
CONSTITUTIONAL REVIEW OF FEDERAL TAX LEGISLATION

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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” (U.S. Const. Article I, Section 8, Clause 1)?

The definition of “tax” for constitutional purposes has become important considering the Supreme Court’s 2012 decision in National Federation of Independent Business v. Sebelius (“NFIB”), in which Chief Justice Roberts for the Court upheld the constitutionality of the individual mandate of the Patient Protection and Affordable Care Act (“ACA”) under the taxing power. This holding has resulted in commentators questioning the utility of Roberts’s distinction between a “tax,” where Congress’s power is nearly unlimited, and a “regulation,” where Congress’s power under the Commerce Clause is limited.

We would propose a different distinction. A “tax” for purposes of the Taxing Clause is a pure tax: a tax implemented “to pay the Debts and provide for the common Defence and general Welfare of the United States.” Accordingly, a pure tax is intended primarily for raising revenue to finance the elected government’s policy and its implementation.

Even a pure tax has constitutional limits; however, they are relatively few. The traditional bases for constitutional judicial review, such as discrimination based on gender, race, or sexual orientation, are applied to tax legislation in a very limited way. The Supreme Court has shown significant reluctance to review tax legislation in the U.S. on constitutional grounds. Nevertheless, one could argue that a tax provision that has a disparate impact on race, gender, or another protected category should be evaluated using strict scrutiny, as some provisions involving gender have been by lower courts. Other provisions should be reviewed on a rational basis ground, although we believe some of them should be struck down even on that basis.

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Pure taxes should be distinguished from regulatory taxes whose main purpose is not to raise revenue but are intended—in accordance with the rules of the free market—to impose the right economic price on those who financially benefit from the damages they cause to the whole community. Regulatory taxes include Pigouvian taxes, such as tobacco taxes and carbon taxes, which are designed to reduce negative externalities, and tax expenditures, which are negative Pigouvian taxes. They are designed to recognize the positive externalities that a particular behavior of a taxpayer that benefits the whole community. Therefore, all members of the community must compensate the taxpayer who created the positive externalities by paying the economic cost of the received benefit—through taxes higher than the taxes paid by the person who created the 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 of the Commerce Clause.

As discussed below, the “penalty” imposed by the individual mandate of the ACA, which was repealed in 2017, was a regulatory tax, not a pure tax, and therefore was subject to the limits on congressional power under the Commerce Clause, contrary to Chief Justice Roberts’s view. In our opinion, the individual mandate should have been upheld as consistent with these limits, per Justice Ginsburg’s dissenting opinion.

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I. INTRODUCTION

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*”?¹

The definition of “tax” for constitutional purposes has become important considering the Supreme Court’s 2012 decision in *National Federation of Independent Business v. Sebelius* (“*NFIB*”), in which Chief Justice Roberts for the Court upheld the constitutionality of the individual mandate of the Patient Protection and Affordable Care Act (“ACA”) under the taxing power.² This holding has resulted in commentators questioning the utility of Roberts’s distinction between a “tax,” where Congress’s power is nearly unlimited, and a “regulation,” where Congress’s power under the Commerce Clause is limited.³

We would propose a different distinction. A “tax” for purposes of the Taxing Clause is a *pure tax*: a tax implemented “*to pay the Debts and provide for the common Defence and general Welfare of the United States*.”⁴ Accordingly, a pure tax is intended primarily for raising revenue to finance the elected government’s policy and its implementation.⁵ We do not address redistributive tax provisions, such as the progressivity feature of the personal income tax⁶ or a wealth

1. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).
2. 567 U.S. 519, 573 (2012).
3. See, e.g., Kyle D. Logue, *NFIB v. Sebelius and the Individual Mandate: Thoughts on the Tax/Regulation Distinction*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 173, 173–74 (2016).
4. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).
5. See *infra* Part II.
6. It is worth noting, however, that progressive taxation does not necessarily stem only from considerations of morality, ethics, and distributive justice. Economic, utilitarian, and libertarian analyses also lead to/provide justification for progressivity, when combining the principle of benefit and perceptions of a free market. For example, one traditional justification is based on the principle of diminishing marginal utility of income. Even if it is difficult to scientifically and accurately determine the curve of declining/diminishing utility, the principle still requires that in order to reach an “equal sacrifice,” or equal price in exchange for goods and services, taxpayers with greater ability should be subject to higher tax rates. Second, even with distinctly utilitarian approaches, it is clear that low-income earners will not agree—or they will not be able—to purchase certain goods or services at their economic cost. Therefore, when the elected government provides a basket of public goods

tax, beyond noting that they are inherently political, and thus, their distributive function of reducing inequality should not be subject to judicial review.

Even a pure tax has constitutional limits; however, they are relatively few.⁷ The traditional bases for constitutional judicial review, such as discrimination based on gender, race, or sexual orientation, are applied to tax legislation in a very limited way.⁸ The Supreme Court has shown significant reluctance to review tax legislation in the U.S. on constitutional grounds.⁹ Nevertheless, one could argue that a tax provision that has a disparate impact on race, gender, or another protected category should be evaluated using strict scrutiny, as some provisions involving gender have been by lower courts.¹⁰ Other provisions should be reviewed on a rational basis ground, although we believe some of them should be struck down even on that basis.

Pure taxes should be distinguished from *regulatory taxes* whose main purpose is not to raise revenue but are intended—in accordance with the rules of the free market—to impose the right economic price on those who financially benefit from the damages they cause to the whole community.¹¹ Regulatory taxes include Pigouvian taxes, such as tobacco taxes and carbon taxes, which are designed to reduce negative externalities, and tax expenditures, which are negative Pigouvian taxes.¹² They are designed to recognize the positive externalities that a particular behavior of a taxpayer that benefits the whole community.¹³ Therefore, all members of the community must compensate the taxpayer who created the positive externalities by paying the economic cost of the received benefit—through taxes higher than the taxes paid by the person who created the

and services at a certain price/cost, some of the taxpayers, under free market conditions, won't be willing to buy some of the goods and services that are above their ability and therefore not within their priorities. Suppose that within this basket is included the cost of NASA's budget. Purchasing such goods is not within a low-income taxpayer's abilities and priorities. Under free market conditions such public goods are not within her interest to buy. She considers it a luxury and would have refrained from purchasing it. If she is forced to purchase such goods and pay the full price, her basic constitutional principles of freedom, liberty, and property would be violated. In other words, forcing low-income taxpayers to purchase goods or services that are not on their full-scale priority constitutes a severe coercion even by clear libertarian principles. This is because the latter were willing to pay the full price of what is considered by the low-income taxpayers as luxuries. For a comprehensive review of economic literature on Mirrlees's approach and ways to show that in practice, a progressive tax system provides efficient and correct economic system, see Richard Blundell & Ian Preston, *Principles of Tax Design, Public Policy and Beyond: The Ideas of James Mirrlees, 1936–2018*, 40 FISCAL STUD. 5 (2019); *infra* text accompanying note 135. But we do not address this question in this Article.

7. See MILAN N. BALL, CONG. RSCH. SERV., R46551, THE FEDERAL TAXING POWER: A PRIMER 12–13 (2020).

8. See Yoseph Edrey, *Constitutional Review and Tax Law: An Analytical Framework*, 56 AM. U. L. REV. 1187, 1206–09 (2007).

9. *Id.* at 1206–07.

10. See, e.g., *Murphy v. Internal Revenue Serv.*, 460 F.3d 79 (D.C. Cir. 2006), *vacated*, No. 05-5139, 2006 WL 4005276 (D.C. Cir. Dec. 22, 2006).

11. Reuven S. Avi-Yonah, *Taxation as Regulation: Carbon Tax, Health Care Tax, Bank Tax and Other Regulatory Taxes*, 1 ACCT., ECON., & L. 1, 2–3 (2011).

12. See *id.* at 6. Pigouvian taxes are deviations from the normative tax base. Their purpose is to treat taxpayers who create positive externalities favorably.

13. *Id.*

externalities.¹⁴ Regulatory tax legislation should be subject to constitutional review under various clauses of the Constitution, including the Due Process Clause, Equal Protection Clause, Establishment Clause, and the limits of the Commerce Clause.

As discussed below, the “penalty” imposed by the individual mandate of the ACA, which was repealed in 2017,¹⁵ was a regulatory tax, not a pure tax, and therefore was subject to the limits on congressional power under the Commerce Clause,¹⁶ contrary to Chief Justice Roberts’s view.¹⁷ In our opinion, the individual mandate should have been upheld as consistent with these limits, per Justice Ginsburg’s dissenting opinion.¹⁸

Any actual tax legislation has more than one purpose.¹⁹ All tax rules influence behavior, and therefore come within our definition of regulatory taxes.²⁰ Moreover, all taxes produce some revenue, and therefore come within our definition of pure taxes.²¹ But some taxes are primarily regulatory, such as Pigouvian taxes that are aimed to deal with negative externalities, whereas tax expenditures are aimed to deal with positive externalities.²² While other taxes are primarily for revenue, such as value added taxes (“VAT”) and personal income taxes (“PIT”),²³ other taxes have multiple purposes. For example, the corporate income tax (“CIT”) has revenue as well as regulatory aims.²⁴ Moreover, any given tax may have multiple provisions with different aims, including the many tax expenditures embedded within the personal income tax and corporate income tax.²⁵

When evaluating the constitutionality of any given tax provision, a court, or Congress, should first classify the provision as either a pure tax or a regulatory tax. If it is the former, the court should generally hold that the provision is constitutional under the Taxing Clause. If it is the latter, the court should evaluate the provision against the limits imposed by the rest of the Constitution.²⁶

In what follows, we will first define pure taxes and regulatory taxes in Part II. In Part III, we will discuss the constitutional limits on pure taxes. In Part IV,

14. *See id.* at 2–3.

15. H.R. REP. NO. 115-466, at 324 (2017).

16. U.S. CONST. art. I, § 8, cl. 3.

17. Chief Justice Roberts found that the Commerce Clause does not provide Congress’s authority to enact the individual mandate. *Nat’l Fed’n of Indep. Bus. v. Sebelius (“NFIB”)*, 567 U.S. 519, 547–58 (2012).

18. *Id.* at 589–646 (Ginsburg, J., concurring in part and dissenting in part).

19. *See* *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

20. *Id.*

21. *Id.* at 555–56 (“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, and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.” (citations omitted)).

22. Avi-Yonah, *supra* note 11, at 2–3, 6.

23. *See generally* JAMES M. BICKLEY, CONG. RSCH. SERV., R41708, VALUE-ADDED TAX (VAT) AS A REVENUE OPTION: A PRIMER (2011).

24. Avi-Yonah, *supra* note 11, at 3.

25. *See generally* Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1 (2006).

26. *See infra* Part IV.

we will discuss the limitations on regulatory taxes, including tax expenditures. Lastly, we will conclude.

II. DEFINING PURE VS. REGULATORY TAXES

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.*”²⁷ In *NFIB*, Chief Justice Roberts relied on this “Taxing Clause” to uphold the constitutionality of the ACA’s individual mandate.²⁸ In the Court majority’s opinion, the “penalty” exceeded the limits of Congress’s power to regulate interstate commerce under the Commerce Clause.²⁹ Consequently, when Congress eliminated the “penalty” in 2017,³⁰ there were doubts as to the constitutionality of the individual mandate and the ACA more generally,³¹ although the Court rejected them on standing grounds without reaching the merits.³²

In *NFIB*, Roberts concluded that the penalty was a “tax” because it was embedded in the tax code, enforced by the IRS, and was not coercive.³³ As many commentators have pointed out, however, the Court’s distinction between a tax and a penalty is not persuasive.³⁴ 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 regulations, not taxes.³⁵

27. U.S. CONST. art. I, § 8, cl. 1 (emphasis added) (the “Taxing Clause”).

28. *NFIB v. Sebelius*, 567 U.S. 519, 563–70 (2012).

29. *Id.* at 588.

30. H.R. REP. NO. 115-466, at 324 (2017).

31. See, e.g., Timothy Sandefur, *So It’s a Tax, Now What?: Some of the Problems Remaining After NFIB v. Sebelius*, 17 TEX. REV. L. & POL. 203, 204 (2013).

32. *California v. Texas*, 141 S. Ct. 2104, 2112 (2021).

33. *NFIB*, 567 U.S. at 566.

34. See, e.g., Logue, *supra* note 3. The Israeli Basic Law: The State Economy draws a distinction between tax and mandatory payment, though both are subject to the Israeli “taxing clause.” Under this distinction, any payment to a monopolistic private entity that provides basic trade and public services is a “mandatory payment” but not necessarily a tax. § 1 Basic Law: The State Economy 5735-1975 LSI (1975), as amended (Isr.); see also YOSEPH M. EDREY, INTERPRETATION OF THE BASIC LAW: THE STATE ECONOMY, 43–44 (Yitzhak Zamir, ed. 2002). The Supreme Court of Israel accepted this conclusion, although in dicta. See Admin No. 7373/10 Levy v. State of Israel Defense Forces Payments Section, 7–8 Supreme Court of Israel (Aug. 13, 2012), https://supremedeisions.court.gov.il/Home/Download?path=HebrewVerdicts/10/730/073/120&fileName=10073730_120.txt&type=4 [https://perma.cc/Q85R-HYAT].

35. Logue, *supra* note 3, at 183–84; see also Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 88 (2012) (“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.” (citations omitted)). For early advocacy of the Taxing Clause as the basis for the constitutionality of the individual mandate, see, for example, Robert D. Cooter & Neil S. Seigel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1223–53 (2012) and Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L.J. ONLINE

We do not agree with this classification because, in our opinion, a “tax” from a constitutional perspective only includes payments to the government, because only such payments can help “*to pay the Debts and provide for the common Defence and general Welfare of the United States.*”³⁶ Yet that still leaves unanswered the basic question of how to distinguish a “tax” that is presumptively constitutional under the Taxing Clause from a “regulation” that is subject to limitations under the rest of the Constitution.

We should make it very clear at the outset that “tax law” is too broad of a term. It includes provisions intended both to raise revenue and regulate behavior.³⁷ PIT, CIT, and even VAT laws include both types of provisions.³⁸ Using the distinction that Professor Stanley Surrey proposed roughly sixty years ago, tax legislation includes both types of provisions: provisions aimed at raising revenue in accordance with the tax base and regulatory provisions (tax expenditures).³⁹ In other words, almost any tax legislation includes both aspects. Hence, referring to PIT means referring to its base, not necessarily all of its provisions.⁴⁰ The purpose of this Article is to draw this distinction and use it as a basic guideline for constitutional review of tax legislation.

We would propose the following distinction:⁴¹ a “tax” for purposes of the Taxing Clause is a *pure tax*, namely a tax implemented to raise revenue in order for the government “*to pay the Debts and provide for the common Defence and general Welfare of the United States.*”⁴² Even a pure tax has constitutional limits,

27 (2010), <http://yalelawjournal.org/forum/conditional-taxation-and-the-constitutionality-of-health-care-reform> [<https://perma.cc/L82B-V76A>].

36. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

37. Avi-Yonah, *supra* note 11, at 2–3, 6.

38. See generally Avi-Yonah, *supra* note 25.

39. See Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. L. REV. 679, 679–80 (1976).

40. BICKLEY, *supra* note 23, at 6.

41. Admittedly, such a distinction has almost no basis in the Court’s existing precedents; as discussed below, 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* Subsection III.C.2.a. 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* (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, 436 (1906) (“[B]ills for raising revenue within the meaning of the constitutional provision . . . 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, 397–98 (1990).

42. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

but they are relatively few.⁴³ Pure taxes should be distinguished from *regulatory taxes*, taxes whose main purpose is not to raise revenue but rather to correct a market failure; they are designed to pass on the cost of damages, caused by the supply of goods and services, from the injured to those who benefit from them.⁴⁴

Regulatory taxes include Pigouvian taxes, such as taxes on tobacco products and carbon taxes that are designed to reduce negative externalities, and tax expenditures (deviations from a normative tax base), which are, in essence, negative Pigouvian taxes.⁴⁵ In some cases, regulatory taxes are intended to change taxpayer behavior as well.⁴⁶

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.⁴⁷ The “penalty” imposed by the individual mandate of the ACA, which was repealed in 2017,⁴⁸ was a regulatory tax and therefore, contrary to Chief Justice Roberts’s view,⁴⁹ was potentially subject to the limits of congressional power under the Commerce Clause.⁵⁰

Any actual tax has more than one purpose.⁵¹ All taxes influence behavior, and therefore come within our definition of regulatory taxes.⁵² Moreover, all taxes produce some revenue, and therefore come within our definition of pure taxes.⁵³ But some taxes are primarily regulatory, such as Pigouvian taxes and tax

43. For a discussion of the appropriate limits on pure taxes, see *infra* Part III. For a similar distinction in the tax treaty context, see Fadi Shaheen, *Income Tax Treaty Aspects of Nonincome Taxes: The Importance of Residence*, 71 TAX L. REV. 583, 606–09 (2018).

44. Avi-Yonah, *supra* note 11, at 2–3.

45. *Id.* at 6.

46. *See id.* at 2–3.

47. For a discussion of the appropriate limits on regulatory taxes, see *infra* Part IV.

48. H.R. REP. NO. 115-466, at 324 (2017).

49. *NFIB v. Sebelius*, 567 U.S. 519, 547–58 (2012).

50. As far as the Internal Revenue Code (26 U.S.C., “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, 1246 (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 antidemocratic 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 S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391, 1412–13 (2002) [hereinafter Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*] (reviewing Joel B. Slemrod, *The Economics of Taxing the Rich*, in DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 3 (Joel B. Slemrod ed., 2000)).

51. *See* *Sonzinsky v. United States*, 300 U.S. 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, . . . and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.”); *see also* *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974).

52. *See* discussion *supra* Part I.

53. *See* *Sonzinsky*, 300 U.S. at 513.

incentives,⁵⁴ while others are primarily for revenue, including value added taxes.⁵⁵ Other taxes have multiple purposes. For example, corporate income taxes have revenue as well as regulatory aims.⁵⁶ Furthermore, any given tax may have multiple provisions with different aims, including the many tax incentives embedded within PIT and CIT.⁵⁷

When evaluating the constitutionality of any given tax provision, a court, or Congress, should first classify the tax as either a pure or regulatory. 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.⁵⁸ As one of us has concluded elsewhere, the current Court is not up to the task of constitutional review of tax legislation because it botches even regular statutory review as a result of being dominated by textualists who refuse to consider legislative purpose.⁵⁹ Our goal instead is to try to imagine what constitutional limits might apply to tax legislation in an ideal world and then consider how these limits might have some practical implications on how Congress approaches drafting such legislation. For example, perhaps 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 Establishment Clause, and other constitutional rights.⁶⁰

The same analysis should be used when it comes to tax incentives. Congress must make an effort to calculate the economic advantage the public gains from activities the government seeks to encourage.⁶¹ If the tax incentive amount is higher than the benefit generated for the public, we will be in a situation where firms that are benefited from entitlement to incentives will be treated favorably

54. Avi-Yonah, *supra* note 11, at 2–3.

55. *Id.* at 6.

56. *Id.* at 3.

57. *See generally id.*

58. For an example of how the Court could evaluate a regulatory tax provision if it were willing to consider disparate impact on protected groups like race or gender, see generally *Moritz v. Comm’r*, 469 F.2d 466 (10th Cir. 1972). Unfortunately, the Court has consistently refused since the 1970s to apply disparate impact, and most tax provisions do not discriminate on purpose. For an extensive discussion on how seemingly neutral tax provisions negatively affect Black Americans, see generally DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021). The *Bob Jones* case shows that the Court was occasionally willing to strike down discriminatory tax rules with no statutory basis, although the case was not decided on constitutional grounds. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 727 (1974).

59. Reuven Avi-Yonah, *Should U.S. Tax Law Be Constitutionalized? Centennial Reflections on Eisner v. Macomber (1920)*, *DUKE J. CONST. L. PUB. POL’Y* 65, 68–69 (2021).

60. *See infra* Part IV.

61. *See, e.g.*, Victor Fleischer, *Curb Your Enthusiasm for Pigovian Taxes*, 68 *VAND. L. REV.* 1673, 1709 (2015).

in comparison to other firms who do not enjoy the tax relief.⁶² Hence principles of equality/nondiscrimination are violated.⁶³ A process where Congress calculates the gain the public receives would 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.⁶⁴ As a result, some lawmakers may be less receptive to pressure from lobbyists to enact new tax expenditures (whose actual cost is usually hidden from the public) favoring their special interests.⁶⁵

A pure tax is a tax imposed for the purpose of raising revenue to finance the implementation of the elected government's fiscal policy.⁶⁶ A regulatory tax is a tax imposed for the purpose of changing individual or corporate behavior.⁶⁷

In essence, regulatory tax legislation aims to improve the free-market economy and regulate commercial activity.⁶⁸ This occurs as a result of transferring the damages created by a particular activity, a negative externality, from the injured party to the creator of the damage.⁶⁹ Alternatively, this occurs by transferring the benefits generated from a desirable activity, a positive externality, from the beneficiary, usually the public, to the firm who created the activity and caused the benefit.⁷⁰

For example, if Congress seeks to impose a Pigouvian tax on tobacco, it must receive an accurate evaluation of the amount of damage the public suffers from smoking, and accordingly, calculate the amount of tax on cigarettes.⁷¹ If the total amount to be collected from the manufacturers or smokers is higher than the total estimated damage to the public, such a Pigouvian tax is discriminatory: nonsmokers do not pay this tax, or a penalty is imposed without due process.⁷²

The same analysis should be applied to tax incentives. Congress must make an effort to calculate the economic advantage the public gains from activities the government seeks to encourage.⁷³ If the total amount of the tax relief is higher than the benefit that will be generated for the public, firms that are entitled to the

62. See Yoseph Edrey & Howard Abrams, *Equitable Implementation of Tax Expenditures*, 9 VA. TAX REV. 109, 110 (1989) ("It is known that the economic benefit derived from tax deductions [and from exclusions, which have the same effect as deductions] is greater for higher marginal rate taxpayers than for lower marginal rate taxpayers. To the extent that such deductions substitute for direct government expenditures, these deductions provide the largest subsidies to the wealthiest taxpayers. We, as have others before us, find such subsidies inequitable and misleading.").

63. See *id.*

64. See, e.g., 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, 138–39 (2010).

65. See, e.g., Fleischer, *supra* note 61, at 1690.

66. See Avi-Yonah, *supra* note 25, at 23.

67. See Avi-Yonah, *supra* note 11, at 6.

68. See generally *id.*

69. See *id.*

70. *Id.* at 2–3.

71. Fleischer, *supra* note 61, at 1683–84.

72. See *id.* at 1683.

73. See, e.g., *id.* at 1709.

incentives will be treated more favorably than other firms who do not enjoy the tax relief.⁷⁴

All tax expenditures, such as a departure from a normative tax base, for example the Haig-Simons definition of income as the sum of consumption and savings,⁷⁵ are regulatory (negative) taxes.⁷⁶ Although it could be argued that tax expenditures are merely subsidies and therefore should be 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 justifies subjecting tax expenditures to a more rigorous constitutional review than subsidies.⁷⁷

74. See Edrey & Abrams, *supra* note 62, at 110.

75. Robert M. Haig, *The Concept of Income—Economic and Legal Aspects*, in THE FEDERAL INCOME TAX 1, 7 (Robert M. Haig ed., 1921); HENRY C. SIMONS, PERSONAL INCOME TAXATION 50 (1938).

76. Tax expenditures are defined in the tax expenditure budget. See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified at 2 U.S.C. § 105 (1982), 2 U.S.C. §§ 621-88 (1982), and parts of 31 U.S.C. (1976)). For the most recent tax expenditure budget, see OFF. TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, TAX EXPENDITURES, FISCAL YEAR 2020 (2018), <https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2020.pdf> [<https://perma.cc/83BJ-UU64>]. The concept was invented by Stanley Surrey in the 1960s. See generally STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (1973); STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985); 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 (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 (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 Issues*, 20 B.C. L. REV. 225 (1979). For the subsequent literature, see generally 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); J. Clifton Fleming & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimension*, 27 VA. TAX REV. 437 (2008); Fleming & Peroni, *supra* note 64. The concept has also drawn significant criticism. See, e.g., STAFF OF JOINT COMM. ON TAX'N, 110TH CONG., A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 39, 47-48 (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, 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).

77. See generally Edward D. Kleinbard, *Tax Expenditure Framework Legislation*, 63 NAT'L TAX J. 353 (2010).

In reality, there is no such thing as a pure “pure tax” or a pure “regulatory tax.”⁷⁸ All real taxes have elements of both.⁷⁹ The “purest” tax is a head tax imposed at the same rate on every individual member of a given society.⁸⁰ Economists like head taxes because they arguably do not influence behavior and therefore are efficient because they do not create deadweight loss.⁸¹ But 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.⁸² At the other extreme, Pigouvian taxes, which are designed to reduce negative externalities, such as externalities from smoking or pollution, always produce some revenue when they fail to sufficiently change behavior.⁸³ Tax expenditures by definition do not raise revenue.⁸⁴ Our main taxes, the PIT and CIT, have a mixture of pure and regulatory elements in them.⁸⁵ VAT, which is the most important tax outside the U.S., is used primarily for revenue raising, but can also have regulatory effects, especially because real VATs always have exemptions and multiple rates.⁸⁶ *In general, the distinction between pure and regulatory taxes should be made provision by provision and not for any given tax as a whole.*⁸⁷

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 where Congress’s power is relatively unlimited; while the latter should be subject to all other limits of the Constitution, namely, those imposed on the Commerce Clause, but also potentially the Equal Protection, Establishment, and other Clauses.⁸⁸ In what follows, we will first discuss the constitutional limits on pure taxes and then on regulatory taxes.

78. See *Sonzinsky v. United States*, 300 U.S. 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 the less a tax because it has a regulatory effect, . . . and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.” (citations omitted)).

79. *Id.*

80. Murray N. Rothbard, *The Consumption Tax: A Critique*, 7 REV. AUSTRIAN ECON. 75, 75 (1994) (“[R]equires that every inhabitant of the United States pay an equal amount to the support of federal, state, and local government.”).

81. See Jacob Nussim, *To Confuse and Protect: Taxes and Consumer Protection*, 1 COLUM. J. TAX L. 218, 236 (2010); Richard T. Page, *Foolish Revenge or Shrewd Regulation? Financial-Industry Tax Law Reforms Proposed in the Wake of the Financial Crisis*, 85 TUL. L. REV. 191, 200 (2010).

82. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 224 (1973) (“[I]t will induce some people to leave the taxing jurisdiction to avoid the tax even though the value of their economic activity may have been greater had they stayed.”).

83. Avi-Yonah, *supra* note 11, at 6.

84. The Congressional Budget and Impoundment Control Act of 1974 defines tax expenditures as “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.” Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3, 88 Stat. 297, 299 (1974).

85. See Avi-Yonah, *supra* note 11, at 2–3.

86. See generally Avi-Yonah, *supra* note 25.

87. See *supra* Part II.

88. See *supra* Part I.

III. THE CONSTITUTIONAL LIMITS ON PURE TAXES

The Constitution itself imposes very few limits on the taxing power.⁸⁹ Goods exported from a state may not be taxed.⁹⁰ Direct taxes must be apportioned among the states by population,⁹¹ and indirect taxes must be uniform.⁹² The only significantly disputed item is the definition of a “direct” tax, which led the court in *Pollock v. Farmers’ Loan & Trust Company* to strike down the second U.S. income tax as unconstitutional.⁹³ Subsequently, this decision was reversed by the adoption of the Sixteenth Amendment in 1913.⁹⁴ There is still some debate among scholars regarding whether an unapportioned federal wealth tax would be constitutional.⁹⁵ Nor has the Supreme Court imposed significant limits

89. See MILAN N. BALL, CONG. RSCH. SERV., R46551, *THE FEDERAL TAXING POWER: A PRIMER* 12 (2020). It is clear, as we discuss below, that it is not permissible to impose taxes that are not intended to “pay the Debts and provide for the Common Defence and General Welfare of the United States.” U.S. CONST. art. I, § 8, cl. 1.

90. U.S. CONST. art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).

91. U.S. CONST. art. I, § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.”).

92. U.S. CONST. art. I, § 8, cl. 1 (“[A]ll Duties, Imposts and Excises shall be uniform throughout the United States”); see generally John R. Brooks & David Gamage, *The Indirect Tax Canon, Apportionment, and Drafting a Constitutional Wealth Tax or Accrual-Income Tax Reform*, IND. L. LEGAL STUD. PAPER NO. 459 (2021).

93. 157 U.S. 429 (1895), *aff’d*, 158 U.S. 601, 637 (1895).

94. U.S. CONST. art. I, § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”). 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. See *Pollock*, 158 U.S. at 637. 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. See *id.* 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 “[t]he 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.” U.S. CONST. amend. XVI. 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). See generally Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of ‘Incomes’*, 33 ARIZ. ST. L.J. 1058 (2001). 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). See generally *id.* 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. See *id.* at 1070; see also *Hylton v. United States*, 3 U.S. 171, 181 (1796).

95. See, e.g., Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 717 (2020). For supporters of constitutionality, see, for example, Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 56–58 (1999) and 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, for example, 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.”). *NFIB* reaffirmed that the only “direct” taxes are poll taxes and taxes on land values. *NFIB v. Sebelius*, 567 U.S. 519, 570 (2012).

on the power of Congress under the Taxing Clause.⁹⁶ The Court has emphasized the sweeping nature of Congress's power from time to time by noting that it "reaches every subject,"⁹⁷ that it is "exhaustive,"⁹⁸ and that it "embraces every conceivable power of taxation."⁹⁹ In fact, the few subject matter limitations imposed in the past have been overruled.¹⁰⁰ Most strikingly, since 1920 the Court has refused to hold any federal income tax statute unconstitutional.¹⁰¹

In our opinion, even pure taxes should have some constitutional limits derived from the Taxing Clause's admonition that taxes should be imposed only for revenue: "*to pay the Debts and provide for the common Defence and general Welfare of the United States.*"¹⁰² In addition, an understanding of the Taxing Clause should be informed by the fact that the American Revolution was fought under the slogan "no taxation without representation."¹⁰³

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.¹⁰⁴ Lawyers tend to emphasize the fact that the taxpayer does not receive *direct* and *equal* consideration in return for her payments.¹⁰⁵ This insight reflects a slight confusion between the substance/fundamental role of taxes and the technical aspect of tax collection.¹⁰⁶ From the substantive point of view, taxes are justified by the benefit principle (that taxpayers benefit from

96. Some lower courts contemplated constitutional review. *See, e.g.,* *Murphy v. Internal Revenue Serv.*, 460 F.3d 79, 85 (2006), *vacated*, No. 05-5139, 2006 WL 4005276 (D.C. Cir. Dec. 22, 2006); *see also* Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687, 689 (1999).

97. *License Tax Cases*, 72 U.S. 462, 471 (1866).

98. *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 12 (1916).

99. *Id.*

100. In *Evans v. Gore*, 253 U.S. 245, 264 (1920) and *Miles v. Graham*, 268 U.S. 501, 509 (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, 299 (1939). The ruling of *Collector v. Day*, 78 U.S. 113, 128 (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, 486 (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); *South Carolina v. United States*, 199 U.S. 437 (1905).

101. *See* *Eisner v. Macomber*, 252 U.S. 189, 219 (1920); *Avi-Yonah*, *supra* note 59, at 67.

102. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

103. H.R. 4958, 116th Cong. (1st Sess. 2019).

104. *See, e.g.,* *Taxes*, OECD (Nov. 18, 2001), <http://stats.oecd.org/glossary/detail.asp?ID=2657> [<https://perma.cc/H28A-JF3S>].

105. *See* *Edrey*, *supra* note 8, at 1209 ("There is a tendency to accept the notion that in order for tax laws to pass constitutional muster, they must follow the principles of horizontal and vertical equity.").

106. *See supra* Section III.A.

the use of the revenues)¹⁰⁷ and because the public consents to taxation.¹⁰⁸ The theoretical assumption must be 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.¹⁰⁹ 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.¹¹⁰ The fact that a tax is an enforced contribution exacted pursuant to legislative authority is a reflection of the need to *collect* taxes efficiently due to the unfortunate human phenomenon of *free riders* (members of the community who try to take advantage of the fact that they can enjoy public goods and services without sharing their cost).¹¹¹

As in the private market, any purchase of goods or services entails a legal obligation to pay its price.¹¹² 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.¹¹³ In other words, taxes are based on the benefit principle.¹¹⁴ Taxpayers enjoy this benefit as firms, income producers, and households, by using income and consuming public goods and services.¹¹⁵ As firms and income producers, public goods and services enable us to produce income and wealth.¹¹⁶ Without the government, which provides goods, services, and enables *social capital* as a factor of production,¹¹⁷ we would not be able to function, operate, or produce our income.¹¹⁸ In other words, our economic production is a common/joint activity within a *partnership* with the public.¹¹⁹ The public, through the elected government, invests in physical and social infrastructure and enables and maintains the domestic social capital that provides economic conditions that

107. Kevin A. Kordana & David H. Tabachnick, *Book Review: Tax and the Philosopher's Stone*, 89 VA. L. REV. 647, 653 (2003) (“[T]he benefit principle ‘requires that taxpayers contribute, via taxation, in proportion to the benefit they derive from government.’” (quoting LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 16 (2002))).

108. See Edrey, *supra* note 8, at 1192 (“The legislature represents the people; hence, a tax should be levied only if there is a collective consent of the people, the taxpayers.”).

109. See *id.* at 1209.

110. *Id.*; *Tax*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/tax> (last visited Oct. 25, 2022) [<https://perma.cc/4GF2-6B2X>].

111. Russell Hardin & Garrett Cullity, *The Free Rider Problem*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward B. Zalta ed., 2020), <https://plato.stanford.edu/entries/free-rider/> [<https://perma.cc/EZ5Y-YQTM>].

112. See Edrey, *supra* note 8, at 1193 (“Taxes are the price for goods and services we purchase from the government. As Justice Holmes put it so beautifully, ‘I like to pay taxes. They are the price we pay for civilized society.’”).

113. See *id.* at 1228.

114. See *id.* at 1210.

115. *Id.* at 1209.

116. *Id.* at 1213.

117. See generally 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*, 4 AM. AFFS. 46 (2020).

118. See Edrey, *supra* note 8, at 1222–25.

119. *Id.* at 1212–13.

allow the partnership to function, operate successfully, and achieve its economic goals.¹²⁰ We refer to this concept as the “*joint project approach*.”¹²¹ As the other “partners” of the “joint project,” the public, through its government, is entitled to a return on its investment.¹²² Thus, taxation is a profit-sharing mechanism between the public—the investor of social capital, and the investors of fiscal and human capital.¹²³ Income generated by firms (the “source side”) is consumed at present and saved for future consumption by households, hence the well-known Haig-Simons formula: Income = Consumption + Savings.¹²⁴ The other aspect of the benefit justification focuses on us as households and consumption, which has two aspects.¹²⁵ First, there is the current or future consumption of private goods and services,¹²⁶ which is only possible in an organized and civilized society with functional markets and regulated and efficient financial institutions.¹²⁷ Second, we directly consume public goods and services, such as national and domestic defense, recognition of private property and its protection, social and legal order, national pride, etc.¹²⁸ These goods and services cost money and we have to pay for them.¹²⁹ 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.¹³⁰ 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 prices of public goods are set in a democratic society.¹³¹

Therefore, 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*.¹³²

Note that the mandatory aspect of the definition serves two functions. First, it combats the “free rider” phenomenon.¹³³ Second, it embodies the principle that public goods and services are not bought by taxpayers based on individual decisions and choices.¹³⁴ This definition insists that a pure tax’s purpose is *merely* to finance the elected government’s general budget in order to execute its stated

120. *See id.*

121. *Id.* at 1222–25.

122. *Id.*

123. *Id.*

124. *Id.* at 1211–12.

125. *Id.* at 1199.

126. *Id.*

127. *See id.* at 1213.

128. *Id.* at 1211.

129. *See id.* at 1211–12.

130. *See id.*

131. *See id.* at 1209 (“The purpose of a tax system in a democratic society is to finance the policies of the elected government.”).

132. *See supra* Part I.

133. *See Hardin & Cullity, supra* note 111.

134. *See Edrey, supra* note 8, at 1209.

policy, not to finance any one specific goal.¹³⁵ Other mandatory payments, such as user fees and duties and regulatory taxes, are not within this definition. As discussed above, the distinction between pure taxes and regulatory taxes has significant meaning regarding constitutional judicial review and the public participation in democratic deliberation.¹³⁶

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 preapportionment for a particular or specific purpose.* The rationale for this addition, the assumption, derives from the concept that taxes are based on consent.¹³⁷ Yet it is quite difficult for the government to provide solid legal evidence that it provides full consideration to each and every member of society.¹³⁸ Accordingly, we need an assumption that the consideration is provided by the government.¹³⁹ The burden of proof on consent is shifted to the taxpayers.¹⁴⁰ If a taxpayer, or a group of taxpayers, argue that they did not receive a quid pro quo for their tax payments and therefore did not consent to pay the tax, they bear a very heavy burden.¹⁴¹ In rare cases, however, this burden is not impossible to bear.¹⁴²

In 1938, the Supreme Court offered the following concept: “[t]axation 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.”¹⁴³

135. 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 the personal income tax (“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.

136. See *supra* Part I.

137. See Edrey, *supra* note 8, at 1192 (“The legislature represents the people; hence, a tax should be levied only if there is a collective consent of the people, the taxpayers.”).

138. *Id.* at 1193 (“One may defy the assumption if no reasonable member of society would agree to pay the challenged tax.”).

139. *Id.*

140. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, *supra* note 50, at 1404 (“[I]ndividual taxpayers can object that the partnership does not apply to them.”); Sagit Leviner, *From Deontology to Practical Application: The Vision of a Good Society and the Tax System*, 26 VA. TAX REV. 405, 419 (2006) (“[T]axpayers can resist entering into partnership with other individuals or the government from the outset, and thereby object to the application of the joint venture to their situation already in the early stages of social or political cooperation.”).

141. See Leviner, *supra* note 140, at 419 (“One can try to isolate herself from others or from a particular activity or resource and may, to some extent, succeed in doing so. Nonetheless, no one can live in a state of isolation and, so, the disassociation of an individual from the joint venture to any meaningful degree is practically impossible.”).

142. See *id.*

143. *Welch v. Henry*, 305 U.S. 134, 146–47 (1938).

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.¹⁴⁴ Second, the obligation to pay a tax is not based on a contractual relationship.¹⁴⁵ Third, taxes should not be used as a punishment.¹⁴⁶

The first and the third components go hand in hand with the definition of a pure tax, as discussed above.¹⁴⁷ The second component may be considered contradictory to our approach, which bases tax on consent; however, we do not think it is fundamentally inconsistent with our approach. As with the notional Social Contract, there is no formal contract involved.¹⁴⁸

Here it is worth noting a certain ambiguity. A common view is that PIT is imposed on economic ability to pay.¹⁴⁹ As we have clarified above, this view is erroneous.¹⁵⁰ The tax is levied on the enjoyment of public services.¹⁵¹ Economic ability is an effective and useful measure of enjoyment. In other words, a person's degree of enjoyment of public services is measured in accordance with his economic capacity.¹⁵² The higher the economic ability, the greater the degree of enjoyment.¹⁵³ When the government provides security services, those taxpayers with higher ability are willing to pay much more than those with lower abilities to pay.¹⁵⁴ The former have much more to lose if there are no rule of law and security services that will recognize their freedom of contract or property and keep them safe and secure.¹⁵⁵ The latter are willing to pay much less because their property is small, if they have property at all.¹⁵⁶ The same goes for expenses paid for public education, transportation, national pride, and sending rockets to the moon or the national team to the Olympic Games.¹⁵⁷ In addition, the very existence of social capital, which enables the creation of wealth, is an illustration of the idea that the benefit principle and economic ability are not contradictory,

144. *Id.*

145. *Id.*

146. *Id.*

147. A tax intended primarily to raise revenues in order to finance the elected government's policy and its implementation. *See supra* Part I (discussing definition of pure tax).

148. This view is consistent with the idea of a "social contract" as developed by philosophers since Rousseau. *See* Fred D'Agostino & Gerald Gaus, *Contemporary Approaches to the Social Contract*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), <https://plato.stanford.edu/archives/win2008/entries/contractarianism-contemporary/> [<https://perma.cc/84RB-KT9F>].

149. *See* Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, *supra* note 50, at 1403.

150. *See* Edrey, *supra* note 8, at 1222–25.

151. *Id.*

152. *Id.*

153. *Id.*

154. *See id.* at 1213.

155. *See id.* at 1211.

156. *See id.*

157. *See id.*

but there is a direct correlation between them.¹⁵⁸ Those who generate high income benefit more from the existence of social capital.¹⁵⁹

C. *Pure Tax Legislation, Constitutional Law, and the Threats to Human Rights*

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

1. *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 Defence and general Welfare of the United States.”¹⁶⁰

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.”¹⁶¹ A broad interpretation of this approach 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.

But a potential solution to this evidentiary problem comes from insights and doctrines developed in the last half-century in the field of public finance known as “optimal taxation”.¹⁶²

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

158. *See id.* at 1212–13.

159. It is worth mentioning that the above equation was used already some 270 years ago: The subjects of every state ought to contribute toward 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. The expense of government to the individuals of a great nation, is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 777 (Edwin Cannan ed., 1937); *see also infra* text accompanying notes 360–66.

160. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

161. *United States v. Butler*, 297 U.S. 1, 65–66 (1936).

162. For the cornerstone of this doctrine, see generally Peter A. Diamond & James A. Mirrlees, *Optimal Taxation and Public Production I: Production Efficiency*, 61 AM. ECON. REV. 8 (1971).

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.¹⁶³

The most important corollary of this doctrine is that any tax has a deadweight loss, meaning that the amount of general welfare loss is greater than the tax's revenue that the government collects.¹⁶⁴ Hence, the government has to be efficient enough in order to provide a greater amount of welfare than deadweight loss.¹⁶⁵ Otherwise, the assumption regarding the public's consent to pay taxes and the constitutional requirement of the *general welfare of the United States* does not hold.¹⁶⁶ 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 in accordance with one of the two goals set by the Constitution? In other words, an inefficient government may levy unconstitutional taxes.¹⁶⁷

2. *Substantive Judicial Review of Pure Tax Legislation*

a. 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 “to serve the public's interests which, 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, rather than using other direct and more appropriate means.¹⁶⁸ Thus, the courts' reluctance to perform judicial review over tax legislation may produce two undesired consequences. First, discriminatory laws, which most likely would not survive judicial review if enacted as nonfiscal legislation, enjoy the “quasi-immunity” reserved for “tax law.”¹⁶⁹ Second, such legislation causes the tax code to become complicated and obscure and detracts from its true and designated goals: to finance the expenses of the elected government.¹⁷⁰ As discussed below, in most cases such legislation serves the interests of the powerful groups and sectors, which leads to a more

163. Alan J. Auerbach & James R. Hines Jr., *Taxation and Economic Efficiency*, in 3 HANDBOOK OF PUBLIC ECONOMICS 1347, 1347–1421 (Alan J. Auerbach & Martin Feldstein eds., 2002).

164. See generally Reuven S. Avi-Yonah & Yoseph M. Edrey, *Putting the Public Benefit in Cost Benefit Analysis of Tax Regulations: A Response to Hemel, Nou and Weisbach*, U. MICH. PUB. L. & LEGAL RSCH. PAPER SERIES, PAPER NO. 618 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228379 [<https://perma.cc/HAY8-UCA4>].

165. *Id.*

166. *Id.*

167. It is worth noting that a distinction should be made between the above approach and the approach of Henry David Thoreau as expressed in his essay on civil disobedience. Henry David Thoreau, *Civil Disobedience*, (1849), <https://xroads.virginia.edu/~Hyper2/thoreau/civil.html> [<https://perma.cc/G72X-DPEU>].

168. See sources cited *supra* notes 75–88.

169. See *infra* Subsection IV.B.3.

170. See *infra* Subsection IV.B.5.

regressive tax system.¹⁷¹ TEs entail economic distortions and result in a lack of public supervision on the government, a hidden process of privatization of the governments' chores, an increase in social gaps, and eventually, inefficiency.¹⁷²

Thus, our claim is that the term "tax" in the Taxing Clause should be interpreted very clearly and narrowly to include only pure taxes. Moreover, like any other legislation, pure taxes must comply with the constitutional limitations imposed upon the legislature by the Constitution.¹⁷³ 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.¹⁷⁴ Nevertheless, even if the tax deprives taxpayers of their property, it is not a "taking" for Fifth Amendment purposes.¹⁷⁵ The aggregate private property is the common-collective property of the community's members.¹⁷⁶ Reality teaches us today that the real government threat to private property is small, whereas the more important threat comes from influential groups, monopolies, powerful entities, and capital owners who covet the collective private property.¹⁷⁷

Note, however, that we do not argue that courts should review and question the elected government's *policy* underlying the reviewed tax law. Rather, courts should focus solely on making sure that while the elected government applies its policy, it respects and obeys constitutional guidelines. In particular, courts must respect the tax rate schedule, which embodies the distributive aims, Diminishing Marginal Utility of Income, or reluctance of low-income taxpayers to purchase public goods and services at the same price that those with high income or economic ability are willing to pay, or any other reasonable/sound justification for progressive tax rates¹⁷⁸ of PIT and CIT, which are inherently political¹⁷⁹ and are subject to democratic debate in every U.S. election.¹⁸⁰

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, or if it represents an arbitrary system that cannot be based on a presumed consent.¹⁸¹ In these circumstances, courts should be called upon to review a pure tax's constitutionality.

171. See *infra* notes 387–92 and accompanying text.

172. See *infra* notes 387–92; see also Yoram Margalioth, Eyal Sulganik, Rafael Eldo & Yoseph Edrey, *A Cost of Tax Planning*, 5 INT'L REV. L. & ECON. 155, 156 (2009).

173. See Edrey, *supra* note 8, at 1224.

174. See *id.* at 1206–07.

175. See *id.* at 1224 (“[A]s long as it is based on equitable and reasonable principles, a tax is not construed as a violation of the right to property, but rather as a profit-sharing mechanism used to distribute wealth created through the joint project between an individual and the community in which the individual lives.”).

176. See *id.* at 1223.

177. *Id.* at 1228.

178. See *supra* note 6 and accompanying text.

179. Note the 94% top PIT rate in the 1940–50s and the 80% CIT excess-profits tax rate in the 1940s. See, e.g., *Historical U.S. Federal Individual Income Tax Rates & Brackets, 1862–2021*, TAX FOUND. (Aug. 24, 2021), <https://taxfoundation.org/historical-income-tax-rates-brackets/> [https://perma.cc/4MUC-6587].

180. See *supra* note 135 and accompanying text.

181. See Edrey, *supra* note 8, at 1192.

The Taxing Clause contains much more than appears at first glance. First, it indicates that *only* the Congress has the power to lay taxes.¹⁸² The Congress represents, of course, the people.¹⁸³ As mentioned already, “no taxation without representation” is not a formal requirement or demand.¹⁸⁴ It signifies the idea of freedom and personal property.¹⁸⁵ No citizen will be asked to pay for the public goods and services without consent.¹⁸⁶ Hence, any tax should be levied only under the reasonable assumption that the public, the taxpayers, has provided its collective consent to pay the tax.¹⁸⁷

Second, our agents should only impose a tax for broad yet confined purposes: the “common defense and general welfare.”¹⁸⁸ Thus, tax laws are not immune from judicial review.¹⁸⁹ Like any other legislation, the power to impose taxes is restricted by constitutional limitations.¹⁹⁰ Although it is extremely difficult to define “general welfare,”¹⁹¹ and identify other governmental goals,¹⁹² the substantive rule is clear even though its implementation may be very complicated and deserves sophisticated analysis.

b. 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 presumed consent.¹⁹³ 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 in Congress who authorized the payment.¹⁹⁴ 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 details of the proposed national budget to the public.¹⁹⁵ This process includes the proposed public goods and services the government intends to provide, and specifies their price—the cost to the public.¹⁹⁶ If we do not approve the budget through our representative agents in the Congress, then the elected government is not allowed to function, leading to a government shutdown.¹⁹⁷ This is the constitutional reflection of the basic rule

182. *Id.* at 1194.

183. *Id.* at 1193.

184. *See id.* at 1192–93.

185. *See id.*

186. *See id.* at 1193.

187. *See id.*

188. *Id.* at 1191–92.

189. *Id.* at 1192.

190. *Id.*

191. *See* John Davisson, *The General Welfare: Congress’s Original Power to Fight Economic Inequality Under the Taxing and Spending Clause*, 24 *GEO. J. ON POVERTY L. & POL’Y* 89, 90–91 (2016).

192. *See* Avi-Yonah, *supra* note 25, at 3–4.

193. *See* Edrey, *supra* note 8, at 1192–93.

194. *Id.*

195. *Id.* at 1199, 1209.

196. *Id.* at 1209.

197. *Id.*

“no taxation without representation.”¹⁹⁸ Since representation is not a merely formal concept but rather expresses the voters’ approval, the substantive rule means: “[n]o taxation without consent.”¹⁹⁹

We argue further that the presumption, the consent to pay tax, holds as long as the tax follows some characteristics. The main characteristics are those that have been accepted since Adam Smith’s *The Wealth of Nations*.²⁰⁰ 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.²⁰¹
- b) **Certainty and non-arbitrariness:** The tax that each individual is bound to pay ought to be certain, and not arbitrary.²⁰² The time of payment, the manner of payment, and the quantity to be paid must be clear and plain to the contributor.²⁰³
- c) **The taxpayer’s convenience:** Every tax ought to be levied at a time, or in a manner that is most likely to be convenient for the contributor to pay.²⁰⁴
- 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.²⁰⁵

These four preconditions/requirements (maxims) were written before the constitutional era and in the absence of an orderly and systematic concept of “human rights.”²⁰⁶ 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 nondiscriminatory rules measured mainly by horizontal and vertical equity.²⁰⁷

There are several dimensions to arbitrariness when it comes to tax laws. The basic and straightforward one is the administrative dimension which deals mainly with the authorities and powers vested in the tax administration, its agents and officers.²⁰⁸ Once we agree that in a democratic system the government’s only purpose is to serve the public and improve its wellbeing, the administrative

198. *Id.* at 1224.

199. *Id.*

200. *Id.* at 1193–94; SMITH, *supra* note 159, at 777–79.

201. *See* Edrey, *supra* note 8, at 1210. 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 that the government provides. In other words, the tax is levied according to the benefit the taxpayer enjoys the good and services; economic ability—as easily measurable—is the measure of benefit.

202. *Id.* at 1198–1200.

203. *Id.* at 1198.

204. *Id.* at 1200–02.

205. *Id.* at 1202–03.

206. *See id.* at 1198–1210.

207. *See id.* at 1197–98.

208. *Cf. id.* at 1198–1200.

arbitrariness threatens citizens' right to know what obligations apply to them and affect the course of their lives and their ability to plan their producing income and consumption accordingly. The government's activity in the absence of transparency constitutes a barrier to criticism and supervision by the public on the one hand, and as a result thwarts the possibility of improving and bettering the government's actions on the other.²⁰⁹ Hence, certainty and nonarbitrariness should be achieved by requiring tax authorities to act objectively and be subject to the principles of the rule of law. At the same time, they are achieved through recognition of human rights, judicial review, and the protection of minorities from government and powerful groups, which might find a way to introduce into the tax system too many favorable and unjustified tax expenditures.²¹⁰

The certainty requirement raises yet another insight: no consent can be presumed with regard to any complex issue whose principles and basic rules are not understood or not available to the general public. Since the tax is a very significant part of the relationship between government and citizens, the relationship must be clear and understandable.²¹¹ Unfortunately, the actual reality is different. Simplicity in tax law is a relative and elusive matter that is not easily achieved.²¹² A simple scrutiny shows that the complexity of the tax laws is not very hard to diminish in reality. The lack of transparency and clarity of tax laws serves interests.²¹³ They are often created by politicians supported by wealthy and influential groups and contributors.²¹⁴ The complication of tax laws creates loopholes in the tax system, which provides "opportunity" for tax planners who offer their services to influential and powerful "free riders," who manage to reduce their fair share of the total price they would have had to pay for enjoying the public goods and services.²¹⁵

Consequently, the certainty requirement leads to an extremely important prerequisite: in a democratic system, where the tax administration is granted a significant power to assess taxpayers and to conduct civil and criminal inquiries and collect tax payments, there is a real danger, or even a constant threat, that the tax administrators might abuse their power in a discriminatory way and grant some concession to preferred taxpayers while providing unfavorable treatment to others.²¹⁶ Furthermore, such situations might invite public corruption.²¹⁷ Hence in most tax systems, in addition to the clear prohibition to tax people

209. *See id.* at 1198.

210. *See id.* at 1208.

211. *See id.* at 1198.

212. Kenneth H. Ryesky, *Tax Simplification: So Necessary and So Elusive*, 2 PIERCE L. REV. 93, 94 (2004).

213. *Id.* at 94.

214. *See* JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES* 244 (2017).

215. *See* Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 893 (2005)

216. *See* Edrey, *supra* note 8, at 1197.

217. *See, e.g.*, Paul Ingram, *Former Santa Cruz County Assessor Pleads Guilty to Conspiracy, Bribery*, TUCSON SENTINEL (Apr. 28, 2022, 2:28 PM), https://www.tucsonsentinel.com/local/report/042722_santa_cruz_assessor_bribery/former-santa-cruz-county-assessor-pleads-guilty-conspiracy-bribery/ [<https://perma.cc/7H6J-NWKR>].

beyond the amounts provided in the tax code, there is an express provision prohibiting the tax authorities to grant *ex gratia* tax-reliefs.²¹⁸

Other requirements derived from the maxim regarding certainty and nonarbitrariness are clarity, transparency, and simplicity of the tax laws.²¹⁹

Efficiency refers not only to the tax administration, but also to the considerations of optimal tax theory, which was only developed, as stated above, roughly fifty years ago.²²⁰

Convenience of paying also relates to the realization of income and the economic possibility that the taxpayer possesses for the payment of a tax.²²¹

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

The conclusion that no taxpayer is expected to pay taxes without consent is a significant one. It brings in an important factor to the legal and constitutional discussion. When Congress imposes duties and limitations, there is an assumption that under the terms of the Social Contract, we have agreed to those duties and limitations.²²² Yet, in rare and unusual circumstances, Congress may deviate from the "terms of agency" and legislate a provision that no reasonable person can be assumed to have agreed to and accepted by its terms.²²³ If the enacted tax legislation law is so unreasonable, the assumption of consent has no merit or basis.²²⁴ For example, a tax law may be extremely unfair, decrease the taxpayer's welfare without due consideration/compensation, or create unjust discrimination, or offends human dignity when it prevents the taxpayer from a minimal dignified existence.²²⁵ If the taxpayer is able to satisfy the burden and provide evidence that they did not receive a fair return for their tax payments, the assumption of consent is no longer valid, and the taxpayer may have a constitutional right to not pay the unjustified tax.²²⁶

We would also argue that in the unusual circumstance where the government fails to provide public goods and services to a certain area, the population within the area should not bear the same tax burden as the rest of the nation.²²⁷ Assume there is a remote border town. Due to hostile neighbors, the state suffers occasionally from enemy attacks. The enemy constantly shells the town. Hence,

218. Cf. I.R.C. § 1 (requiring individuals to pay income tax).

219. See Janene R. Finley & Amanda M. Grossman, *Equity in Reforming the Tax Treatment of Health Insurance Premiums*, 34 SETON HALL LEGIS. J. 1, 2 n.6 (2009).

220. Auerbach & Hines Jr., *supra* note 163, at 1415.

221. Edrey, *supra* note 8, at 1201–02.

222. *Id.* at 1193.

223. *Id.*

224. *See id.*

225. *Id.* at 1202.

226. See Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, *supra* note 50, at 1404 (“[I]ndividual taxpayers can object that the partnership does not apply to them.”); see also Thoreau, *supra* note 167.

227. See Edrey, *supra* note 8, at 1209.

daily life is totally ruined: the educational system does not function, trade and business activity are significantly reduced, free movement is restricted, and the property and life of the town's residents are in jeopardy. In this situation, is it still sensible to assume that the town's residents have agreed to pay taxes, even though they do not enjoy basic goods and services? Do they have to pay the same amount of tax as a safe town's residents? Don't they have the constitutional right to pay less because they are getting less, or at least shouldn't they be obligated to not pay the full amount of tax until the government takes the necessary steps to restore peace?

Another example is the deduction for casualty losses.²²⁸ Such losses occur, most of the time, due to the government's failure to provide satisfactory public services.²²⁹ Suppose an innocent bystander is affected by a hostile, terrorist, or criminal action, or a natural disaster, and suffers significant damage. The chances that the taxpayer can collect damages through a civil suit are zero. Are they 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 personal security and private property. The deductibility of casualty losses in such cases might be a reasonable means to answer these questions.²³⁰

In conclusion, the above examples demonstrate the basic requirement of taxation that we mentioned already: no taxpayer is expected to pay taxes without consent.²³¹ The consent is assumed as the taxpayer receives *quid pro quo* consideration—the benefit derived from the public goods and services.²³² If the taxpayer can provide a clear and unequivocal proof that the benefit is missing, the taxpayer is entitled to a tax relief that should reflect an absence of the benefit.²³³

c. Tax and the Right to a Dignified Minimum Standard of Living

Any tax system that does not provide a taxpayer with a dignified minimum standard of living likely violates the constitutional right to human dignity.²³⁴

228. I.R.C. § 165.

229. See Matthew J. Rossman, *Counting Casualties in Communities Hit Hardest by the Foreclosure Crisis*, 2016 UTAH L. REV. 245, 250 (2016).

230. 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.

231. Edrey, *supra* note 8, at 1224.

232. *Id.* at 1193.

233. *Policy Basics: Tax Exemptions, Deductions, and Credits*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 24, 2020), [cbpp.org/research/federal-tax/tax-exemptions-deductions-and-credits](https://perma.cc/H962-GECC) [https://perma.cc/H962-GECC].

234. See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 693 (2008); The Hon. Maite D. Oronoz Rodríguez, *Gender Equality and the Rule of Law*, 95 N.Y.U. L. REV. 1599, 1602–03 (2020); see also the quotation from Arthur Okun *infra* text accompanying note 241.

Some scholars draw a line between negative-passive rights and positive-active rights.²³⁵ Negative-passive rights embody the principle that the government should not drive a human below a certain level of poverty.²³⁶ Positive-active rights represent the idea that the government is obligated to ensure that any member of society has a dignified minimum standard of living and, when needed, *actively provide* the minimum standard of living (“second generation human rights”).²³⁷ Note that the line between these rights is much thinner than it seems.²³⁸ Nevertheless, since we are dealing with tax legislation, we confine our major discussion to a passive-negative human right. That is, the government should not tax a person to the point where it leaves the taxpayer without adequate means to guarantee a minimum standard of living.²³⁹ After all, human rights include, by definition, the right to survive.²⁴⁰ 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.²⁴¹

Indeed, most personal income taxation systems around the world have implemented their own means of ensuring that individuals and their families have an amount suitable enough to maintain a basic standard of living.²⁴² The U.S. tax

235. See Leif Wenar, *Rights*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2020), <https://plato.stanford.edu/archives/spr2021/entries/rights/> [<https://perma.cc/GR4A-XG2E>]; see, e.g., JAN NARVESON, *THE LIBERTARIAN IDEA* 57 (1989).

236. See Thomas Pogge, *Introduction*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?* 1, 8 (Thomas Pogge ed., 2007) (“[T]here is a negative duty not to violate people’s right to access to essential human goods.”).

237. See Jeremy Waldron, *Nozick and Locke: Filling the Space of Rights*, 22 *SOC. PHIL. & POL’Y* 81, 95–97 (2005); John Tasioulas, *The Moral Reality of Human Rights*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?* 75, 80 (Thomas Pogge ed., 2007) (“[A] right against extreme poverty is typically thought to entail positive duties to provide its holders with opportunities and resources.”).

238. See Wenar, *supra* note 235 (“[W]hen it comes to the enforcement of rights, this difference [between positive and negative rights] disappears . . . in the context of citizens’ rights to state enforcement, all rights are positive.”).

239. Edrey, *supra* note 8, at 1201.

240. See G.A. Res. 217 (III) A, *Universal Declaration of Human Rights* art. 25(1) (Dec. 10, 1948) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security . . .”).

241. ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 16–17 (1975).

242. Dylan Matthews, *Basic Income: The World’s Simplest Plan to End Poverty, Explained*, *VOX* (Apr. 25, 2016, 6:07 PM), <https://www.vox.com/2014/9/8/6003359/basic-income-negative-income-tax-questions-explain> [<https://perma.cc/5S6P-6NHP>].

system achieves this goal by various measures.²⁴³ Before 2017, the major ones were: first, personal exemptions in the amount of \$4,050, in 2016, for a taxpayer and each dependent.²⁴⁴ Second, the child tax credit,²⁴⁵ which was worth, in 2016, up to \$1,000 per child under the age of seventeen and has increased since then.²⁴⁶ Third, the standard deduction,²⁴⁷ which amounts, in 2016, for single taxpayers, and married couples filing separately, to \$6,300.²⁴⁸ For married couples filing jointly, the provision returns the amount of \$12,200 to \$12,600, and after 2017, \$24,000.²⁴⁹ Fourth, the tax credit for the elderly and the permanent and totally disabled²⁵⁰ of up to \$1,125 for a married couple filling jointly in 2015.²⁵¹ Fifth, deductibility of medical expenses.²⁵² Lastly, the deductibility of casualty losses.²⁵³ Since 2017, these credits have mostly been replaced by the larger standard deduction of \$24,000 for a married couple filing jointly, which means that income up to that level is exempt.²⁵⁴

In addition, the earned income tax credit,²⁵⁵ which is a refundable “negative income tax,” signals that in the U.S., the right to a minimum standard of living has transformed into a positive-active right.²⁵⁶ As discussed below, some deductions, exemptions, and tax credits are phased-out for taxpayers with higher incomes.²⁵⁷

d. The Constitutional Right to Equality

As previously discussed, fairness is the most fundamental requirement of a good tax system.²⁵⁸ Horizontal and vertical equity embody the principles of

243. *Id.* (“In the United States, Social Security is more or less an age-limited basic income program which ties benefits to wages to make itself look like a pension program. Supplemental Security Income is a guaranteed minimum income scheme for the aged, blind, and disabled. Food stamps are a guaranteed minimum income distributed through food rather than cash. The Earned Income Tax Credit functions much like a negative income tax with a work requirement.”).

244. *See* I.R.C. § 151; *Publication 501: Exemptions, Standard Deduction, and Filing Information*, IRS, 1, 1 (2016), <https://www.irs.gov/pub/irs-prior/p501--2016.pdf> [<https://perma.cc/XUB8-VSBR>].

245. I.R.C. § 24.

246. *See id.* § 24(h).

247. *Id.* § 63(c).

248. Richard Auxier, *The Standard Deduction and Personal Exemption 2*, TAX & POL’Y CTR. (Feb. 5, 2017), <https://www.taxpolicycenter.org/sites/default/files/publication/138246/2001144-the-standard-deduction-and-personal-exemption.pdf> [<https://perma.cc/GG4U-53Y3>].

249. I.R.C. § 63(c).

250. *Id.* § 22.

251. *See id.*

252. *Id.* § 213(a).

253. *Id.* § 165(c)(3).

254. Tax Cuts and Jobs Act, Pub. L. No. 115-97, §11021, 131 Stat. 2054, 2072 (2017); I.R.C. § 63(c).

255. I.R.C. § 32.

256. *See* Richard V. Burkhauser & Kevin Corinth, *The Minimum Wage Versus the Earned Income Tax Credit for Reducing Poverty*, IZA WORLD LAB. 1 (2021) (“The earned income tax credit is an effective way to reduce poverty. It raises only the after-tax wage rates of workers in low- and moderate-income families, the tax credit increases with the number of dependent children, and evidence shows that it increases labor force participation and employment in these families.”).

257. *See, e.g.*, Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11011, 131 Stat. 2054, 2063–64 (2017).

258. *See supra* text accompanying notes 222–26.

fairness in taxation and mandate that equal taxpayers pay equal tax payments and different taxpayers pay different tax payments.²⁵⁹ The next step is determining the most suitable criteria for determining equality and differences between taxpayers.

The most prominent trait of taxation is money: the means that we use for paying our taxes.²⁶⁰ Money represents economic value and economic ability, which is, as stated above,²⁶¹ the most effective and efficient measure of the benefit the public receives from the goods and services that the government provides.²⁶² Therefore, one may argue that a taxpayer's economic ability is the right criterion for assessing 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.²⁶³

It should be mentioned that in some European countries, the principles of horizontal and vertical equity are no longer theoretical or philosophical concepts, but rather are constitutional principles mentioned in written constitutions.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶

Keep in mind that different statutory tax rates for different types of income do not necessarily constitute unjustified discrimination, but rather, serve as a practical compromise to complicated calculations of accurate tax rates.²⁶⁷ Thus, for example, justifications can be provided for the low tax rate for capital gains, interest, and dividends.²⁶⁸ An age-old claim is that a tax on passive income, in

259. Vertical equity requires that the greater the taxpayer's means as measured by income, the greater the share of the overall income tax burden the taxpayer should bear. RICHARD A. WESTIN, *WG&L TAX DICTIONARY* 835 (2000). Horizontal equity requires that identically situated taxpayers bear identical shares of the tax burden. *Id.* at 338.

260. See Edrey, *supra* note 8, at 1224.

261. See *id.* at 1213.

262. See *id.*

263. R.A. Musgrave, *In Defense of an Income Concept*, 81 *HARV. L. REV.* 44, 45–46 (1967) (“[L]ook for a general index of economic well-being which broadly measures a person's capacity to contribute or to ‘sacrifice’ on behalf of government. This is the tradition of taxation according to ability to pay.”).

264. Henry Ordower, *Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted*, 7 *FLA. TAX REV.* 259, 264 (“In Germany, constitutional protections of individual liberties have rendered unconstitutional such matters as mandatory joint assessment of married couples, retroactive application of rate increases, deductibility of political contributions, value-based taxes that do not apply the same valuation standard to all properties, income taxation of the subsistence minimum, and . . . a tax that the government was unable in practice to assess and collect uniformly.”); Avi-Yonah, *supra* note 59, at 75.

265. See Avi-Yonah, *supra* note 59, at 70–72.

266. See *id.* at 72.

267. See *id.* at 71.

268. See *id.* at 72.

addition to active income, results in double taxation:²⁶⁹ taxation once on active income from labor and business, and taxation again on the fruits of savings from that active income.²⁷⁰ Needless to say, this claim is too sweeping and general. Without going into the details, we mention that this claim is limited to passive income equal to the market interest rate.²⁷¹ Hence, instead of calculating accurately the component that should be exempted, the practical solution of imposing a lower rate on the whole gain is implemented.²⁷² A similar idea should be applied to avoid a triple tax on corporate earnings.²⁷³

e. The Constitution and Retroactive Taxes

The third clause of Article I, Section 9 of the United States Constitution prohibits Congress from passing any bill of attainder or *ex post facto* law.²⁷⁴ While the term “*ex post facto* law” may be construed to embrace all retrospective laws, in the early case of *Calder v. Bull*, the Supreme Court decided that the phrase, as used in the Constitution, applies only to penal and criminal statutes and not to tax legislation.²⁷⁵

Retroactive application of a statute may violate substantive due process rights under the Fifth Amendment.²⁷⁶ In 1938, the Supreme Court acknowledged that application of a new law to preceding taxable years may be an unconstitutional deprivation of property without due process of law.²⁷⁷ 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.”²⁷⁸

269. See DAVID F. BRADFORD, *UNTANGLING THE INCOME TAX* 18 (Robert C. Holland ed. 1986); McCaffery, *supra* note 215, at 812–13; Yoseph M. Edrey, *What Are Capital Gains and Capital Losses Anyway*, 24 VA. TAX REV. 141, 166 (2004).

270. See Edrey, *supra* note 269, at 166.

271. *Cf. id.*

272. *Cf. id.*

273. 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–\$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 equal to the corporate retained earning (\$1,000–\$790) and subject to her tax rate of 20% and which is taxed again (\$790*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 Doe from the change in expectations from the corporate’s earning 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, Joanne, will pay tax on the dividend she will receive in the future from the company’s retained earnings.

274. U.S. CONST. art. I, § 9, cl. 3.

275. 3 U.S. 386, 397 (1798).

276. See generally Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 694 (1960).

277. *Welch v. Henry*, 305 U.S. 134, 145 (1938).

278. *Id.* at 147.

Lack of notice may be considered as an important factor, probably, only when the legislation is an introduction or a creation of a new tax.²⁷⁹ In *Blodgett v. Holden* and *Untermeyer v. Anderson*²⁸⁰ the Court discussed the question of whether the new gift tax took effect on the day the law was enacted in June 1924 or as early as January 1924, in accordance with a provision stipulating that it would take effect at the beginning of the year.²⁸¹ In both cases, the taxpayers made their gifts between January and the end of May 1924.²⁸² The Supreme Court found that this was unconstitutional legislation and invalidated the retroactive provision, since the taxpayers had “no reason to suppose that any transactions of the sort will be taxed at all.”²⁸³ These two cases are quite exceptional, since they dealt with the imposition of a totally new tax.²⁸⁴ Other tax legislation, with retroactive applicability, intended only to amend existing tax laws—including a change in tax rates—has not encountered significant judicial review; the Court has not invalidated provisions in tax laws *en masse*, as long as the legislation did not create a new tax.²⁸⁵

In 1981, the Supreme Court in *United States v. Darusmont* demonstrated once again its reluctance to review tax legislation.²⁸⁶ 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.²⁸⁷ This holding was in spite of the fact that the taxpayer might have relied on the old rules and could not alter preenactment transactions in light of the new rules.²⁸⁸

Furthermore, when the new Code of 1986 was enacted, taxpayers realized that there was a loophole in one of the Code’s provisions and took advantage of it.²⁸⁹ When the government found out about it, it announced its intention to

279. *See id.* at 145.

280. *Blodgett v. Holden*, 275 U.S. 142 (1927); *Untermeyer v. Anderson*, 276 U.S. 440 (1928).

281. *Blodgett*, 275 U.S. at 144–45; *Untermeyer*, 276 U.S. at 445.

282. *Blodgett*, 275 U.S. at 146; *Untermeyer*, 276 U.S. at 444.

283. *United States v. Darusmont*, 449 U.S. 292, 298 (1981); *Blodgett*, 275 U.S. at 147; *Untermeyer*, 276 U.S. at 446.

284. *Blodgett*, 275 U.S. at 145; *Untermeyer*, 276 U.S. at 444.

285. *See United States v. Carlton*, 512 U.S. 26, 28 (1994); *cf. Milliken v. United States*, 283 U.S. 15, 23–24 (1931) (showing that a gift tax rate increase that applied to a gift made two years earlier sustained the court review); *United States v. Hudson*, 299 U.S. 498, 501 (1937). The Court consistently has held that the application of an income tax statute to the entire calendar year in which enactment took place does not *per se* violate the Due Process Clause of the Fifth Amendment. *See Stockdale v. Atl. Ins. Cos.*, 87 U.S. 323, 331–32 (1873); *id.* at 341 (Strong, J., dissenting); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 20 (1916); *Cooper v. United States*, 280 U.S. 409, 411 (1930); *Milliken*, 283 U.S. at 21; *Reinecke v. Smith*, 289 U.S. 172, 175 (1933); *Hudson*, 299 U.S. at 500–01; *Welch v. Henry*, 305 U.S. 134, 146, 148–50 (1938); *Fernandez v. Wiener*, 326 U.S. 340, 355 (1945); *Darusmont*, 449 U.S. at 300–01.

286. 449 U.S. at 301.

287. *Id.* at 297.

288. *See id.* at 301.

289. *Carlton*, 512 U.S. at 28 (“Congress effected major revisions of the Internal Revenue Code in the Tax Reform Act of 1986, 100 Stat. 2085. One of those revisions was the addition of a new estate tax provision applicable to any estate that filed a timely return after the date of the Act, October 22, 1986. The new provision, codified as 26 U.S.C. § 2057 (1982 ed., Supp. IV), granted a deduction for half the proceeds of ‘any sale of employer securities by the executor of an estate’ to ‘an employee stock ownership plan.’”).

amend the provision in order to stop the abuse.²⁹⁰ The legislative process ended in 1987 but applied retroactively to 1986.²⁹¹ Based on the government's announcement and due to the fact that the period of retroactivity was slightly over one year, the Supreme Court upheld the amendment: "[b]ecause we conclude that retroactive application of the 1987 amendment to § 2057 is rationally related to a legitimate legislative purpose, we conclude that the amendment . . . is consistent with the Due Process Clause."²⁹² Justice O'Connor added a proviso to the majority opinion, noting that in this case, the retroactivity period, which was around a year, was a "relatively short period," but any longer of a period would have raised "serious constitutional questions."²⁹³

A few years later, one petitioner against the state of Washington²⁹⁴ and six other petitioners against the state of Michigan²⁹⁵ were required to pay state taxes in Washington and Michigan, respectively.²⁹⁶ The basic question in both state courts was: can a state, by statute, change its tax laws retroactively for a period of longer than one year (in the Michigan case—six years, and the Washington case—three years), where the change was not promptly instituted and was designed to increase state tax revenue?²⁹⁷

The state supreme courts in both states dismissed the petitioners' claims, and subsequently, the petitioners filed a certiorari petition to the U.S. Supreme Court.²⁹⁸ The common argument of all seven petitioners was that the provisions of the laws that required them to pay taxes were retroactive and therefore violated their due process.²⁹⁹ On May 22, 2017, the U.S. Supreme Court declined to hear the taxpayers' challenges to the retroactive application in *Dot Foods v. Washington Department of Revenue*.³⁰⁰

290. *Id.* at 29 ("On January 5, 1987, the Internal Revenue Service (IRS) announced that, '[p]ending the enactment of clarifying legislation,' it would treat the § 2057 deduction as available only to estates of decedents who owned the securities in question immediately before death.").

291. *Id.* ("On December 22, 1987, the amendment to § 2057 was enacted. As amended, the statute provided that, to qualify for the estate tax deduction, the securities sold to an ESOP must have been 'directly owned' by the decedent 'immediately before death.'").

292. *Id.* at 35.

293. *Id.* at 38 (O'Connor, J., concurring).

294. *See Dot Foods, Inc. v. Wash. Dep't of Revenue*, 372 P.3d 747, 749 (Wash. 2016).

295. *Sonoco Prods. Co. v. Mich. Dep't of Treasury*, 137 S. Ct. 2157 (2017); *Skadden, Arps, Slate, Meagher & Flom, LLP v. Mich. Dep't of Treasury*, 2016 WL 1040147, at *1 (Mich. Ct. App. Mar. 15, 2016); *Gillette Com. Operations N. Am. v. Dep't of Treasury*, 878 N.W.2d 891, 899 (Mich. Ct. App. 2015); *Int'l Bus. Mach. Corp. v. Mich. Dep't of Treasury*, 891 N.W.2d 880, 881 (Mich. Ct. App. 2016); *Goodyear Tire & Rubber Co. v. Mich. Dep't of Treasury*, 2016 WL 299803, at *1 (Mich. Ct. App., Jan. 21, 2016); *DIRECTV Grp. Holdings LLC v. Mich. Dep't of Treasury*, 2016 WL 1040147, at *1 (Mich. Ct. App. Mar. 15, 2016). The petitions in the consolidated Michigan cases all derived from the Michigan court of appeals's decision in *Gillette Com. Operations N. Am. v. Dep't of Treasury*, 878 N.W.2d 891, 899 (Mich. Ct. App. 2015).

296. *See Dot Foods*, 372 P.3d at 755; *Gillette*, 878 N.W.2d at 899.

297. *See Dot Foods*, 372 P.3d at 748; *Gillette*, 878 N.W.2d at 899.

298. *See Dot Foods*, 372 P.3d at 748; *Gillette*, 878 N.W.2d at 899.

299. *See Dot Foods*, 372 P.3d at 748; *Gillette*, 878 N.W.2d at 906.

300. *See Dot Foods*, 372 P.3d at 755.

Only in *Nichols v. Coolidge*, a rare case with unusual facts, has the Supreme Court invalidated a retroactive application of a federal estate tax provision to a transaction, which took place twelve years (!) earlier.³⁰¹

It seems that the rationale behind the courts' general tendency was laid down in *Welch v. Henry*: "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."³⁰² This statement has two elements.

As for the first element, that tax legislation is not a promise, our approach is different. As indicated earlier, tax legislation is part of the Social Contract and is based on the presumed consent to pay quid pro quo for public goods and services in the broadest meaning.³⁰³ As with the private market, one party is not allowed to change the terms of a contract unilaterally; so is the case with tax legislation.³⁰⁴ Each year taxpayers learn, out of the deliberation and the approval of the national budget, what public goods and services they will receive from the elected government and how much they will be paying for them.³⁰⁵ They must make serious decisions based on that price.³⁰⁶ For example, whether to work harder or spend more time on leisure, whether to make an investment and postpone current consumption, whether to take higher risks, etc.³⁰⁷ Thus, 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, retroactive tax legislation should be upheld.³⁰⁸ Another exception to the general rule would be when it is very clear that a tax law's drafter made a clear mistake that leaves the law ineffective, and the tax authority acknowledges the mistake and announces its intention to fix the problem without delay.³⁰⁹ In those circumstances, the taxpayers are not in a position to argue that they were surprised and could change their behavior had they known that the law would be changed.³¹⁰ Thus, the amending legislation should be upheld even if the process takes longer than one taxable year.³¹¹

If the tax legislation is done during the taxable year, it should not be effective until 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 with having two different sets of rules during one taxable year.³¹²

301. See 274 U.S. 531, 542–43 (1927).

302. *United States v. Carlton*, 512 U.S. 26, 33 (1994) (citing *Welch v. Henry*, 305 U.S. 134, 146–47 (1938)).

303. See Edrey, *supra* note 8, at 1192–93.

304. *Id.* at 1193 (“[T]here is an underlying assumption that all taxpayers accept the tax.”).

305. See *id.* at 1199.

306. See *id.* at 1200.

307. See Cheryl Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C. L. REV. 863, 902–04 (2002).

308. See Edrey, *supra* note 8, at 1192–93, 1198–99.

309. See *United States v. Carlton*, 512 U.S. 26, 32 (1994).

310. See *id.*

311. See *id.* at 33.

312. See Hochman, *supra* note 276, at 706–07.

The second part of the above statement, that a taxpayer has no vested right in the Internal Revenue Code, has two meanings. It seems to us that taxpayers have a vested right in the Internal Revenue Code against any retroactive legislation.³¹³ Yet no taxpayer has the right to act with the belief that the Code will remain unchanged indefinitely.³¹⁴ If a taxpayer makes an economic decision (business, investment, or consumption) in year one based on the Code's provisions in that year, the taxpayer has not concluded their decision in that year, but rather their decision is materialized in year two.³¹⁵ If in the beginning of year two the law changes, and afterwards the taxpayer has concluded the transaction, then such legislation is not a retroactive one.³¹⁶ It applies to the entirety of the transaction, which was concluded after the date of the legal change.³¹⁷ Tax legislation is like any other variable in that any person should take into consideration that it is subject to change.

One may argue that our approach is inconsistent. If the tax is based on consent and if Congress decides to change tax legislation retroactively, then the public consents to the retroactive change. This argument is wrong. The consent to pay taxes is merely assumed.³¹⁸ The assumption is valid as long as the tax is based on accepted principles and ideas—*e.g.*, the four canons of a good tax.³¹⁹ Changing the rules of the game after the game is over (the transaction is concluded) contradicts the above canons. The tax should be certain, not arbitrary, and consider the convenience of the taxpayer.³²⁰ Furthermore, economic stability is a significant factor of efficiency.³²¹ Hence, disallowing retroactive tax legislation promotes, in ordinary times, economic efficiency as well.³²²

f. The Constitution and Punitive Taxes

Although there is no clear line that distinguishes taxation from regulation accompanied by a penalty, it has been widely accepted that legislatures cannot use tax law as a punishment.³²³ As noted above, the Supreme Court in *Welch v. Henry* stated that taxation is not a penalty imposed on the taxpayer.³²⁴ One may

313. See Robert R. Gunning, *Back from the Dead: The Resurgence of Due Process Challenges to Retroactive Tax Legislation*, 47 DUQ. L. REV. 291, 325–26 (2009) (“[L]egislation is retrospective if it ‘destroys or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.’ By their nature, retroactive tax measures create new obligations or impose new duties with respect to transactions or considerations already past.” (citations omitted)).

314. See *Carlton*, 512 U.S. at 33.

315. See Hochman, *supra* note 276, at 706–07.

316. See *id.*

317. See *id.*

318. See Edrey, *supra* note 8, at 1198–99.

319. *Id.* at 1193–94.

320. *Id.* at 1198–99.

321. See *id.* at 1202–03.

322. See *id.*

323. Leo P. Martinez, “*To Lay and Collect Taxes*”: *The Constitutional Case for Progressive Taxation*, 18 YALE L. & POL’Y REV. 111, 136 (1999).

324. *Welch v. Henry*, 305 U.S. 134, 146 (1938).

suspect that in light of the D.C. Court of Appeals's approach in *Murphy v. Internal Revenue Service* discussed below,³²⁵ if taken to the extreme, Congress may legislate a penalty under the guise of a tax in order to bypass the Fifth and Fourteenth Amendment's due process requirement.³²⁶ The chances of such an occurrence, however, are very slim. In *NFIB*, discussed below, the Court took the opposite approach and labeled a penalty a tax.³²⁷ In our opinion, labeling a penalty as a tax does not shield it from review as a regulatory tax.

g. Is Tax a Confiscatory Payment? Taxes and the Property Right

The "Takings Clause" of the Fifth Amendment instructs that: "private property [shall not] be taken . . . without just compensation."³²⁸ A popular, yet a bit superficial observation may lead one to conclude that any tax, by definition, infringes upon property rights because it transfers wealth from the taxpayer to the government "without just compensation."³²⁹ This issue has been answered already by the Supreme Court.³³⁰ As a rule, the Court exempted taxes from substantial review under the Takings Clause and supported the constitutionality of progressive taxation.³³¹

But not everybody agrees. A notable and assertive voice of the opponents is law Professor Richard Epstein. Epstein—then in Chicago—expressed fiercely in his book, *Takings: Private Property and the Power of Eminent Domain*,³³² and in some earlier articles,³³³ that all the government redistribution programs undermine/infringe the Takings Clause.³³⁴ Under his sweeping and short-sighted approach, any government action, or even plan, that causes an observable reduction in the value of a person's asset might be considered a taking (what might be called "regulatory takings").³³⁵ Accordingly, any kind of tax is a form of taking and should be examined under principles applicable to all other takings.³³⁶ For example, 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 a taking without just compensation because it takes wealth from those who have it and transfers it to those who do not.³³⁷

325. 460 F.3d 79 (D.C. Cir. 2006).

326. *See id.* at 81–82.

327. *NFIB v. Sebelius*, 567 U.S. 519, 566 (2012).

328. U.S. CONST. amend. V.

329. U.S. CONST. amend. V; *see, e.g.*, Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85, 88 (1996).

330. *See Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916).

331. *Id.*

332. *See* RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 95 (1985).

333. *See, e.g.*, Richard Epstein, *Taxation, Regulation, and Confiscation*, 20 OSGOODE HALL L.J. 433, 437 (1982).

334. *See* EPSTEIN, *supra* note 332, at 95.

335. *See id.* at 295–305.

336. *See id.*

337. *See id.* at 161–94.

There are two major problems with Epstein's approach. One is the sweeping definition of the term property.³³⁸ As we argue below, good taxes do not take any private property from firms or households.³³⁹ As for firms, who are income producers, Epstein relies quite significantly on John Locke's labor justification of private property.³⁴⁰ Alas, even if we ignore Locke's own famous "provisos"³⁴¹ and concentrate on the core of the justification, a clear conclusion emerges. In modern life, no person can sincerely argue that they operated alone and produced their wealth without using critical means/factors of production, namely social capital.³⁴² The fruits of the "joint project" go to all the participants/partners—the taxpayers and the public.³⁴³ As argued above, a good tax is a "profit-sharing mechanism" between those who contribute their means of production.³⁴⁴ This includes the public and its agent, the government.³⁴⁵ In other words, taxes, which follow the four canons (take into account the rights of the taxpayer; certain, predictable, and not arbitrary; efficient; and fair) are not a "taking."³⁴⁶ They distribute the proceeds of the joint project to its members who are *entitled* to the return on their investment.³⁴⁷

As for households, good taxes are the *quid pro quo* for the benefit of the public goods and services we, the consumers, enjoy.³⁴⁸

The second problem with Epstein's approach stems from his implied assumption that taxes, especially progressive ones, do not provide just compensation to taxpayers who are subject to higher tax rates.³⁴⁹ Such an assumption ignores Adam Smith's subtle argument that ability and benefit principles do not contradict each other, but rather, are complementary.³⁵⁰ Firms that have higher economic ability, wealth, and income production enjoy public goods and services more, including the recognition of private property and its protection, freedom of contract and occupation, the existence of functioning economic markets, and sustainable law and order.³⁵¹ Those who do not have economic ability barely enjoy those public goods and services.³⁵² The same applies to households.³⁵³ The more wealth and consumption a household has, the greater benefit the household enjoys from major public goods and services, including security, law and order, recognition of property's rights and their protection, regulation of financial

338. *See id.* at 10–11.

339. *See infra* text accompanying notes 359–63.

340. *See* EPSTEIN, *supra* note 332, at 7–17.

341. *See id.*

342. *See* Edrey, *supra* note 8, at 1212–13.

343. *Id.*

344. *See supra* notes 115–23 and accompanying text.

345. *See* Edrey, *supra* note 8, at 1224–25.

346. *Id.* at 1224.

347. *Id.* at 1223–24.

348. *Id.* at 1193; *see supra* notes 123–30 and accompanying text.

349. *See* EPSTEIN, *supra* note 332, at 298–300.

350. *See* Edrey, note 8, at 1195; SMITH, *supra* note 159, at 651.

351. *See* Edrey, *supra* note 8, at 1211–12.

352. *See id.* at 1211.

353. *See id.*

institutes, and economic stability.³⁵⁴ Therefore, those who have more receive a just compensation parallel to their higher consumption of public goods and services, and consent and are able to pay a higher amount of taxes than those who have less. It is a matter of priorities: those with low economic ability can purchase fewer goods and services than those with high ability, and therefore the former consent to pay less than the latter.³⁵⁵

The conclusion, which we suggested already above, is that good taxes provide full compensation to the taxpayer.³⁵⁶ Nevertheless, when sufficient evidence is provided that indicates that a taxpayer does not adequately enjoy public goods and services in comparison to other community members, such taxes might be subject to constitutional challenge.³⁵⁷

IV. THE CONSTITUTIONAL LIMITS ON REGULATORY TAXES

A. Introduction

The Court does not impose many limits on regulatory taxes either.³⁵⁸ 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.³⁵⁹

As was pointed out in *Magnano Co. v. Hamilton*: “[f]rom 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

354. See *id.* at 1211–12.

355. See *id.*; see also FRANCES F. PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 175 (1971).

356. See *supra* text accompanying notes 346–55.

357. See generally Edrey, *supra* note 8.

358. See *United States v. Sanchez*, 340 U.S. 42, 45 (1950).

359. *Id.* at 44 (citations omitted). 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 U.S. 20, 37 (1922) (“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?”); see also *Hill v. Wallace*, 259 U.S. 44, 69 (1922); *Trusler v. Crooks*, 269 U.S. 475, 482 (1926); *United States v. Constantine*, 296 U.S. 287, 296 (1935); *United States v. Butler*, 297 U.S. 1, 78 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238, 289 (1936). But the Court switched its view of the Commerce Clause in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 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. *NFIB v. Sebelius*, 567 U.S. 519, 575 (2012).

constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.”³⁶⁰

In *NFIB*, Chief Justice Roberts used a functional approach in evaluating the requirement of paying a “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) 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 IRS.³⁶¹ Moreover, the Court noted, unlike a normal penalty, the cost of the tax was outweighed by the cost of obtaining health insurance.³⁶² Roberts therefore concluded that the ACA “penalty” was in fact a “tax” authorized by the Taxing Clause.³⁶³

Many commentators have criticized this conclusion.³⁶⁴ As Kyle Logue has written:

[I]f 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 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.³⁶⁵

We do not agree that from a constitutional perspective, a tax—as opposed to a mandatory payment³⁶⁶—can include a payment to a nongovernmental entity, like an insurance company. The Taxing Clause is clear that a tax must be used to raise revenue for the government: “*to pay the Debts and provide for the common*

360. 292 U.S. 40, 47 (1934).

361. *NFIB*, 567 U.S. at 566.

362. *Id.*

363. *Id.*

364. *See, e.g.*, Logue, *supra* note 3, at 175.

365. *Id.* at 174–75.

366. It is worth noting that the Israeli basic law: the state economy refers both to “tax” and . . . other mandatory payments. One of us claimed that mandatory payment also includes payments to private companies selling basic goods and services not under market conditions. Justice Zylbertal, of the Supreme Court of Israel, has also agreed with this proposition, in dicta. *See* Admin No. 7373/10 Levy v. State of Israel Defense Forces Payments Section, 1–2, 12–24 Supreme Court of Israel (Aug. 13, 2012) (Isr.), https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/10/730/073/120&fileName=10073730_120.txt&type=4 [<https://perma.cc/Q85R-HYAT>].

Defence and general Welfare of the United States.”³⁶⁷ This includes all tax provisions designed to finance the elected government’s spending according to the national budget that is approved by the public through its agents at the legislative branch.³⁶⁸ But we agree that the key constitutional consideration for the Court is to “focus on the primary purpose of the exaction: is it to raise revenue, or to alter behavior?”³⁶⁹ When the primary purpose of a tax provision is not to raise revenue, but rather to change taxpayer behavior, it is a regulatory tax.³⁷⁰ Moreover, all tax expenditures (provisions in the tax law that deviate from the normative tax base) are regulatory (negative) taxes.³⁷¹

When a tax is a regulatory tax, it should not be judged primarily by the Taxing Clause. Instead, it should be judged similar to any other regulation by other provisions of the Constitution, including in particular, the Due Process Clause, the Equal Protection Clause, the Establishment Clause, and the limits of Congressional power under the Commerce Clause.³⁷² Thus, under this analysis, Chief Justice Roberts was wrong. The ACA “penalty” is a regulatory payment under the proposed model of a Pigouvian tax, and therefore is not authorized by the Taxing Clause, but rather is subject to the limits of congressional power under the Commerce Clause.³⁷³ We disagree with the Chief Justice and the other conservative Justices that the Commerce Clause should invalidate the individual mandate³⁷⁴ because, as Justice Ginsburg wrote in her concurrence (discussed further below), the individual mandate addresses a market failure (adverse selection³⁷⁵) that does not apply to, for example, a requirement to eat broccoli.³⁷⁶ Nevertheless, we agree with the four conservative dissenters that the Taxing Clause does not save the ACA penalty.³⁷⁷ Luckily, the ACA can stand on its own

367. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

368. See Edrey, *supra* note 8, at 1209.

369. Logue, *supra* note 3, at 175.

370. *Id.* at 185.

371. *Id.* at 185–87.

372. See *id.* at 186.

373. See *id.*

374. See *NFIB v. Sebelius*, 567 U.S. 519, 548–58 (2012).

375. *Id.* at 594, 598 (Ginsburg, J., concurring in part and dissenting in part). The adverse selection phenomenon is explained as follows:

[C]onsider a simple situation where an insurance firm could tell nothing about an individual, other than that he was willing to purchase an insurance policy at the premium being offered. At higher premiums, those who are least likely to need medical care—say, healthy young individuals—decide it is not worth paying the premium. Or they may decide only to buy a policy that covers very large medical expenses. Thus, as premiums increase, there is an adverse selection effect: the best risks decide not to purchase the policy. . . . But with the best risks dropping out of the market, the average cost per policy issued increases. . . . Because there are few highly risk-averse individuals who are willing to pay larger amount in excess of their expected cost, a small fraction of the population obtains insurance. . . . Concern about the lack of coverage for certain high-risk groups in the population—in particular the elderly—has formed one of the strongest motivations for the expansion of the government’s role in health care.

JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 316, 318 (3d ed. 2000).

376. *NFIB*, 567 U.S. at 607–08 (Ginsburg, J., concurring in part and dissenting in part).

377. *Id.* at 661–69 (Scalia, J., dissenting).

without the penalty, as has been demonstrated by developments after the penalty was abolished in 2017.³⁷⁸

As one of us has discussed elsewhere, in many democratic countries, regulatory taxes are subject to a two-step judicial review.³⁷⁹ First, the court ascertains what the regulatory purpose underlying the legislation is.³⁸⁰ Second, the court determines whether the injury to rights, such as equal protection, is proportional to the regulatory purpose.³⁸¹ The first author has argued that under this approach, many of the larger U.S. tax expenditures would not survive judicial review because they would be found to violate the Equal Protection Clause without a rational basis.³⁸² For example, the exclusion of premiums for health insurance paid by employers for employees and the lack of such a tax benefit for independent contractors is a pure accident of history with no rational basis and should be deemed unconstitutional.³⁸³ Another example is the exemption for interest on state and local bonds, which is designed to help states and localities, but in most cases it benefits taxpayers in the highest tax bracket.³⁸⁴ A third example is the home mortgage interest deduction, which is designed to encourage home ownership but has been abolished in other countries with no adverse effect on home ownership.³⁸⁵ Furthermore, some researches have indicated that this provision is inconsistent with its declared purposes.³⁸⁶ The list is long.³⁸⁷

B. The Quality and Substance of Tax Legislation: A Case of Judicial Reluctance

Any tax may be declared unconstitutional if it does not represent a substantive collective consent, or if it was not enacted to provide common defense and enhance the general welfare.³⁸⁸ Furthermore, a tax should not violate any other constitutional rights and interests (*e.g.*, property rights, equality, or any other rights recognized by the Constitution).³⁸⁹ As previously mentioned, tax laws may be regarded as posing a constant threat to human rights: tax laws may violate a person's property;³⁹⁰ discriminate between people;³⁹¹ violate the Due Process Clauses set forth in the Fourth and Fifth Amendment, the Establishment Clause of the First Amendment, or the equal protection component of the Fifth

378. See *California v. Texas*, 141 S. Ct. 2104, 2120 (2021) (rejecting a challenge to the ACA's individual mandate where plaintiffs lacked standing to challenge it).

379. See *Avi-Yonah*, *supra* note 59, at 68.

380. See *id.*

381. See *id.*

382. *Id.* at 68–69.

383. *Id.* at 82–83.

384. *Id.* at 84.

385. *Id.* at 85–86.

386. *Id.*

387. For the longer list, see *id.* at 82–87.

388. See *supra* Subsections III.C.1, 2.a.

389. See *supra* Subsections III.C.2.d, 2.g.

390. See *supra* Subsection III.C.2.g.

391. See *supra* Subsection III.C.2.d.

Amendment;³⁹² injure an individual's standard of living in a way that violates her human dignity;³⁹³ or affect economic activity by infringing on freedom of contract and occupation.³⁹⁴ Moreover, tax laws grant the tax administration powers that may violate human privacy and intimacy.³⁹⁵ And yet, as indicated already, after 1920, the courts are still very reluctant to review these provisions from a constitutional perspective.³⁹⁶ Here are a few examples:

1. *Labeling and Twisting the Meaning of Statutory Terms*

In 1920, the Supreme Court demonstrated, in one of the most famous, fundamental, and significant cases in the history of U.S. tax law, a high degree of judicial review regarding tax legislation.³⁹⁷ Ms. Macomber had received a significant amount of stock dividends.³⁹⁸ Since Congress specifically declared in the Revenue Act of 1916 that a "stock dividend shall be considered income, to the amount of its cash value," the IRS sought to tax her.³⁹⁹ The Supreme Court disapproved.⁴⁰⁰ The majority concluded that a stock dividend is not within the ordinary meaning of the term "income," which contains two major attributes.⁴⁰¹ One is a gain or profit.⁴⁰² The other, according to the majority's view:

"[T]he *gain—derived—from—capital*," etc. Here we have the essential matter: *not* a gain *accruing to* capital, *not* a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being "*derived*," that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description.⁴⁰³

In other words, income means realized gain or profit.⁴⁰⁴ Since stock dividends are not separated from the issuing corporation (*i.e.*, do not distribute money to its shareholders but provide them with additional "papers"), and since "enrichment through increase in value of capital investment is not income in any proper meaning of the term," the majority concluded:

Thus, from every point of view we are brought irresistibly to the conclusion that neither under the Sixteenth Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend made lawfully

392. *See supra* Part II.

393. *See supra* Subsection III.C.2.c.

394. *See supra* Subsection III.C.2.g.

395. *See supra* text accompanying notes 379–80.

396. *See* Edrey, *supra* note 8, at 1206–07.

397. *See* Eisner v. Macomber, 252 U.S. 189, 199–200 (1920).

398. *Id.* at 200–01.

399. *Id.* at 205 (quoting Revenue Act of 1916 § 2(a), 39 Stat. 756, 757 (1916)).

400. *Id.* at 219.

401. *Id.*

402. *Id.* at 207.

403. *Id.*

404. *See id.*

and in good faith, or the accumulated profits behind it, as income of the stockholder. The Revenue Act of 1916, in so far as it imposes a tax upon the stockholder because of such dividend, contravenes the provisions of article 1, § 2, cl. 3, and article 1, § 9, cl. 4, of the Constitution, and to this extent is invalid, notwithstanding the Sixteenth Amendment.⁴⁰⁵

This decision raises several issues, including the full meaning of realization and its impact on the development of income tax in the U.S.⁴⁰⁶ This issue is not discussed here. The essential point here is that the Supreme Court had signaled to Congress that it is not free to change the meaning of words or terms by twisting their accepted meaning—that Congress does not have the power to redefine the term income as it appears in the Constitution.⁴⁰⁷

Some ninety years later, the United States Court of Appeals for the District of Columbia Circuit had a different view regarding labeling or redefining statutory terms.⁴⁰⁸ In the controversial *Murphy* case, the court originally held that federal income taxation of emotional distress awards is unconstitutional.⁴⁰⁹ That decision was widely criticized and revised by the same court a few months later.⁴¹⁰ The later decision of the court was that the taxpayer's recovery could be taxed under Article I, Section 8 of the Constitution even if the recovery was not classified as "income" under the Sixteenth Amendment.⁴¹¹ The court ruled that gross income under Section 61 of the Internal Revenue Code includes compensatory damages for nonphysical injuries, even if the award is not an "accession to wealth."⁴¹² Furthermore, the court decided that the income tax imposed on such an award is an indirect tax, regardless of whether the recovery is restoration of "human capital."⁴¹³ The court stated:

Although the "Congress cannot make a thing income which is not so in fact," . . . it can *label* a thing income and tax it, so long as it acts within its constitutional authority, which includes not only the Sixteenth Amendment but also Article I, Sections 8 and 9. . . . The personal injury award was "within the reach of the congressional power to tax under Article I, Section 8 of the Constitution" even if the award was "not income within the meaning of the Sixteenth Amendment."⁴¹⁴

On April 21, 2008, the Supreme Court declined to review *Murphy*.⁴¹⁵

405. *Id.* at 219.

406. *See id.*; Charlotte Crane, Pollock, Macomber, and the Role of the Federal Courts in the Development of the Income Tax in the United States, L. & CONTEMP. PROBS. 1, 20–21 (2010).

407. *See* U.S. CONST. amend. XVI. ("The Congress shall have the 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.")

408. *Murphy v. Internal Revenue Serv.*, 460 F.3d 79, 92 (D.C. Cir. 2006).

409. *Id.*

410. *Murphy*, 460 F.3d 79, vacated, No. 05-5139, 2006 WL 4005276 (D.C. Cir. Dec. 22, 2006).

411. *Murphy v. Internal Revenue Serv.*, 493 F.3d 170, 186 (D.C. Cir. 2007).

412. *Id.* at 180.

413. *Id.* at 178.

414. *Id.* at 173, 179.

415. *Id.*, *cert. denied*, 553 U.S. 1004 (2008).

2. *Taxes and the Establishment Clause*

Tax laws might violate the Establishment Clause of the First Amendment, which provides that “Congress shall make no law respecting an establishment of religion”⁴¹⁶ Under the most commonly applied test, a tax law might violate the Establishment Clause if it has no secular purpose, if its primary effect advances or inhibits religion, or if it fosters an excessive entanglement with religion.⁴¹⁷

In 1989, the Supreme Court, in *Texas Monthly, Inc. v. Bullock*, struck down a tax exemption granted solely to religious groups or persons.⁴¹⁸ A state law exempted from the state sales tax “[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings *sacred to a religious faith*.”⁴¹⁹ The Court held that the statute violated the Establishment Clause and emphasized that “[e]very tax exemption constitutes a subsidy that affects non-qualifying taxpayers.”⁴²⁰ Furthermore, the Court elaborated that “when government directs a subsidy exclusively to religious organizations that is not required by the free exercise clause . . . ‘it provide[s] unjustifiable awards of assistance to religious organizations’ and cannot but ‘conve[y] a message of endorsement’ to slighted members of the community.”⁴²¹

Some twenty years earlier, in *Flast v. Cohen* (1968), the Supreme Court provided some encouraging signals, through analyzing the taxpayer’s attack on a discriminatory legislation via the Establishment Clause.⁴²² The Court announced that there is no absolute bar in Article III of the Constitution to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs since the taxpayers may or may not have the requisite personal stake in the outcome.⁴²³ Yet, to prevail in the action of challenging the constitutionality of a federal spending program, the petitioner has to establish his “standing” (*i.e.*, to demonstrate the necessary stake as a taxpayer).⁴²⁴ There must be a logical link between the taxpayer’s status and the type of challenged legislation.⁴²⁵ In addition, the petitioner “must establish a nexus between that status and the precise nature of the [supposed] constitutional infringement” and that the legislation “exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the

416. U.S. CONST. amend. I.

417. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

418. 489 U.S. 1, 25 (1989).

419. *Id.* at 5 (emphasis added).

420. *Id.* at 14.

421. *Id.* at 15 (citation omitted).

422. 392 U.S. 83, 105–06 (1968). The case did not challenge tax legislation. Rather, the petitioners argued that the Secretary of Health, Education, and Welfare’s spending of funds on religious schools violated the First Amendment’s ban on the establishment of religion.

423. *Id.* at 101.

424. *Id.* at 102.

425. *Id.*

enactment is generally beyond the powers delegated to Congress by Art. I, s 8.⁴²⁶ In the *Flast v. Cohen* case, the Court arrived at the conclusion that the taxpayers had the required standing, consistent with Article III, to invoke federal judicial power since they argued that tax money had been spent in violation of a specific constitutional protection against the abuse of legislative power (*i.e.*, the Establishment Clause of the First Amendment).⁴²⁷

Unfortunately, even this limited precedent, which was narrowed to the old Establishment Clause canon, has been eroded significantly.⁴²⁸

A private dwelling is private consumption.⁴²⁹ If a taxpayer receives a free rent dwelling as compensation in return for services, the market value of the benefit is added to the taxpayer's taxable income and is subject to income tax.⁴³⁰ A special provision—Code Section 119—excludes from gross income “the value of any . . . lodging furnished to [the taxpayer and his family] by or on behalf of his employer for the convenience of the employer,” subject to some requirements.⁴³¹ Clearly, if the free housing is not required, and is part of the compensation for the services the employee provides, its value is taxable.⁴³² Any monetary allowance paid in lieu of the housing is taxed as well.⁴³³

The IRS is very strict regarding the application of this exclusion and, in most of the cases, the courts support the IRS's interpretation.⁴³⁴ This is a general rule, which applies to most of the “ordinary” employees but not to some “special” ones.⁴³⁵ Code Section 107 provides a much better deal for a minister of the gospel: Section 107(1) excludes from income tax “the rental value of a home furnished to him as *part of his compensation*.”⁴³⁶ This means that the basic requirement that applies to all other ordinary taxpayers—*i.e.*, the convenience of the employer—is omitted.⁴³⁷ Furthermore, some sixty years ago, the Congress added Section 107(2), which excludes also

the rental *allowance* paid to [clergy] as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.⁴³⁸

Undoubtedly, both provisions violate some basic constitutional values and principles. Yet it took almost sixty years until the Federal District Court in

426. *Id.* at 102–03.

427. *Id.* at 103, 106.

428. *See Gaylor v. Mnuchin*, 919 F.3d 420, 436–37 (7th Cir. 2019).

429. *See infra* sources cited notes 442–47.

430. I.R.C. § 61(a)(1).

431. I.R.C. § 119(a).

432. *See id.* § 119.

433. *See id.*

434. *See, e.g., Comm'r v. Anderson*, 371 F.2d 59, 67 (6th Cir. 1966).

435. *See* I.R.C. § 119(b).

436. I.R.C. § 107(1) (emphasis added).

437. *Compare id.*, with *id.* § 119(a).

438. I.R.C. § 107(2) (emphasis added).

Wisconsin struck down—though *only* on the latter provision—the exclusion of the allowance.⁴³⁹ The court based its decision only on the Establishment Clause.⁴⁴⁰

Initially, both the Supreme Court (in *Arizona Christian School Tuition Organization v. Winn*⁴⁴¹) and the Court of Appeals for the Seventh Circuit (in *Freedom From Religion Foundation v. Lew (FFRF)*⁴⁴²) refrained from dealing with the core of the constitutional challenges and dismissed the cases on the “lack of standing” argument.

In the *Winn* case, Justice Kagan expressed the dissent/minority opinion: “[c]ash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations.”⁴⁴³ In her opinion, “taxpayers should be able to challenge the subsidy.”⁴⁴⁴

Alas, the minority’s opinion did not leave any impression on the Court of Appeals for the Seventh Circuit, when the court of appeals reversed the district court decision in *FFRF*:

To summarize, plaintiffs do not have standing to challenge the constitutionality of the parsonage exemption. A person suffers no judicially cognizable injury merely because others receive a tax benefit that is conditioned on allegedly unconstitutional criteria, even if that person is otherwise “similarly situated” to those who do receive the benefit. Only a person that has been denied such a benefit can be deemed to have suffered a cognizable injury. The plaintiffs here have never been denied the parsonage exemption because they have never requested it; therefore, they have suffered no injury.⁴⁴⁵

The issue was raised again, however, in *Gaylor v. Mnuchin*⁴⁴⁶, in which the Seventh Circuit reached the merits, concluding that:

FFRF claims § 107(2) renders unto God that which is Caesar’s. But this tax provision falls into the play between the joints of the Free Exercise Clause and the Establishment Clause: neither commanded by the former, nor proscribed by the latter. We conclude § 107(2) is constitutional.⁴⁴⁷

It is noteworthy that military personnel also enjoy very generous tax-exempt allowances and combat zone pay.⁴⁴⁸ Some of these exemptions pose significant

439. *Freedom from Religion Found., Inc. v. Lew (FFRF)*, 983 F. Supp. 2d 1051, 1073 (W.D. Wis. 2013), *vacated and remanded*, 773 F.3d 815 (7th Cir. 2014).

440. *Id.* at 1053.

441. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011).

442. *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 818 (7th Cir. 2014) [hereinafter *FFRF*, 773 F.3d at 825.].

443. *Winn*, 563 U.S. at 148 (Kagan, J., dissenting).

444. *Id.*

445. *FFRF*, 773 F.3d at 825.

446. The petitioners in that case tried to cope with the standing issue by providing its managers a free dwelling. The president of the organization was audited and her claim was that she should be exempted, or § 107(b) should be invalidated. The district court agreed, but not the Court of Appeals for the Seventh Circuit.

447. *Gaylor v. Mnuchin*, 919 F.3d 420, 436–37 (7th Cir. 2019).

448. *See, e.g.*, I.R.C. § 134.

problems of equality.⁴⁴⁹ Yet, if the *FFRF* case is indeed based mainly on the Establishment Clause, it seems that the chances for judicial review of these tax exemptions for military personnel are very much slim.⁴⁵⁰

To sum it up, under the current law, most “ordinary/common” employees who enjoy free housing as compensation from their employers have to pay income tax on such a benefit, but not clergymen nor some military personnel.⁴⁵¹

It seems to us that such special privileges, granted by statutes to limited yet special groups of employees, ignore basic constitutional insights. Suffice to say that any government subsidy to one selected group violates constitutional principles such as equality, freedom of contract and occupation (for other taxpayers who have to pay higher tax amounts with the same income), and even the property right.⁴⁵²

3. *Discriminatory Tax and the Freedom of the Press*

The state of Arkansas imposed a tax on cable television and satellite broadcast services but not on print media.⁴⁵³ Cable companies claimed that the tax violated both their freedom of expression right under the First Amendment and their Fourteenth Amendment Equal Protection right. In *Leathers v. Medlock* (1991), the Supreme Court’s majority (7:2) concluded that, without the intent or effect of suppressing expression, the First Amendment allows differential taxation of different media and differential taxation of some members of the same medium.⁴⁵⁴ Furthermore, the Court held that the law under review was a generally applicable sales tax, and that its burden on cable television, while exempting the print media, was content-neutral and not intended to interfere with expression.⁴⁵⁵ Furthermore, the majority ruled that the First Amendment allows a differential tax burden on some members of pay television services (that is, a tax on cable but not satellite services) if the tax is not intended to suppress expression.⁴⁵⁶ The majority decided that an Arkansas sales tax on cable television, with an exemption for other media such as newspapers, did not violate the First Amendment, since the tax was not content-based, while emphasizing that: “[i]nherent in the power to tax is the power to discriminate in taxation.”⁴⁵⁷ The dissenting Justices’ opinion was that the First Amendment’s nondiscrimination principle prohibits a heavier tax burden on one medium and not on the other.⁴⁵⁸

449. See *supra* text accompanying notes 264–66.

450. See *FFRF*, 773 F.3d at 825.

451. Compare I.R.C. § 119, with I.R.C. 107.

452. See *supra* text accompanying notes 264–66.

453. *Leathers v. Medlock*, 499 U.S. 439, 441–42 (1991).

454. *Id.* at 439–41, 442–43.

455. *Id.* at 453.

456. *Id.*

457. *Id.* at 451.

458. *Id.* at 459 (Marshall, J., dissenting).

4. *Possible Explanation for the Court's Reutterance from Reviewing Tax Legislation*

The *Murphy* decision and Chief Justice Roberts's opinion in *NFIB* embody a constant tendency. As stated above, for about the last two decades the U.S. courts have demonstrated a significant reluctance when facing constitutional challenges regarding tax legislation.⁴⁵⁹ It seems that the general trend is quite simple—perhaps simplistic. The courts confine their review to the issue of the Congress's authority to levy taxes, and refrain from a substantive judicial review of fiscal legislation and from examining the quality of the tax laws, their purposes, whether the goals are achieved, and the possible violations of constitutional rights and interests.⁴⁶⁰

One explanation for this reluctance is based on the conclusion that, once the Congress had been granted the power to lay and collect taxes and the Sixteenth Amendment removed the apportionment requirement from income tax, the Congressional limits have been very much narrowed and the tax legislature's discretion has been very much broadened.⁴⁶¹

Another explanation for the courts' tendency not to intervene probably relies on the Fifth and the Fourteenth Amendments, which grant the government the power of eminent domain (*i.e.*, the power to take private property for "public use").⁴⁶² Under this approach, whether a tax is indeed a "taking" is no longer relevant since it is for "public use."⁴⁶³ The underlying rationale for such an explanation is that taxes, by definition, are confiscatory measurements.⁴⁶⁴ As indicated throughout this Article, such a rationale is unacceptable in a modern democratic society; taxes are not "taking" or confiscatory measures.⁴⁶⁵ They are meant to be the right price for the public good and services we consent to pay.⁴⁶⁶

5. *NFIB v. Sebelius and the Constitutional Meaning of "Tax"*

The *NFIB* case,⁴⁶⁷ decided in 2012 by a slim majority, might serve as an example for the confusion in this area. Both Chief Justice Roberts and Justice Ginsburg concluded that the mandatory payment imposed in Code Section 5000A (b) is not a penalty, even though the drafter used the term "penalty" some eighteen times in the "Obamacare" legislation.⁴⁶⁸

459. See *Murphy v. Internal Revenue Serv.*, 493 F.3d 170, 171 (D.C. Cir. 2007); *NFIB v. Sebelius*, 567 U.S. 519, 521 (2012).

460. See, e.g., *NFIB*, 567 U.S. at 575.

461. See, e.g., *id.*

462. See U.S. CONST. amend. V; *id.* amend. XIV.

463. See U.S. CONST. amend. V.

464. See Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application*, 97 NW. L. REV. 189, 193 (2002).

465. See discussion *supra* Subsection III.C.2.g.

466. See discussion *supra* Subsection III.C.2.c.

467. *NFIB v. Sebelius*, 567 U.S. 519, 521–22 (2012).

468. *Id.* at 522.

In *NFIB*, the Supreme Court had to cope with another type of “labeling”⁴⁶⁹—the question of whether the Congress has the power to require all citizens to obtain health insurance or to “penalize” individuals who refrain from buying medical insurance offered by the ACA (“Obamacare”).⁴⁷⁰ One of the ACA’s major purposes was to increase the number of Americans covered by health insurance and decrease the cost of health care.⁴⁷¹ The case focused on 26 U.S.C. § 5000A, of which the title of Subsection (a) states: “(a) Requirement to maintain minimum essential coverage.”⁴⁷² The title of Subsection (b) is: “Shared responsibility payment.”⁴⁷³ Yet, paragraph (1) states “If a taxpayer . . . fails to meet the requirement of subsection (a) . . . there is hereby imposed on the taxpayer a **penalty** with respect to such failures. . . .”⁴⁷⁴ The Congress labeled the mandatory payment as a “penalty” eighteen times throughout the Act.⁴⁷⁵ The amount of the “penalty” was to be determined by reference to the individual’s income and the size of their family and would be paid to the IRS with the individual’s income tax.⁴⁷⁶ In addition, the Act provided that the “penalty” should be assessed and collected in the same manner as tax penalties, such as the penalty for claiming too large an income tax refund.⁴⁷⁷ One of the questions presented to the Supreme Court was the constitutionality of the payment levied by the Act.⁴⁷⁸

The Court was divided. The minority (composed of four Justices: Scalia, Kennedy, Thomas, and Alito) concluded that the payment was unconstitutional since it is indeed a penalty, not a tax, and that such economic regulation is beyond the powers granted to Congress under the Commerce Clause.⁴⁷⁹ The majority (Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan) upheld the law but were divided as well.⁴⁸⁰

According to Chief Justice Roberts, the payment was not a penalty but rather an indirect tax not under the apportionment requirement:

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress’s power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress’s power to tax.⁴⁸¹

469. See *supra* notes 397–421 and accompanying text.

470. *NFIB*, 567 U.S. at 530–32.

471. *Id.* at 538.

472. I.R.C. § 5000A(a).

473. *Id.* § 5000A(b).

474. *Id.* § 5000A(b)(1).

475. *Id.* § 5000A.

476. *Id.* § 5000A(c).

477. *Id.* §§ 5000A(g), 6676(a).

478. *NFIB v. Sebelius*, 567 U.S. 519, 530–31 (2012).

479. *Id.* at 646–47 (Scalia, J., dissenting).

480. *Id.* at 528–29 (majority opinion).

481. *Id.* at 588.

While indicating that there are significant limitations on Congress's power to tax and the use of taxation motivated by a regulatory purpose, including tax incentives, Chief Justice Roberts concludes:

Tax incentives already promote, for example, purchasing homes and professional educations. . . . Sustaining the mandate as a tax depends only on whether Congress *has* properly exercised its taxing power to encourage purchasing health insurance, not whether it *can*. Upholding the individual mandate under the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one.⁴⁸²

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, concluded that the payment is within Congress's power under the Commerce Clause of Article 1, Section 8, Clause 3 of the Constitution.⁴⁸³

Justice Ginsburg elaborated on the issue of adverse selection⁴⁸⁴ and the free rider phenomenon, and she concluded:

[T]he Commerce Clause authorizes Congress to enact the minimum coverage provision. . . . "It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices."⁴⁸⁵

As discussed above, it seems to us that Justice Ginsburg's approach is addressing and implementing (though not in so many words) the accurate definition of the term "tax"—*i.e.*, a payment—which is levied on the general public, intended only to finance the costs of the elected government and its limited goals.⁴⁸⁶ Indeed, the way both Chief Justice Roberts and Justice Ginsburg describe the challenged payments is that they are a regulatory measure.⁴⁸⁷ The (significant in our mind) difference is that Chief Justice Roberts's approach relates to the power of the Congress to lay such payment in the Taxing Power of Article 1, Section 8, Clause 1, while Justice Ginsburg's approach relies on the Commerce Clause in Article 1, Section 8, Clause 3.⁴⁸⁸ In other words, according to Justice Ginsburg's approach, the payment in question is in fact not a tax nor a penalty.⁴⁸⁹

A more accurate analysis, similar to Justice Ginsburg's approach in *NFIB*, would lead to the conclusion that the payments are neither tax nor penalties, but instead they are "Pigouvian Mandatory Payments" ("PMP").⁴⁹⁰ As mentioned above, PMPs are a regulatory measure designated to correct the price of goods or services that the free market fails to achieve in an efficient way.⁴⁹¹ In fact, the

482. *Id.* at 572.

483. *Id.* at 589 (Ginsburg, J., concurring in part and dissenting in part).

484. See *supra* note 375.

485. *NFIB*, 567 U.S. at 589, 603 (quoting *Wickard v. Filburn*, 317 U.S. 111, 128 (1942)).

486. See discussion *supra* Section III.A.

487. *NFIB*, 567 U.S. at 567; *id.* at 623 (Ginsburg, J., concurring in part and dissenting in part).

488. *Id.* at 561 (majority opinion); *id.* at 589–90 (Ginsburg, J., concurring in part and dissenting in part).

489. *Id.* at 596; see discussion *supra* Subsection III.C.1, Section IV.A.

490. *NFIB*, 567 U.S. at 589 (Ginsburg, J., concurring in part and dissenting in part); see Section IV.A.

491. See discussion *supra* Part II.

PMP concepts underlie Chief Justice Roberts's approach in *NFIB*: “[f]irst, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance.”⁴⁹²

Indeed, Code Section 5000A does not command taxpayers to buy medical insurance or to pay the payment either.⁴⁹³ It is a tool aimed to improve the free market economy.⁴⁹⁴ It is supposed to take care of a market failure and to promote efficiency.⁴⁹⁵ It requires the market's participants to bear the economic price and the social cost of their actions and decisions.⁴⁹⁶ Justice Ginsburg reminds us that in the medical insurance industry there is a built-in market failure due to the adverse selection phenomenon, which prevents the free market from reaching the efficient market price.⁴⁹⁷ Hence, the government is called upon to fulfill its obligation to what Okun refers to as the “assurance of dignity for every member of the society [which] requires a right for a decent existence—to some minimum standard of nutrition, health care and other essential of life” (*i.e.*, to make sure that the industry operates efficiently).⁴⁹⁸

In other words, those who refrain from joining the national medical insurance plan were not penalized by the law but were required to pay the public the right economic price that is supposed to compensate the public for the damage they create by avoiding the plan.

The amount of the mandatory payment must be estimated and calculated. Accordingly, there is room for judicial review. The government carries the burden to convince the Court that it made all the efforts to calculate the payment so it is not over- or under-charging: that it is not “taking revenge” against or persuading those who do not cooperate with the government on the one hand, and that it does not accept that those who joined the program pay a higher price due to those who did not.

V. CONCLUSION

In this Article, we have attempted to do three things. First, we defined what is a “tax” for purposes of the Taxing Clause is: it is a payment to the government to raise revenue.⁴⁹⁹ A tax that is not primarily for revenue raising is a regulatory tax and is therefore out of the scope of the Taxing Clause.

Second, we argue that a tax in a democratic society is imposed with the consent of the taxpayers. Consent is constructive. It is assumed only as long as the tax meets the basic requirements—the “four canons of good tax” as formulated in the eighteenth century and adapted to the present day: the tax is certain

492. *NFIB*, 567 U.S. at 566.

493. See I.R.C. § 5000A.

494. See *supra* text accompanying note 68.

495. See discussion *supra* Part II.

496. See discussion *supra* Section III.B.

497. See *supra* note 375.

498. See OKUN, *supra* note 241, at 17.

499. See discussion *supra* Part II.

and not arbitrary; it considers the convenience of the contributor; it is efficient; it is fair and equitable. Anyone who claims against these assumptions will have the (heavy) burden of proof to refute them.

Third, we explored the possibilities of judicial review of regulatory taxes. Such review is not limited to the constitutional “taxing power,” but must be broader, and respect constitutional principles like any other legislative act.

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.⁵⁰⁰ But the Court is capable of examining several quantitative questions in reviewing tax expenditures and Pigouvian Mandatory Payments. First, did the government perform proper administrative work before offering the PMP?⁵⁰¹ What is the goal that the provision sought to achieve?⁵⁰² Will it sustain a judicial review, or is it violating constitutional principles?⁵⁰³ The next step is perhaps not a purely legal question; however, even conservative Justices have used expert opinions of amicus curiae who are able to show through quantitative and empirical data whether an administration has properly assessed what benefit American society will receive. Is the goal clear and defined?⁵⁰⁴ What is its estimated cost or whether it may achieve the goal—*ex post* or *ex ante*?⁵⁰⁵ Whether the means, the tax expenditure or PMP, is approximately equal to accomplish the stated goal?⁵⁰⁶ Whether the revenue loss or gains is not significantly higher than needed, as the Treasury can, and even must, quantify the tax losses or revenue that the specific tax expenditure or PMP causes to the government?⁵⁰⁷ Such a review will improve tax policy and of course the performance of the administration and its decision-making process.

We hope that this Article contributes to reopening the academic debate on the proper application of the Constitution to tax law. This debate has been mostly closed since the Court last invalidated a federal income tax law on constitutional grounds.⁵⁰⁸ On a more practical level, the fact that the Court may not be equipped to conduct constitutional review of tax legislation does not mean that the constitutional inquiry is worthless. Congress is charged with upholding the Constitution, and Congress can ask, in considering tax legislation, whether it is a pure or a regulatory tax, and if it is the latter, whether it is constitutional.⁵⁰⁹ Congress

500. See discussion *supra* Part IV.

501. See discussion *supra* Subsection III.C.2.b.

502. See discussion *supra* Subsection III.C.2.c.

503. See discussion *supra* Subsection III.C.2.a.

504. See discussion *supra* Subsection III.C.2.b.

505. See discussion *supra* Subsections III.C.2.e, IV.B.4.

506. See discussion *supra* Subsection III.C.2.a; *supra* note 84 and accompanying text.

507. See *supra* note 84 and accompanying text.

508. Avi-Yonah, *supra* note 59, at 67.

509. See discussion *supra* Parts II–IV.

also has the requisite tax expertise.⁵¹⁰ In fact, this could be a new process for the staff of the Joint Committee on Taxation: for every new proposed tax legislation, the Joint Committee should ask not merely how much it costs or what its distributive effects are, but also whether it is constitutional. Admittedly, this would require hiring more lawyers and social philosophers and scientists, and fewer economists.⁵¹¹ 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 Congress to regulate more via direct legislation or subsidies than by the ever-expanding use of the tax code for nonrevenue purposes.

510. Avi-Yonah, *supra* note 59, at 88.

511. *Id.*