009).

assumption that the public, the taxpayers, provides its collective consent to pay the tax is reasonable.

Second, our agents should only impose a tax for broad yet confined purposes - "common defense and general welfare." Thus, tax laws are not immune from judicial review. Like any other legislation, the power to impose taxes is restricted by constitutional limitations. Though it is extremely difficult to define "General Welfare" and identify other governmental goals, yet the substantive rule is clear, though its implementation might be very complicated and deserves some sophisticated analysis.

## 2) *The Constitutional Right Not to Pay without Consent.*

As already suggested, the Taxing Clause makes a fascinating human rights claim: No person should pay any tax without the presume consent. When a tax payment is made to the government, the required consent is both collective and constructive, assuring that a law is enacted by the public's agents at the Congress who authorized the payment. In other words, the political parties offer their platforms and we, the public, vote for a certain one and affirm it. **Every year, the elected government has to present the annual budget to the public.** This bill includes the proposed public goods and services the government intends to provide, and specifies their price – the cost to the public. If we do not approve the budget—through our representative agents in the Congress—then the elected government is not allowed to function – a government shutdown. This is the constitutional reflection of the basic rule "No Taxation Without Representation". Since representation is not a merely formal concept but rather expresses the voters' approval, then the substantive rule means: "No Taxation Without Consent".

We argue further that the said presumption - the consent to pay tax - holds as long as the tax follows/fits some characteristics. The main characteristics are those that have been accepted since the writing of Adam Smith's *Wealth of Nations*.<sup>34</sup> A good tax system has to follow these maxims:

- a) **Equity:** The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state.<sup>35</sup>
- b). **Certainty and non-capricious:** The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor.

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<sup>34</sup> An Inquiry into the Nature and Causes of the Wealth of Nations, book v. ch. ii. (1776) available on line <https://www.marxists.org/reference/archive/smith-adam/works/wealth-of-nations/book05/ch02b.htm>

<sup>35</sup> Note that the above sentence expresses in our understanding the view that the greater the economic ability of the taxpayer the more he or she enjoys the public goods and services of the government provides. In other words the tax is levied according to the benefit the taxpayer enjoys the good and services; Economic ability - as a Easily measurable - is the measure of benefit.

c) **The taxpayer's convenience:** Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it.

d) **Efficiency:** Every tax ought to be contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state.

These four preconditions/requirements (maxims) were written before the constitutional era and it is possible that even in the absence of an orderly and systematic thinking pattern of "human rights". The adaptation of these maxims to contemporary time leads to some modern elaborations:

The question of **equity** is traditionally examined in accordance with principles of non-discriminatory rules measured mainly by horizontal and vertical equity.

**Certainty and non-arbitrariness** should be achieved by subordinating the tax authorities to act objectively, and be subject to the principles of the rule of law on the one hand, and through recognition of human rights, judicial review and the protection of minority from government and powerful groups, which might find the way to introduce to the tax system too many favorable and unjustified tax expenditures on the other hand.

**Efficiency** refers not only to the tax administration but also to the considerations of optimal tax, which were developed, as stated about, some 50 years ago.

**Convenience of paying** also refers to the issue of realization of income and the economic possibility that the taxpayer possesses for the payment of tax.

If these maxims are the basis underlying the public's consent to pay tax, and the public's consent is indeed a condition for the constitutionality of tax laws, it follows that these preconditions may serve as guiding principles for judicial review of tax legislation.

The conclusion that the tax is based on the taxpayers' consent to pay is a significant one. It brings in an important factor to the legal and constitutional discussion. When the Congress imposes duties and limitations there is an assumption that under terms of the Social Contract we have agreed to those duties and limitations. Yet, it may be in rare and unusual circumstances, that Congress deviates from the "terms of agency" and legislates a provision that a reasonable person cannot be assumed to have agreed to and accepted. In case the enacted tax legislation law is so unreasonable, the assumption of consent has no merit nor basis. For example, the tax law may be extremely unfair, decreases the taxpayer's welfare without due consideration/compensation, or creates unjust discrimination. In case the taxpayer indeed is able to satisfy the burden and provides hard evidence that he or she does not receive a fair return for her tax payments, the consent assumption is no longer valid and she may have a constitutional right not to pay the unjustified tax.

We would also argue that in some other unusual cases, when the government fails to provide its public goods and services to a certain area, the population of this area should not bear the same tax burden as the rest of the nation's taxpayer. Assume there is a remote border town.

Due to its hostile neighbors, the state suffers occasionally from enemy attacks. The enemy constantly shells the town, hence the daily life is totally ruined: The educational system does not function, trade and business activity is significantly down, free movement is restricted, and the property and the life of the town's residents are in jeopardy. In such a situation, is it still sensible to assume that the town's residents agree to pay taxes, even though they do not enjoy the basic goods and services? Do they have to pay the same amount of tax as the other safe towns' residents? Don't they have the constitutional right for paying less since they get less, or at least they should not be obligated to pay the full amount of tax until the government takes the necessary steps/precaution to restore peace?

Another example is the deduction for casualty losses. Such losses occur, in most of the time, due to the government's failure to provide satisfactory public services. Suppose an innocent bystander is affected by a hostile, terrorist, criminal action or natural disaster and suffers significant damage. The chances that he can collect damages through a civil suit are actually none. Is he entitled to tax relief or government compensation? After all, the government/administration failed to provide the most important public services: preventing criminal or hostile activity and protecting our personal security and private property. The deductibility of the casualty losses in such cases, might be a reasonable means to ease or answer these questions.

Another example relates to the inhabitants of some parts of Louisiana who suffered from hurricane Katrina and from the inefficiency of the government that failed to provide sufficient assistance. They paid their taxes in order that the government will provide them with reasonable protection in any circumstance. Since they did not enjoy this protection, should they be granted some tax relief? Note, that under the current system those taxpayers who suffer economic casualty indeed pay a lesser amount of tax due to the deductibility of casualty and theft losses under code section 165(c)(3). The question whether such deductions are sufficient or the taxpayers should receive an additional tax relief is beyond our point.

The above examples demonstrate the basic requirement of taxation: no taxpayer is expected to pay taxes without consent. The consent is assumed as long as the taxpayer receives quid pro que consideration - the benefit derived from the public goods and services. If the benefit is missing, the taxpayer is entitled to a tax relief that should reflect the absent of the benefit.

### *3) Tax and the Right to a Dignified Minimum Standard of Living*

Any tax system that does not leave the taxpayer with a dignified minimum standard of living probably violates the constitutional right to human dignity.<sup>36</sup>

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<sup>36</sup> See McCrudden, Human Dignity and Judicial Interpretation of Human Rights, *European Journal of International Law* 19(4); NYU L. Rev., <https://www.nyulawreview.org/wp-content/uploads/2020/12/NYULawReview-Volume-95-Issue-6-Oronoz-Rodriguez.pdf>.

Some scholars draw a line between negative-passive rights and a positive–active rights. The former mean that the government should not violate the right by driving the human below a certain level of poverty. The latter means that the government is obligated to assure that any member of society has the dignified minimum standard of living and when needed, it is obligated to **actively provide** the minimum standard of living (“second generation human rights”). Note though, that the line between those types is much thinner than it seems. Anyhow, since we deal here with tax legislation, we confine our major discussion to a passive-negative human right, i.e. the government should not violate this right by taxing a person and leaving him or her without enough means that guarantee a minimum standard of living. After all, human rights include, by definition the right to survive. As the economist Arthur Okun expressed the idea in a simple yet clear and precise way:

"While I am not persuaded by the argument for many proposed new rights, the case for a right to survival is compelling. The assurance of dignity for every member of the society requires a right for a decent existence – to a minimum standard of nutrition, health care and other essential of life. Starvation and dignity do not mix well. The principle that the market should not legislate life and death is a cliché. I do not know anyone today who would disagree, in principle, that every person, regardless of merit or ability to pay, should receive medical care and food in the face of serious illness or malnutrition. Attitudes about this issue have changed dramatically during the past century..."<sup>37</sup>

Indeed, most personal income taxation systems around the world have their own version of leaving the individual with an amount suitable enough to enable him or her and their family to maintain a basic standard of living. The US tax system reaches this goal by various measures. Before 2017, the major ones were the personal exemptions [§151] (of the amount of \$4,050 in 2016) for a taxpayer and for each dependent. The child tax credit [§ 24], (which is worth in 2016 up to \$1,000 per child under the age of 17) [§ 32]. The standard deduction [§ 63(c)], which amounts in 2016 for single taxpayer and married couple filing separately the amount of \$6,300; for married couple filing joint returns the total amount of \$12,600 to \$12,200 for married taxpayers filing jointly Tax credit for the elderly and the permanent and totally disabled [§ 22], up to \$1,125. for a married couple filling jointly, in 2015; deductibility of medical expenses [§ 213(a)]; and the deductibility of casualty losses, Code Sec. 165(c)(3)]. Since 2017, these were mostly replaced by a larger standard deduction of \$24,000 of a couple filing jointly.

In addition, the earned income tax credit, which is refundable “negative income tax” signals that the right for minimum standard of living has turned in the U.S. to a positive-active right. As is discussed below, some of the deduction, exemptions and tax credits are phased-out for taxpayers with higher income.

#### 4) *The Constitutional Right to Equality*

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<sup>37</sup> Arthur Okun, *Efficiency and Equality – the big trade-off*, at pp. 16-17.

As previously discussed, fairness is the most fundamental requirement for a good tax system. Horizontal and Vertical Equity express the principles of fairness in taxation, mandating that equal taxpayers have to pay equal tax payments and different taxpayers ought to pay different tax payments. The next step is determining the most suitable criteria for equality and differences between taxpayers.

The most prominent trait of taxation is money, the means that we use for paying our taxes. Money represents economic value, an economic ability, which is, as stated above, the most effective and efficient measure of the benefit from the public goods and services provided by the government. Hence, one may argue that the taxpayers' economic ability is the right criterion for equality and differences between taxpayers; taxpayers with equal economic ability ("**ability to pay**") should pay the same tax payments, and taxpayers with different economic abilities should pay different tax payments.

It should be mentioned though, that in some European countries, the principles of Horizontal and Vertical equity are no longer theoretical or philosophical concepts, but rather, constitutional principles mentioned in written constitutions. Furthermore, some foreign constitutional courts have expressed the notion that the ability to pay is the leading criterion for measuring equality and difference among taxpayers. According to this approach, different tax rates levied on the same amount of income, yet from different sources (e.g. labor, capital income such as interest and capital gain), may be considered a violation of the constitutional principle of equality.

Keep in mind that different statutory tax rates for different types of income do not necessarily constitutes unjustified discrimination, but rather serve as a practical compromise as alternative to complicated calculations of the accurate tax rates. Thus, for example, justifications can be provided for the low tax rate for capital gains, interest and dividends. An age-old claim is that tax on passive income, in addition to active income, results a double taxation:<sup>38</sup> once on active income (from labor and business) and once on the fruits of savings from that active income. Needless to say, this claim is too sweeping and general. Without going into the details, we mention that this claim is limited to the passive income equals to the market interest rate. Hence instead of calculate accurately the component that should be exempted, a practical solution of a lower tax rate on the whole gain is used. A similar idea should apply in order to avoid a triple tax on corporate earnings.<sup>39</sup>

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<sup>38</sup> See inter alia: Bradford, David F. *Untangling the Income Tax*. (1986); Edward J McCaffery, A new understanding of tax, 105 *Michigan law rev.* 807 (2005) ` Yoseph M. Edrey, "What are 'Capital Gains' and 'Capital Losses' Anyway ?" 24 *Virginia Tax Rev.*, 141 (2004-2005).

<sup>39</sup> This concept is illustrated by the following example: Suppose that during one year, John Doe invests \$5,000 in a C corporation, which is 100% of the company's stocks. During that year, the company earns \$1,000 and pays corporate tax (21%). The after-tax company profits are consequently 1,000-t= \$790. At the beginning of the second year, John Doe sells his stock for \$6,000. Under current law, John Doe earns Capital gain of \$1,000 (assuming tax rate is 20%= \$200)). Furthermore, suppose that a few weeks later, Joanne, who purchased the stock from John for \$6,000, receives a dividend which is equals to the corporate retained earing (1,000-t=\$790) and subject to her tax rate of 20% and

Keep in mind though that different statutory tax rates for different types of income do not necessarily constitute unjustified discrimination. Thus, for example, justifications may be provided for the low tax rate for capital gains, interest and dividends. An age-old claim is that tax on passive income, in addition to active income, results in a double taxation:<sup>40</sup> once on active income (from labor and business) and once on the fruits of savings that active income. Needless to say, this claim is too sweeping and general. Without going into the details, we mention that this claim is limited to the passive income equals to the market interest rate. Hence instead of calculating accurately the gain component that should be exempted, a practical solution of a lower tax rate on the whole gain is used. A similar idea should apply in order to avoid a triple tax on corporate earnings.<sup>41</sup>

### 5) *The Constitution and Retroactive Taxes*

Clause 3 of [Article I, Section 9](#) of the [United States Constitution](#) prohibits the Congress from passing any bill of attainder or ex post facto law. While the term “ex post facto laws” might be construed to embrace all retrospective laws, in the early case of **Calder v. Bull** (1798), the Supreme Court decided that the phrase, as used in the Constitution, applies only to penal and criminal statutes, and eventually not to tax legislation.

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which is taxed again ( $790 \times 20\% = \$158$ ). Under such a system, the above corporate earnings of \$1,000 are triple-taxed! ( $210 + 200 + 158 = \$568$ ). Hence the \$1,000 earning is subject to a tax rate of 56.8% ! Note that we ignore the distinction between a real capital gain - created for John from the change in expectations from the corporate's earnings in the future, and the disguised capital gain that comes from the corporate's retained after-tax earnings. Nor are we trying to accurately calculate the stock's price in light of the fact that the purchaser, John Ann will pay tax on the dividend she will receive in the future from the company's retained earnings.

<sup>40</sup> See inter alia: Bradford, David F. *Untangling the Income Tax*. (1986); Edward J McCaffery, A new understanding of tax, 105 *Michigan law rev.* 807 (2005) ; Yoseph M. Edrey, "What are 'Capital Gains' and 'Capital Losses' Anyway ?" 24 *Virginia Tax Rev.*, 141 (2004-2005).

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Retroactive application of a statute may violate substantive due process rights under the Fifth Amendment. In 1938, the Supreme Court acknowledged that applications of new laws to preceding taxable years, might be regarded as an unconstitutional deprivation of property without due process of law. Yet the Court put a proviso to that rule: “the nature of the tax and the circumstances in which it is laid [are] so harsh and oppressive as to transgress the constitutional limitation” ([Welch v. Henry, 305 US 134, 147 \(1938\)](#)).

In 1981, the Supreme Court (**U.S. v. Darusmont**) demonstrated, once again, its reluctance to review tax legislation. It concluded that “Current year retroactivity” (application of income tax statutes to the entire calendar year in which enactment took place), is not a per se violation of the Due Process Clause. That is in spite of the fact that the taxpayer might have relied on the old rules and cannot alter pre-enactment transactions in the light of the new rules.

Furthermore, when the new I.R.C of 1986 was enacted, taxpayers realized that there was a loophole in one of the Code’s provision and took advantage of it. Once the government found out about it, it announced its intention to amend the provision in order to prevent the abuse. The legislative process ended only in 1987 but applied retroactively to 1986. Based on the government’s announcement (warning) and due to the fact that the period of retroactivity was slightly over one year, the Supreme Court upheld the amendment (Carlton <sup>42</sup>): “a retroactive change in law is constitutional if it is supported by a legitimate purpose furthered by rational means.” Justice O’Connor added a proviso to the majority opinion since in this case, the retroactivity period, around a year, was “relatively short period.”<sup>3</sup> and any period longer than that raises “serious constitutional questions.”

A few years later one petitioners (against the state of Washington) and other six (against Michigan) were required to pay state taxes in Washington and Michigan. The basic question in both states courts was: can a State, by statute, change its tax laws retroactively for a period of longer than one year (in the Michigan case – 6 years and the Washington case – 3 years), where the change was not promptly instituted and where the change was designed to increase state tax revenue.

The supreme courts in both states dismissed their petitions and all of them filed a *cert* petition to the U.S. Supreme Court. The common argument of all the seven petitioners was that the provisions of the laws that required them to pay these taxes were retroactive and therefore violated the due process principle. On May 22, 2017, the U.S. Supreme Court denied to hear taxpayer challenges to the retroactive application of changes to States (Washington and Michigan) tax laws in *Dot Foods v. Washington Department of Revenue*.<sup>43</sup>

Only in a rare case with unusual facts, the Supreme Court invalidated a retroactive application of a Federal estate tax provision transaction which took place 12 years (!) earlier. [**Nichols v. Coolidge**, 274 U.S. 531 (1927)].

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1. <sup>42</sup> 512 U.S. 26 (1994).

1. <sup>43</sup> *Dot Foods, Inc. v. State of Washington, Dep't of Revenue*, Petition for Writ of Certiorari, U.S. Supreme Court Dkt. No. 16-308.

It seems that the underlined rationale to the courts' general tendency was laid down in **Welch v. Henry's** statement (1938): "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." This statement is two folded.

As for the first part – Tax legislation is not a promise - our approach is indeed different. As indicated a few times already, tax legislation is indeed part of the social contract and is based on a presumed consent to pay quid pro quo for the public good and services in the broadest meaning. As with the private market, one party is not allowed to change the term of a contract unilaterally, so is the case with tax legislation. Each year taxpayers learn (out the deliberation and the approval of the annual budget) what kind of public goods and services they will get from the elected government and how much they are going to pay for them. They make serious decisions based on that price e.g.: whether to work harder or spend more time on leisure; to make an investment and postpone current consumption; to take higher risks etc. Hence, only in very rare cases, where the government can argue seriously and sincerely that without a retroactive legislation the structure of the social contract is in danger, such retroactive tax legislation should not be upheld. Another exception to the general rule would be when it is very clear that the tax law's drafter made a clear mistake which leaves the law ineffective and the tax authority acknowledges the mistake and announces its intention to fix the problem without a reasonable delay. In such a case, the amending legislation should be upheld even if the process takes longer than one taxable year.

In case the tax legislation is done during the taxable year, it should be effective not before the end of the legislative process. All the transactions that were concluded prior to that date are subject to the old rule and those that take place after that date will be subject to the new rule. There are not too many practical problems in having two different sets of rules during one taxable year.

The second part of the above statement that a taxpayer has no vested right in the Internal Revenue Code - has two meanings. No doubt, taxpayers have a vested right in the Internal Revenue Code against any retroactive legislation. Yet no taxpayer has the right to act with the belief that the Code will remain unchanged in the future. If a taxpayer made an economic decision (business, investment or consumption) on year 1, based on the Code's provisions in that year, but she has not materialized/concluded it in that year but in year 2. If in the beginning of year 2 the law changed, and afterwards she concluded the transaction, then such a legislation is not a retroactive one. It applies to all the transaction, which were concluded after the date of the legal change. Tax legislation is like any other variable that any person should take in consideration that it might change in the future, during the process of contemplating the deal up to its conclusion.

One may argue though, that our approach is inconsistent. If the tax is based on consent, and if the Congress decided to change it retroactively, then the public consents to the retroactive change. This is a wrong argument. The consent to pay taxes is just assumed. The assumption is valid as long as the tax is based on accepted principles and ideas – the four canons of a good

tax. Changing the rules of the games after the game is over (i.e. the transaction is concluded), definitely contradicts the above canons – the tax should be certain and not arbitrary and consider the convenience of the taxpayer. Furthermore, economic stability is a significant factor of efficiency. Hence disallowing retroactive tax legislation promotes, in ordinary times, economic efficiency as well.

#### 6) *The Constitution and Punitive Taxes*

While there is no clear line that distinguishes taxation from regulation accompanied by a penalty, it has been widely accepted, that the legislatures cannot use tax law as a punishment. As noted above, the Supreme Court stated in **Welsh v. Henry** (1938) that Taxation is neither a penalty imposed on the taxpayer. One may suspect that in light of the Court of appeals of D.C.'s approach in the **Murphy** case, if is taken into extreme, the Congress might have the power to label a penalty as a tax and legislate it as a tax law in order to bypass the Fifth and Fourteenth amendment's Due process requirement. However, the chances for such an occurrence are very slim. In NFIB, discussed below, the Court took the opposite approach and labeled a penalty a tax, but in our opinion, this does not shield it from review as a regulatory tax.

#### 7) *Is Tax a Confiscatory Payment? Taxes and the Property Right*

The "Taking Clause" of the Fifth Amendment instructs: "private property shall not be taken without just compensation". A popular, yet a bit superficial observation, may lead to the conclusion that any tax, by definition, infringes upon property rights, since it transfers wealth from the taxpayer to the government "without just compensation." This issue has been answered already by the Supreme Court. As a rule, the Court exempted taxes from a substantial review under the Takings Clause, and supported the constitutionality of progressive taxation (e.g., **Brushaber v. Union Pacific Railroad Co** (1916)).

Yet not everybody agrees. A notable and assertive voice of opponents is law Prof. Richard Epstein. Epstein – then, in Chicago – expressed fiercely in his "Takings - Private Property and the Power of Eminent Domain", and in some earlier articles, his claim that government actions, actually all the government redistribution programs, undermine/infringe the Taking Clause. Under his sweeping and one-sided/short-sighted approach, any government action or even plans that cause apparent/observable reduction in the value of a person's asset might be considered as taking; what might be called "regulatory takings". Accordingly, any kind of taxes are forms of taking and should be examined under principles applicable to all other taking, i.e. does the tax provide just compensation to those taxpayers who are subject to high marginal tax rates. According to Epstein's approach, progressive taxation is a clear example of taking without a just compensation, since it takes wealth from those who have and transfers it to those who do not have.

There are two major problems with Epstein's approach. One is the sweeping definition of the term property. As we argue below, good taxes do not take any private property, neither from firms nor from households. As for firms, i.e. income producers, Epstein relies quite significantly

on John Locke's labor justification of private property. Alas, even if we ignore Locke's own famous "provisos" and concentrate on the core of the justification, a clear conclusion emerges. In modern life no person can sincerely argue that he, she or it operated alone and produced their wealth without using a critical means/factor of production, namely social capital. Hence the fruits of the "joint project" go to all the participants/partners, i.e. the taxpayers and the public as well. Indeed, as is argued below, a good tax is actually a "profit sharing mechanism" between those who contribute their means of production, including the public and its agent—the government. In other words, taxes, which follow the good tax' four cannons (a tax must take into account the rights of the taxpayer; a tax must be certain, predictable and not arbitrary; a tax must be efficient; and a tax must be fair) are not a taking. They distribute the proceeds of the joint project to its members who are indeed **entitled** to their return on their investment.

As for households, good taxes are the quid pro quo for the benefit of the public goods and services we, the consumers, enjoy.

The second problem with Epstein's approach stems from his implied assumption that taxes, especially progressive ones, do not provide just compensation to the taxpayers who are subject to higher tax rates. Such assumption ignores Adam Smith's subtle argument that the ability and benefit principles do not contradict each other but are actually complementary. As we argue later on, firms which have higher economic ability – wealth and income production – enjoy much better the major public goods and services e.g., recognition of private property and its protection, freedom of contract, the existence of functioning economic markets and sustainable law and order. Those who don't have economic ability, barely enjoy those public goods and services. The same applies to households. The more we have – wealth and consumption – the greater benefit we enjoy the major public good and services, i.e. security, law and order, recognition of property's rights and their protection, regulation on financial institutes, and economic stability. Hence, those who have more receive a just compensation for their higher consumption of public goods and services, and rightly pay higher amount of taxes than those who have less. (F.F.Piven, R. A. Cloward, *Regulating the Poor: the Functions of Public Welfare*, N.Y. .1971)

The conclusion, which we suggested already above, is that good taxes do provide full compensation to the taxpayer. Nevertheless, when sufficient arguments and evidence are provided to support that the taxpayer does not enjoy the public goods and services as the rest of the community's members, such a tax might not prevail.

#### 4. The Constitutional Limits on Regulatory Taxes

The Court does not impose too many limits on regulatory taxes either. It has held that—

It is beyond serious question that a tax does not cease to be valid [under the Taxing Clause] merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle applies even though the revenue obtained

is obviously negligible . . . or the revenue purpose of the tax may be secondary. . . . Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate. As was pointed out in *Magnano Co. v. Hamilton*, 292 U.S. 40, 47 (1934): 'From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.'"<sup>44</sup>

In *NFIB*, Chief Justice Roberts used a functional approach in evaluating the authority for the requirement to pay the “penalty” for violating the individual mandate, and held that the “penalty” was a tax because (a) it had no penal intent and lacked a scienter requirement, and (b) because the tax level under the ACA is established based on traditional tax variables such as taxable income, number of dependents and joint filing status and the tax is collected by the Internal Revenue Service. Moreover, the Court noted, unlike a normal penalty the cost of the tax was far outweighed by the cost of obtaining health insurance. Roberts therefore concluded that the ACA “penalty” was in fact a “tax” authorized by the Taxing Clause.<sup>45</sup>

Many commentators have criticized this conclusion. As Kyle Logue has written,

If the Court is going to interpret the Constitution as drawing an important distinction between taxes and regulations (or penalties), a distinction that permits Congress to achieve some ends through the use of taxes that it cannot achieve through the use of regulations (because the breadth of the taxing power is greater than that of the regulatory power), then the Court needs a different way of distinguishing taxes from regulations. Specifically, I argue that instead of focusing so much on how coercive an exaction is (in the Court’s view, the more coercive, the more likely it is to be considered a “penalty” or a “regulation”), the Court should focus on the primary purpose of the exaction: is it to raise revenue or to alter behavior? I also argue that the definition of a tax should not include a requirement that money be paid to the government; rather, it is enough that there be a mandatory payment of money towards a public purpose. On this

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<sup>44</sup> *United States v. Sanchez*, 340 U.S. 42, 45 (1950). This was not always true. From 1922 to 1936, the Court ruled in a series of cases that Congress could not accomplish under the Taxing Clause what was beyond the limits of its regulatory powers under the Commerce Clause. See *J.W. Bailey v. Drexel Furn. Co.*, 259 US 20 (1922) (Child Labor Tax Case): “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. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?” *Id.*, at 37. See also *Hill v. Wallace*, 259 US 44 (1922); *Trusler v. Crooks*, 269 US 475 (1926); *United States v. Constantine*, 296 US 287 (1935); *United States v. Butler*, 297 US 1 (1936); *Carter v. Carter Coal Co.*, 298 US 238 (1936). However, when the Court switched its view of the Commerce Clause in *West Coast Hotel Co. v. Parrish*, 300 US 379 (1937) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1 (1937), these decisions became obsolete until 1995, when the Court began to reinstate the limits on congressional power under the Commerce Clause. This trend culminated in *NFIB v. Sebelius*, in which the Court invalidated the individual mandate under the Commerce Clause but upheld it under the Taxing Clause.

<sup>45</sup> *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

alternative understanding of the tax/regulation distinction, it is the individual mandate itself that has the important characteristics of a tax while the [penalty] has the characteristics of a penalty or enforcement provision that backs up the mandate.<sup>46</sup>

We do not agree that from a constitutional perspective a tax can include a payment to a non-governmental entity (like an insurance company). The Taxing Clause is clear that “tax” must be used for revenue raising for the government (“to pay the Debts and provide for the common Defence and general Welfare of the United States”), which includes all tax whose main purpose is raising financial resources which are designated to finance the elected government spending according to the annual budget approved by the public through its agents at the legislative branch. But we agree that the key constitutional consideration is for the Court to “focus on the primary purpose of the exaction: is it to raise revenue, or to alter behavior?”<sup>47</sup> When the primary purpose of a tax provision is not to raise revenue, but rather to change taxpayer behavior, it is a regulatory payment. Moreover, all tax expenditures, i.e., provisions in the tax law that deviate from the normative tax base, are regulatory [negative] taxes.

When a tax is a regulatory payment tax, it should not be judged primarily on the basis of the Taxing Clause. Instead, it should be judged like any regulation under the other provisions of the Constitution, including in particular the Due Process Clause, the Equal Protection Clause, the Establishment clause, and the limits on Congressional power under the Commerce Clause. Thus, under this analysis, Chief Justice Roberts was wrong: The ACA “penalty” is a regulatory payment – under the proposed model a negative Pigovian tax” and therefore it is not authorized by the Taxing Clause but rather subject to the limits on congressional power under the Commerce Clause. We disagree with the Chief Justice and the other conservative justices that the Commerce Clause should invalidate the individual mandate, because (as Justice Ginsburg wrote in her concurrence/dissent) it addresses a market failure (adverse selection) that does not apply to, for example, a requirement to eat broccoli. But we agree with the four conservative dissenters that the Taxing Clause does not save the ACA penalty; luckily, the ACA can stand without the penalty, as has been shown by developments after the penalty was abolished in 2017.

As one of us has discussed elsewhere, in many democratic countries, regulatory taxes are subject to a two-step judicial review. First, the court ascertains what is the regulatory purpose underlying the legislation. Second, the court determines whether the injury to rights such as equal protection is proportional to the regulatory purpose. The first author has argued that under this approach many of the larger US tax expenditures would not survive judicial review because they violate the Equal Protection Clause without a rational basis.<sup>48</sup> For example, the exclusion of premiums for health insurance paid by employers for employees and the lack of

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<sup>46</sup> Kyle Logue, *NFIB v. Sebelius and the Individual Mandate: Thoughts on the Tax/Regulation Distinction*, 5 *Michigan Bus. Enterp. L. Rev.* (2016).

<sup>47</sup> Logue, *supra*.

<sup>48</sup> Avi-Yonah, *Should US Tax Law be Constitutionalized*, *supra*.

such a tax benefit for independent contractors is a pure accident of history with no rational basis and should be deemed unconstitutional. Another example is the exemption for interest on state and local bonds, which is designed to help states and localities, but in most cases can be empirically demonstrated by the interest rate to inure to the benefit of taxpayers in the highest tax bracket. A third example is the home mortgage interest deduction, which is designed to encourage home ownership, but which has been abolished in other countries with no adverse effect on home ownership. The list is long.<sup>49</sup>

Another example of the application of the constitution to tax law is the notorious parsonage exemption (section 107), which is a clear violation of the Establishment Clause. Until recently, it was difficult to challenge this provision because of standing concerns, but the Seventh Circuit overcame this difficulty recently.<sup>50</sup> While the Court of Appeals upheld the provision on the merits, the arguments against it are persuasive and it is likely to be challenged again.<sup>51</sup>

## 5. Conclusion

In this essay, we have attempted to do three things. First, we define what is a “tax” for purposes of the Taxing Clause, as amended by the Sixteenth Amendment: It is a payment to the government either to raise revenue or to redistribute income. A tax that is primarily not for revenue is a regulatory tax and therefore out of the scope of the Taxing Clause.

Second, we have defined what are the appropriate constitutional limits on pure taxes on the basis of the idea that taxes in a liberal democracy must be based on the consent of the taxpayers, and that the taxpayers would not consent to a tax that is not fair or efficient. Third, we have defined the appropriate constitutional limit on regulatory taxes as a violation of Equal Protection that is narrowly tailored to a defensible rational regulatory purpose and that does not offend other constitutional limits like the Commerce or Establishment Clauses and the Establishment Clause

As stated above, we do not believe that the current Court is up to the task of applying constitutional analysis to either pure or regulatory taxes, because (a) both require an investigation into the purpose of legislation, which is anathema to textualists, and (b) the Court does not have a well-defined doctrine of proportionality to evaluate the extent to which a violation of a constitutional right is justified by the legislative purpose, as other supreme courts do. However, the courts are capable to examine several quantitative questions in order to review tax expenditures. First, did the government perform a proper administrative work

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<sup>49</sup> For the longer list see Avi-Yonah, *Should US Tax Law be Constitutionalized*, *supra*.

<sup>50</sup> On taxpayer standing see *Flast v. Cohen* (1968), which upheld taxpayer standing to mount Establishment Clause challenges, but in *Winn* (2011) the Court restricted this holding, and in *FFRF v. Lew* (2014) the 7<sup>th</sup> Circuit followed suit in rejecting standing. However, the taxpayers persisted and were able to reach the merits in *Gaylord v. Mnuchin* (2019), but they lost on the merits because the court wrongly compared section 107 to the generally applicable exclusion of housing “for the convenience of the employer” in section 119. But this provision is much more limited than section 107 and does not encompass cash allowances.

<sup>51</sup> For a persuasive critique of *Gaylord* see Adam Chodorow, *The Parsonage Exemption*, 51 *UC Davis L Rev* 849 (2018).

before offering the benefit? E.g. what is the goal that the administration sought to achieve? Will it sustain a judicial review, or is it violating constitutional principles. The next step is maybe not a pure legal question, however even conservative Justices have used expert/pr opinions of amicus curiae who are able to show through quantitative and empirical data whether the administration has done proper staff work to assess what benefit American society will benefit from; Is the goal clear and defined; what is its estimated cost or whether it may achieve the goal - ex post or ex ante; whether the means - tax expenditure is approximately equal to accomplish the stated goal; whether the revenue loss is not significantly higher than needed, as the Treasury can - and even must - quantify the tax losses that the specific tax expenditure causes to the government.

No need to say that such review will improve dramatically the administration, There is no need to detail how such a review will dramatically improve the Administration's performance, increase the decision-making process and lead to great transparency of the administration for the benefit of taxpayers. But we hope that this essay contributes to reopening the debate on the application of the Constitution to tax law that has been mostly closed in the century that has passed since the Court last invalidated a federal income tax law on constitutional grounds.

On a more practical level, the fact that the Court is not equipped to conduct constitutional review of tax legislation does not mean that the constitutional inquiry is worthless. Congress is, too, charged with upholding the Constitution, and Congress can ask when considering tax legislation whether it is a pure or a regulatory tax and, if the latter, whether it is constitutional. Congress also has the requisite tax expertise. In fact, this could be a new process for the staff of the Joint Committee on Taxation: For every new tax legislation, the Joint Committee should ask not just how much it costs or what its distributive effects are, but also whether it is constitutional (admittedly, this would require hiring more lawyers and fewer economists). A report along these lines may persuade members of Congress to refrain from some of the more egregious violations of the constitution found in current regulatory tax legislation, and perhaps encourage it to regulate more via direct legislation or subsidies than by the ever expanding use of the tax code for non-revenue purposes.

