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Judicial Review of Congressional Power to Tax under U.S. Constitution: Tensions between Framers' Intent and Imperatives of Reality

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Abstract

This paper discusses authority granted to Congress over imposing federal taxes in general, and income tax in specific. The author used the critical analytical method to analyze the rulings of the U.S. Supreme Court, the U.S. Income Tax Law, and the U.S. Constitution, to reach the policy followed by the court in ruling on the constitutionality of legal provisions related to the constitutionality of such tax legislations. The importance of this article comes in that it is one of the few studies that analyzed and criticized the policy of the U.S. Supreme Court in its ruling on the constitutionality of tax federal legislations. The author explains the role of the U.S. Supreme Court in identifying what is considered as income in some gray areas that the U.S. tax code (26 U.S. Code of 1986) did not provide an answer for, or petitioners claimed that such income does not fall in gross income inclusions. In addition, the author explains the philosophy behind granting Congress such power, and the effects of such authority. Although the author believes that many amendments to the tax code has political backgrounds rather than economic, granting this power to Congress would be less arbitrary compared to the political scenarios that could appear if it granted to the Executive Branch. At last, the author discusses the constitutional limits on congressional power of taxing and how these limits would affect tax legislations that Congress was trying to pass, considering people's right of equity in tax treatment under Uniformity Clause.

Keywords: Separation of Powers; Taxing Power; Taxation Clauses; Taxable Income; Checks and Balances

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الرقابة القضائية على سلطة الكونجرس في فرض الضريبة وفق الدستور الأمريكي: التوترات ما بين نوايا واضعي الدستور وضرورات الواقع

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ملخص

يناقش هذا البحث السلطة الممنوحة للكونغرس الأمريكي في فرض الضرائب الفيدرالية بشكل عام، وضريبة الدخل بشكل خاص. وظّف المؤلف المنهج التحليلي الناقد لتحليل أحكام المحكمة العليا الأمريكية، وقانون ضريبة الدخل الأمريكي، والدستور الأمريكي؛ ليصل إلى السياسة التي اتبعتها المحكمة في الحكم على دستورية النصوص القانونية المتعلقة بدستورية التشريعات الضريبية. تتمثل أهمية البحث في كونه من الأبحاث القليلة التي حللت ونقدت سياسة المحكمة العليا الأمريكية في حكمها على دستورية التشريعات الضريبية الفيدرالية. يشرح المؤلف دور المحكمة العليا الأمريكية في تحديد ما يعدّ دخلًا خاضعًا للضريبة في بعض المناطق الرمادية التي لم يقدم قانون الضرائب الأمريكي إجابة لها أو التي ادعى المكلفون أن هذا الدخل لا يقع في إجمالي الدخل الخاضع للضريبة. بالإضافة إلى ذلك، يشرح المؤلف الفلسفة الكامنة وراء منح الكونجرس مثل هذه السلطة، والآثار المترتبة على ذلك. ومع أن المؤلف يرى أن العديد من التعديلات التي أجريت على قانون الضرائب ذات خلفيات سياسية وليست اقتصادية، فإن منح هذه السلطة للكونغرس سيكون أقل تعسفًا، مقارنة بالسيناريوهات السياسية التي يمكن أن تظهر إذا مُنحت للسلطة التنفيذية. يناقش المؤلف أيضًا الحدود الدستورية لسلطة الكونغرس في فرض الضرائب، والآثار المتوقعة لهذه الحدود على التشريعات الضريبية التي يحاول الكونغرس تمريرها، مع الأخذ في الاعتبار حق الناس في المساواة في المعاملة الضريبية.

الكلمات المفتاحية: الفصل بين السلطات، سلطة فرض الضريبة، قواعد الضريبة الدستورية، الدخل الخاضع للضريبة، التوازن والرقابة بين السلطات

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Introduction

"The power to tax involves the power to destroy."

– John Marshall (1819)[1]

The subject of this article mainly focuses on the power granted to the US Congress to impose federal taxes. However, the problem that the author is trying to answer is the lack of a clear standard for determining the controls of this power, in addition to the lack of stability in the US Supreme Court's interpretation of this Congressional power. This led to a conflict in the rulings of the US tax courts, even though it is common law system. Believing that they are applying the taxation clauses that were settled by the US Supreme Court, however, they were actually adopting new jurisprudence and viewpoints far from the true vision of the Supreme Court, which led many of such cases to be reviewed by the Supreme Court. In fact, this was expected since the taxation clauses are deficient and do not include all cases of tax imposition that Congress has under the powers granted to it by the Constitution.

The importance of this article comes from the fact that the author analyzed the rulings of the Supreme Court in interpreting taxation clauses, trying to deduce the court's policy in this regard, in order to help researchers' legal understanding in those clauses, because trying to understand these constitutional provisions without knowing the Supreme Court's policy in considering tax cases and linking them to those clauses will be an incomplete and unclear interpretation of future cases that may be presented to the Supreme Court.

The government formed under the Articles of Confederation was not strong enough to govern the new country. For example, it lacked an executive authority and a court system that governs the entire country. It could not regulate interstate commerce or tax states or state citizens. In addition, other countries were always reluctant to trade with the Thirteen States because of the lack of a unified tax system for all of them and the ambiguity of the trade and tax powers of the Confederation.

However, when the federal constitution was ratified, framers wanted to avoid all of these problems, especially the trade and tax ones. They wanted to create a clear tax system that would encourage other countries to trade with the United States. Therefore, they granted Congress the power to impose taxes.[2]

Article I, Section 8, Clause 1 of the Constitution, which provides the basis for constitutional authorization of the Congress to tax, states that: "The Congress shall have Power To lay and Collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." In this provision, framers determined the power of Congress to impose and collect taxes, the ways in which taxes would be spent, and the philosophy of tax collection. The first part of this clause is referred as "Taxing and Spending Clause," the second part, which describes expenditure fields, is known as "General Welfare Clause," and finally, the last part which requires uniformity on imposing taxes, is known as "Uniformity Clause."

1 McCulloch v. Maryland, 17 U.S. 316, 431 (1819).

2 U.S. Const. art. I, § 8, cl. 1., 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 defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

In addition to this clause, there is another constitutional provision which controls congressional taxing power, which is the "Export Clause," found in Article I, Section 9, Clause 5.[3] Noting that this clause is distinct from the "Import-Export Clause" described in Article I, Section 10, Clause 2,[4] which restricts states' taxing power in favor of the federal government.

1. Income Tax: The Role of the Supreme Court

Executive branch draws the foreign policy of the United States during both the state of war and peace, it is a settled ruling in many Supreme Court decisions.[5] Moreover, in some cases, the Supreme Court provided immunization from judicial review for some executive decisions[6] when the political question doctrine applies. It is true that Congress has checks and balances instruments in some matters of foreign affairs that limit President's power in such matters, such as "advice and consent" requirement,[7] but President still holds the most significant power in foreign affairs.

However, the question here, is to what extent Congress has the power over imposing taxes? And whether the Executive Branch has any power concerning that?

There are four major limits on congressional powers over imposing taxes, these limits will be discussed in details in Part III of this paper. Also, Article I restricts Congress's authority in spending, as gaining revenue is the major goal of imposing taxes, such revenue must be spent to achieve definite goals, which is paying the government's debts, defending the U.S., and achieve general welfare for the people.

1.1. Reasons behind Imposing Taxes

Government needs revenue to spend for its responsibilities, and the Constitution did not provide enough clear words about the "welfare" that government should seek, this makes sense because it is not in the functions of the constitution to do so.

Issues of applying Taxing Clause could arise when Congress passes a law with an unconstitutional answer to the question of "why this subject is being taxed?" Answer to this question is unconstitutional when Congress did not intend to "pay the Debts and provide for the common Defense and general

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3 U.S. Const. art. I, § 9, cl. 5. provides that: "No Tax or Duty shall be laid on Articles exported from any State."

4 U.S. Const. art. I, § 10, cl. 2. provides that: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

5 Haig v. Agee 453 U.S. 280 (1981); In *Haig v. Agee*, the Supreme Court held that: "… foreign policy was the province and responsibility of the Executive." Agee 453 U.S. at 293; 1 Otis H. Stephens, Jr. & John M. Scheb II, American Constitutional Law 188 (4th ed. 2008).

6 Regan v. Wald, 468 U.S. 222 (1984); In *Regan v. Wald*, the Supreme Court held that: "Matters relating 'to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" Wald, 468 U.S. at 242; Baker v. Carr, 369 U.S. 186 (1962); In *Baker v. Carr*, the Supreme Court held that: "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Carr, 369 U.S. at 211-12.

7 U.S. Const. art. II, § 2, cl. 2., provides that: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

Welfare of the United States" when imposing such taxes. The Supreme Court dealt with many cases to interpret congressional intent of imposing taxes in definite subjects.

In *United States v. Butler*, the Court found that Congress was trying to control agricultural production by imposing tax on such activities, therefore, the accepted spending categories does not exist. The Court did not ignore Congress's power on imposing tax, but it went through its intention to check the "Spending Clause." The court said that: "The Act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end."[8] When the Court made sure that such tax was aimed for a different-unconstitutional goal, it declared its unconstitutionality, which means that Taxing and Spending Clause checked by courts was not just for making sure that the branch imposing tax is the Legislative Branch, but rather, and properly most importantly, to confirm Congress's intention of such taxing.

Thus, what did the framers meant by "general welfare"? The Court in *Butler* never determined the scope of this phrase, indeed, it refused to do so by stating that: "We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to determine whether an appropriation in aid of agriculture falls within it,"[9] instead, the Court adopted Justice Story's philosophy in his book "*Commentaries on the Constitution of the United States*," in which he adopted Alexander Hamilton's position on such matters in *The Federalist*; that the "power of Congress to authorize expenditure of public money for public purposes is not limited by the direct grants of legislative power found in the Constitution,"[10] which leads that "general welfare" is not limited to government's duties as long as it satisfies welfare of the United States. Also, the Court found that the general welfare is a qualification to impose tax.

Thus, the Court expanded the meaning of "welfare" without clearly identifying it. We would never know why the Court in *Butler* did not mention categories of the welfare to make it clear. Though the Court preserved to its authority of judicial review, it threw the "task" of identifying welfare to Congress in each coming Act, and satisfied in reviewing it to determine whether it was constitutional or not.

Should we go further on that? Could Congress have other motives by imposing taxes? Or this should not be questionable because the Constitution provides unclear phrase, and the Court never clearly interpreted welfare categories, thus, its presumably that Congress imposes taxes just to achieve welfare for the United States?

James Madison answered "no" for the last question, he believes that taxing and spending powers could be a governmental tool to "aid one religion over another or to aid religion in general," if the First Amendment was not existing.[11] We can infer from this, that Madison did not deny the possibility that the government may intend to achieve private goals, and these goals in one way or another may not be aimed at achieving the constitutional meaning of welfare.

8 U.S. v. Butler 297 U.S. 1, 67-69 (1936).

9 *Id.*

10 *Id.* at 66.

11 Flast v. Cohen 392 U.S. 83, 104 (1968).

Despite Court's judicial review power on reviewing each tax Act to confirm welfare requirement, government could still use tax to affect activities that it cannot influence using other constitutional ways.[12] Focusing on Court's decision in *Butler*, we easily can notice that the Court adopted the theory that Constitution granted Congress a broad authority to tax and spend for the general welfare[13] by not identifying welfare categories. However, that does not mean that spending power is unlimited,[14] as mentioned above, the Court did not deny its authority of reviewing Congressional taxing and spending purposes, as Congress's tax power is limited with the welfare scope, even the Court did not intend to provide a lifelong meaning of this phrase.

In 1937, after one year of *Butler*, the Court decided in *Sonzinsky v. U.S.*, that the annual license tax imposed on dealers in firearms is constitutional, because the court will not analyze Congress's motives for imposing such tax.[15] In this decision, the Court confirmed the rationale that it has established in *Butler*, and it did not permit any type of control over Congress's determinations of the general welfare.[16]

Moreover, in *South Dakota v. Dole*, the Court held that Congress acted constitutionally according to Welfare Clause when enacted legislation to withhold 5% of the federal highway funds from the states did not adopt the Act that prohibited people under 21 from drinking alcohol.[17] *Dole* could be a logical result of *Butler*, but more importantly, Dole is a recognizing of the economic and political approaches that Congress may reach with its taxing and spending power, as when Congress failed to achieve its goal directly, it used its taxing power to force the states to follow its policy indirectly.

It is surprising that despite the complexity of the U.S. tax code which is described as a well-advanced code, the constitutional matters of taxes had not been argued enough in the Supreme Court,[18] this may be due to the fact that the legislative policy, itself, now is differed from what it was in 1791 regarding imposing taxes, World War I and the ghost of World War II which became true, made Congress to reconsider that the U.S. is in continuous need of funding.

1.1.1. Economic and Political Approaches

The Sixteenth Amendment,[19] which is known as the "income tax amendment," made it enough clear

12 Erwin Chemerinsky, Constitutional Law 134 (6th ed. 2020).

13 *Id.* at 241.

14 *Id.* at 246; Pennhurst State School and Hospital v. Halderman 451 U.S. 1, 1-2 (1981).

15 Sonzinsky v. U.S., 300 U.S. 506, 513-14 (1937).

16 *Id.* at 512-13; In *Sonzinsky*, the Court stated that: "In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." *Id.*; See, William D. Araiza, Constitutional Law 500-02 (2nd ed. 2021).

17 South Dakota v. Dole, 483 U.S. 203, 206 (1987); In *Dole*, the Court stated that: "Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. […] we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly." *Id.*, which means that the Court clearly recognize congressional unlimited power of indirect regulating when it cannot directly regulate.

18 Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 Ariz. L.J. 1057, 1155 (2001).

19 U.S. Const. amend. XVI, provides that: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

that tax on income is constitutional; in fact, it expanded Congress's taxing power.[20] This Amendment passed by Congress on July 2, 1909, and ratified on February 3, 1913, was important for the federal government to lay income tax, as it overruled the Court's decision in *Pollock v. Farmers' Loan & Trust Co.*, which recognized the right of individual states to levy direct taxes, including income tax, in favor of the federal government, which means that the federal government has to proportion its income tax with the states' government taxes.

Article I of the Constitution stated that: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union,"[21] in which the Court interpreted to mean that federal government has no power to levy direct tax.[22] Surprisingly, the Court ignored the history of Articles of Confederation which did not vest upon the federal government the power to impose taxes, and the need of the federal government to solve this issue at first. Thus, the Sixteenth Amendment was literally the constitutional tool that allows Congress to impose income tax.

After the Sixteenth Amendment, the Court philosophy has been moved over to upheld tax Acts unless there is a clear violation to the Constitution. Despite its holding in *Pollock*, the author strongly believes that the Supreme Court was looking for a constitutional provision like the Sixteenth Amendment to adopt such rationale.

In 1916, Congress enacted the federal estate tax under the Revenue Act, and the Court upheld this Act in *New York Trust Co. v. Eisner*, when the Court recognized estate tax as a "duty or excise,"[23] not as a direct tax under Article I. Eight years later, in 1924, Congress enacted the federal gift tax in a way to prevent individuals from avoiding estate tax.[24]

It is settled in Courts' decisions that direct taxes should be apportioned among the states and the federal government has nothing to do with it, but incredibly, the Court recognized gift tax as "supplementary to the estate tax."[25]

Since 1916, it seems that the government has begun to sense the importance of funding for military preparations for world wars. If business owners make profits from their businesses, the government

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20 Stephens, Jr. & Scheb II, *supra* note 4, at 107.

21 U.S. Const. art. I, § 2, cl. 3.

22 Pollock v. Farmers' Loan & Trust Co, 157 U.S. 429, 634-35 (1895); In *Pollock*, the Court stated: "'Indirect taxes, such as duties of impost and excises, and every other description of the same, must be uniform; and direct taxes must be laid in proportion to the census or enumeration, as remodeled in the fourteenth amendment. Taxes on lands, houses, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the constitution, are within the same category; but it never has been decided that any other legal exactions for the support of the federal government fall within the condition that, unless laid in proportion to numbers, that the assessment is invalid." *Id.* at 635.

23 New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

24 Sanford's Estate v. Commissioner of Internal Revenue, 308 U.S. 39, 43-44 (1939).

25 *Id.;* In *Sanford's Estate*, the Court stated that: "There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death." *Id.* at 44.

that has provided the business environment conducive to such profits must have a share in these profits. Therefore, legislators were certain that income taxes are the best source of public revenue, especially since the federal government has provided a suitable environment for capital owners to make these investments, and has clearly created an ideal market by adopting commercial legislations that support the system of economic liberalization.

We cannot discuss congressional authority on imposing taxes without discussing tax policies, which always have economic and political backgrounds. For example, when President Trump administration was in charge and the Republicans had the majority of the Senate, the Tax Cuts and Jobs Act (TCJA) were passed with the highest deductions for business[26] and a low tax rate for corporations.[27]

Another example, the Court in *National Federation of Independent Business v. Sebelius*[28] held that "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds."[29] As in this decision, Court declared that Taxing and Spending Clause empowers Congress to legislate the individual mandate, but the Act was unconstitutional because it threaten the states to "loss of their existing Medicaid funding if they decline to comply with the [Act]."[30] The Court believes that Congress violated the Spending Clause by this. Although the majority thinks that the reasons of passing the Act itself is constitutional.[31]

The administration of President Obama tried, through this Act that was passed by Congress, to draw up a new social policy in the United States, but it failed in making its implementation comply with the Constitution.

Most recently, President Biden's administration is trying to include minimum tax rates on high wealthy taxpayers in budget proposal,[32] "The tax would require that American households worth more than $100 million pay at least 20 percent on their full income, as well as unrealized gains in the value of liquid assets like stocks."[33] President Biden wants to reduce the national deficit after the increase in prices when the U.S. determined to stop the commerce and business transactions with Russia because of its invasion of Ukraine. Although one of the best methods to reduce the public deficit is to reduce spending by reducing taxes not increasing it.[34]

Taxes have always been a tool for the federal government to draw the United States policy, either when it comes to economy, politics, or even social issues, Congress has an extraordinary power to affect all of such approaches just by using taxes, although it is restricted with "general welfare of the

26 26 U.S.C. § 199A (2018).

27 26 U.S.C. § 11 (2018); Section 11(b) of the Internal Revenue Code, as amended in 2018 by TCJA, imposes income tax on corporations with 21%.

28 Known as Affordable Care Act (ACA) case, or Obama-Care case.

29 National Federation of Independent Business v. Sebelius, 567 U.S. 519, 579 (2012).

30 *Id.* at 523.

31 *Id.* at 548-49.

32 *Biden to Include Minimum Tax on Billionaires in Budget Proposal*, N.Y. Times (Mar. 26, 2022, 7:30 PM), https://www.nytimes.com/2022/03/26/us/politics/biden-billionaires-minimum-tax.html?smid=fb-nytimes&smtyp=cur&fbclid=IwAR0cI1XxR0IUeK3QszAy-Bx9fOfVq2X3l6DyidntZNMfeYtUEK0V7vjs9dc

33 *Id.*

34 Karla W. Simon, *Congress and Taxes: A Separation of Powers Analysis*, 45 U. of Miami L. Rev. 1005, 1012 (1991).

United States" objective in the Spending Clause.

As a result, Congress's main goal of imposing taxes is to gain revenue for the federal government, but also Congress uses this power to regulate the private conduct and influence private behavior.[35] For example, aiming to reduce the number of smokers by imposing a high sales tax on goods that contain nicotine. The Supreme Court has no issue with that unless it found that Congress aimed to issue a penalty on special group of people.[36] In *Bailey v. Drexel Furniture Co.*, known as "*Child Labor Tax Case*," the Court found that "the so-called tax is imposed to stop the employment of children within the age limits prescribed."[37]

1.1.2. Congress v. The Executive Powers: A Constitutional Debate

We now know that Congress imposes taxes under the constitutional provisions of Article I and the Sixteenth Amendment, as such power should achieve welfare and will be controlled under Taxing and Spending Clause. However, does the Executive Branch has any role in imposing taxes? And if it does, will this role be affecting the separation of power?

Congress has many limitations on its taxing power, which the author will discuss in next part, and the Executive Branch headed by the President has the power to implement laws issued by Congress.[38] In addition, the Executive agencies may be authorized by Congress to issue regulations to implement the statutes. It is not negotiable that such regulations should be compatible to the statutes, and thus the executive power in this matter will be limited. However, to what limit can the Executive Branch affect taxing decisions?

The power to veto the bills passed by Congress under Article I[39] is a significant method of checks and balances for the Executive Branch to prevent a legislation, including tax Acts, from passing through the Congress, especially when such Act passed at the first time with a minimum required majority. However, veto is not a powerful authority when Congress passed the bill with high majority (two-thirds or more), because it will properly pass it again with the same majority and then such bill becomes a law despite the President's objection.

The Executive Branch is responsible for running country's projects, and it needs suitable funds to do so. If the Executive Branch had no authority on funding, it cannot do its work. Who would know the funding needed better than the branch that will use it? Accordingly, who would know how should government gain such funding better than government itself? Moreover, if Congress adopts this philosophy, it cannot delegate the power of taxing and spending to the Executive Branch because of

35 Milan N. Ball, Congressional Research Service, The Federal Taxing Power: A Primer 13 (2020).

36 Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

37 *Id.* at 37.

38 U.S. Const. art. I, § 1, cl. 1.; Article I vested the executive power to the President.

39 U.S. Const. art. I, § 1, cl. 2, provides that: "If [the president] approve[d] [t]he [bill], [he] shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."

nondelegation doctrine.[40] Thus, how could the Executive Branch play a role here?

The author's argument is not that the framers were wrong when authorizing Congress, the power to tax, but could not find a rationale of not giving the Executive Branch even a simple role in this whole process. Among the years, and especially after World War II, Congress has agreed to resolutions authorizing the use of military force in accordance with War Power Resolution.[41] By such resolution, the Executive Branch had broad powers regarding military operations. On the other hand, the Executive Branch does not have similar powers regarding internal affairs, such as funding, in which it needs.

1.2. Gross Income Inclusions: How to Decide?

The Internal Revenue Code (I.R.C. of 1986) defines taxable income as the gross income minus the deductions.[42] Section 61 of I.R.C. defines gross income as: "all income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, fringe benefits, and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Annuities; (9) Income from life insurance and endowment contracts; (10) Pensions; (11) Income from discharge of indebtedness; (12) Distributive share of partnership gross income; (13) Income in respect of a decedent; and (14) Income from an interest in an estate or trust."[43]

This open definition of the gross income makes the Supreme Court role in defining gross income essential. The Legislature did not, and could not, give a narrow definition of gross income, and it has to say "not limited to"[44] in the definition, because taxpayers would find many categories that would not exactly fall in the definition of Section 61. In fact, the Court decided in many cases to establish new categories to be included in gross income inclusions, whereby it played the role of the Legislature in adding them. While the Court decision is to interpret the law, not making it, the author highly believes that Congress itself intended to grant the Court such power due to the special circumstances of business transactions and income related issues, which is described as evolving and constantly changing.

While the Constitution granted Congress the legislative power,[45] and the Court's decisions confirmed the existence of nondelegation doctrine,[46] could this be a constitutional question of separation of powers?

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40 Hampton v. United States, 276 U.S. 394 (1928), and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

41 50 U.S.C. §§ 1541–48; Section 1542 of 50 U.S.C. provides that: "The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations." Neither the reporting requirements stated in Section 1543 of this code nor the termination provisions stated in Section 1544(b) would strip the President from such power that Congress itself granted to him in initiating a war.

42 26 U.S.C. § 63 (2018).

43 26 U.S.C. § 61(a) (2018).

44 *Id.*

45 U.S. Const. art. I, § 1.

46 A.L.A. Schechter Poultry Corporation v. U.S., 295 U.S. 495 (1935); In *A.L.A. Schechter Poultry Corporation*, the Court held that: "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.* at 529.

U.S. codes are abundant with sections in which Congress made the text opened and broad, and this does not mean that Congress intended to delegate its power to other branches of government including the Judiciary because it cannot. However, the Court should not interpret the text very broadly violating the principle of separation of powers at least, if not violating Congress's intention.

In fact, the Legislative Branch did well when passing Section 61 of the I.R.C. in a "broad" meaning, and the Court never interpreted this section in an extreme way, as the Court only responded to attempts to circumvent this text reasonably. For example, in *Gitlitz v. C.I.R.*, the Court stated that: "excluded discharged debt is indeed an 'item of income,' which passes through to the shareholders and increases their bases in the stock of the S corporation."[47] In its decision, the Court based on reasonable analysis of the I.R.C., more precisely, the Court tried to make the category of income questioned before it to be fallen in one of Section 61 categories, as it said that: "Section 61(a)(12) states that discharge of indebtedness generally is included in gross income. Section 108(a)(1) provides an express exception to this general rule … If discharge of indebtedness of insolvent entities were not actually 'income,' there would be no need to provide an exception to its inclusion in gross income; quite simply, if discharge of indebtedness of an insolvent entity were not 'income,' it would necessarily not be included in gross income."[48]

Focusing on Section 61 categories, it will be difficult to find a source of income that has not been included among them. Even further, taxpayer needs to find an exception in the code that makes such income excluded from her gross income.[49] In *Old Colony Trust Co. v. Commissioner of Internal Revenue*, the Court held that the tax paid by the employer on behalf of her employee is considered an income to the employee, as the Court said that: "The taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor."[50] As the Court determined that this kind of income falls into the field of compensations.

In fact, the Supreme Court made it clear, in *Commissioner of Internal Revenue v. Glenshaw Glass Company*, that when Congress defined the gross income as all sources of income except those excluded explicitly from the gross income.[51] After *Glenshaw Glass Company*, taxpayer cannot argue gross income inclusions or exclusions issues if she does not claim it with a clear provision in the I.R.C. For instance, gross income does not include the value of gifts and inheritance in which the taxpayer received,[52] but the income from such properties is taxable.[53]

Returning to the basic question in this regard, has the role of Congress become ineffective when determining gross income before *Glenshaw Glass Company*? And if yes, did the Congress returned

47 Gitlitz v. C.I.R., 531 U.S. 206, 212 (2001).

48 *Id.* at 214.

49 *See*, *e.g.*, Cesarini v. U.S., 296 F. Supp. 3 (D. Ohio 1969).

50 Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U.S. 716, 729 (1929).

51 Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955); In *Glenshaw Glass Co.*, the Court said that: "the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted." *Id.*

52 26 U.S.C. § 102(a) (2018).

53 26 U.S.C. § 102(b) (2018).

such power of determination after this case? In fact, what really differed was the interpretation of the legal text, which became broader after *Glenshaw Glass Company*. But as a result, the power of determining what the taxable income is has shifted from both Congress and the court's interpretations to the Congress alone. The author believes that this holding is a shift in the court's view of taxes as a source of income, as after World War II, the United States became the country where every business dreamed to be established in. As a result, the U.S. needed a shift in its tax policy, not just for domestic income, but for foreign income as well.

In addition, among the years, Congress was fighting with the Executive Branch for domestic and foreign relations powers, even such powers are separated in the Constitution and interpreted by the Court, Congress needs to protect its high influence at least inside the U.S., so it used the legislative power granted to it by Article I to maintain such influence.

As a result, Congress is the sole branch who determines what to tax; by tax Acts passed by Congress, it can draw the financial policies of the country, because the main source of the U.S. financial plan is revenue from taxes. On the other hand, Court's role is still important and needed as any other legal question, because codes are designed to govern the majority of legal rulings, and the author is satisfied to say that no code can cover every prospective dispute. However, this is not to say that Courts make laws when there is no provision in the current code to govern the dispute, courts cannot make laws, their role is to interpret them, and in the previous prescribed situation, to find the best legal text that applies, or to make their decisions based on the rationale of the current code.

It should not be surprising to state that codes are constantly evolving, and tax legislation is not an exception, as Congress, of course, follows up on court rulings and assesses the need for the legislations to be developed accordingly. This does result in that the courts are affected by Congress's legislations nor determinations. Instead, Congress notices and follows the social, economic and political changes, and accordingly draws its legislative policy.

Thus, Court's decisions regarding gross income inclusions could be described as a policeman who control Congress's taxing power, but biased towards its legislative policy in determining whether such income is taxable or not. For example, in *Lyeth v. Hoey*, the Court determined that in an inheritance settlement agreement, the property received by the heir is considered "inheritance," even if such agreement violates the decedent's will.[54]

Last but not least, when Congress enacted I.R.C. of 1986 (Tax Reform Act), it aimed to "broaden the tax base,"[55] means to make the majority of income sources taxable. Thus, taxpayers may hardly argue the exclusion of their income from gross income. Economically, it does make sense, because Congress decreased tax rates after the 1986's Act.

2. Limitation on Taxing Power: The Constitutional Policy

In the previous part, the author discussed the main limitation on congressional taxing power, which is a part of the Taxing Clause, or known as "General Welfare Clause." The author explained this

54 Lyeth v. Hoey, 305 U.S. 188, 192 (1938).

55 James J. Freeland et al., Fundamentals of Federal Income Taxation 93 (17th ed. 2013).

limitation when he discussed the Taxing Clause because it cannot be separated or understood without connecting it with the Taxing Clause. In addition to this limitation, there are another three important limitations connected to the congressional power on imposing taxes and affecting it. First, the Origination Clause, in Article I, Section 7, Clause 1, which states that: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills;" Second, Uniformity Clause, the last part of the Taxing and Spending Clause in Article I, Section 8, Clause 1, which states that: "all Duties, Imposts and Excises shall be uniform throughout the United States;" and the last one stated in Article I, Section 9, Clause 5, provides that: "No Tax or Duty shall be laid on Articles exported from any State."

As we will discuss in this part, these limits would be effective in different and special situations, in which congressional taxing power will face these limits while Congress tries to use its power to force taxes, as the Framers intended to use such limits as methods of separation of powers.

2.1. Origination Clause: Who Can Make it Different?

Article I, Section 7, Clause 1, states that: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." So, the questions that arise here are: What are the "bills for raising revenue"? Are such bills limited to tax Acts? And why did the Framers prevent the Senate from conducting such process alone? If it is just a regular Act same as other Acts, why did the Framers create this text and were not satisfied with the text of Article I, Section 7, Clause 2?[56]

The Framers were influenced by some features of the British system, in which it gave the House of Commons this privilege because they are representing the people and the money should be spent and collected within the people's will.[57] Thus, such bills are limited to and confined to bills that levy taxes,[58] and Framers set it in a separate provision for historical reasons.

Thus, if the Act intends to increase revenue in order to support government in general, then it is a "bill to levy tax," otherwise it is not, even the result of any similar Act would be the same which is increasing revenue, but the Court differentiates between Acts that mainly aim to increase revenue, and the Acts that had an impact on increasing revenue but do not mainly aim to support government, but to achieve different goals. For example, in *U.S. v. Munoz-Flores*, the Court held that: "the special assessment statute does not violate the Origination Clause because it is not a "Bill for raising Revenue."[59] Court's determination was based on the function of the statute which was governing any person convicted of a federal crime and did not aim to increase revenue at first.

Thus, a "bill for raising revenue" could exist when there is a governmental project that needs money

56 U.S. Const. art. I, § 7, cl. 2, states that: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States."

57 Joseph L. Story, Commentaries on the Constitution of the United States § 871 (1833), Book 3, Chapter 13. Available on: https://lonang.com/library/reference/story-commentaries-us-constitution/sto-313/

58 *Id.* at § 877.

59 U.S. v. Munoz-Flores, 495 U.S. 385, 387-88 (1990).

and the government needs to raise revenue to support such a project.[60] On the other hand, other bills, which create revenues in different circumstances, are not included in this clause.

Basically, this clause does not restrict Congress's taxing power as a whole, it is just organizing the process for definite sorts of tax Acts, in which it requires such Acts to originate in the House and not the Senate. In *Millard v. Roberts*, the Court held that the bill that "enjoins the Treasurer of the United States from devoting public funds to the purposes authorized by congressional legislation for the elimination of grade crossings and for a union railway station in the District of Columbia" is constitutional because it did not aim to raise revenue as a main goal.[61]

Whatever Framers intended from such clause, even if they put it in the constitution for historical purposes, as stated above, this clause organizes the taxing process and limits the process that Congress may follow while practicing its taxing power, and it does not, limit its taxing power or eliminate its taxing scope. In fact, Courts did not struggle in testing tax bills when testing the Origination Clause, as it does not impose any burden in congressional taxing power, thus, the Court was testing the taxing procedures by examining Congress's intention, which is not hard to know in this case.

2.2. Uniformity Clause: A Way to Equality

The federal tax system, as a part of the federal system, aimed to motivate foreign nations to conduct trade and business within the United States. Of course, the trade and business transactions were existing during the confederation, but foreign nations were hesitant and afraid of conducting business under the confederation due to the different tax treatment within the states.

A need of a "uniformity" in tax treatment was essential in the new federal system, because foreign investors and businessmen wanted to feel safe and equal when starting business with any state. In fact, we can easily say that without the Uniformity Clause, the federal system would be useless and not different from any confederation union.

The Uniformity Clause requires a uniform tax treatment for the states in different tax matters, which will lead to equality in collecting taxes to all U.S. persons (citizens and permanent residents), by preventing the Legislature from preferring one taxpayer over another. In specific, it targets high-wealthy taxpayers from having special credits that low-income taxpayers would not have. How could Congress achieve uniformity in tax? And what is considered as a violation for this clause?

Speaking broadly, the Uniformity Clause prevents states from "discriminatory actions by the national government,"[62] but does that mean that Congress has to devise a tax that falls equally or proportionately on each state in order to conform with the Uniformity Clause? If not, when will the tax be constitutionally "uniform"?

If the Uniformity Clause prevents Congress from distinction between similar taxpayers, how could it determine the subject of each tax? In addition, there are some "geographically isolated problems," that require Congress to make special tax treatment; if the Uniformity Clause prevents Congress from

60 Ball, *supra* note 35, at 4.

61 Millard v. Roberts, 202 U.S. 429, 435-37 (1906).

62 Louis Fisher & Katy J. Harriger, American Constitutional Law 744 (12th ed. 2019).

organizing all of this, how could it, effectively, practice its taxing power under the Taxing and Spending Clause?

In *U.S. v. Ptasynski*, the Court held that: "the [Uniformity] Clause does not require Congress to devise a tax that falls equally or proportionately on each State."[63] In *Ptasynski*, the Court referred to its decision in *Edye v. Robertson*, in which it declared that tax is uniform according to Uniformity Clause "when it operates with the same force and effect in every place where the subject of it is found,"[64] which means that federal tax Act that applies in different states is uniform even if it determined group of taxpayers, as long as such Act applies to all taxpayers (or taxable activities) that share the same characteristics.

Imagining the opposite, if the U.S. Constitution did not adopt the Uniformity Clause, Congress will be able make different tax act for every state, which means the same situation of the confederation. Although the Court neither in *Edye* nor *Ptasynski*, discussed the effect or determined how could tax have "the same force," as its rationale targeted the characteristics of such taxable activity. Despite this, the author believes that economic impact of the same tax rules, may differ in similar economic jurisdiction, this could happen when one state, for example, has faced a natural disaster, or a sudden increase in demand due to special social events, in which at least theoretically, it could exist in a state and not exist in another; in such event, the "same force test" may not be effective.

Clearly, the author believes that such test is not the best way to describe the "uniformity," as the Supreme Court failed to develop a clear jurisprudence with such limit, because it has failed in determining the role of the Uniformity Clause in the constitution's strategy,[65] as stated above, to improve the economy and promote the free market economy for the federal union.

Still, the court followed a reasonable rationale when it declared that Congress may decide, based on geographically isolated problems, the frame of the tax, and that will not violate the Uniformity Clause as long as there is no "actual geographical discrimination."[66] Moreover, it is true that the Uniformity Clause prevents Congress from distinction between similar taxpayers, but it "does not prevent [it] from defining the subject of a tax by drawing distinctions between similar classes."[67]

In fact, the Uniformity Clause requires Congress to treat the same "geographically isolated problems" at the same treatment, but it does not prevent it from recognizing such geographical difference, otherwise, it could affect the economy and commerce itself by applying same rules for different economic circumstances, which could lead to a recession or inflation in states that differ in

63 U.S. v. Ptasynski, 462 U.S. 74, 82 (1983).

64 Edye v. Robertson, 112 U.S. 580, 594 (1884). In *Edye v. Robertson*, the Court said that: "The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, this is uniform and operates precisely alike in every port of the United States where such passengers can be landed. It is said that the statute violates the rule of uniformity and the provision of the constitution that 'no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another,' because it does not apply to passengers arriving in this country by railroad or other inland mode of conveyance." *Id.*

65 Nelson Lund, *The Uniformity Clause*, 51 Chi. L. Rev. 1193, 1229 (1984).

66 *Ptasynski*, 462 U.S. at 85.

67 *Id.* at 82.

economic characteristics. The Supreme Court could have been clearer and more daring in reining in the Congress taxing power.

This confirms that the Court supported in its rulings throughout the twentieth century a broad congressional authority to impose and collect taxes. In fact, the federal government was fully aware of the importance of money in that bloody century that brought two world wars and many American wars, during which the American government needed money to confront its enemies. As the court was somewhat illogically shy, from applying the Uniformity Clause in its extreme shape, although it does not make sense to understand this clause without being applied in extreme due to the historical necessity of equality in tax treatment. The author does not mean that the Court should always stuck down any tax act, because that will violate the Taxing and Spending Clause itself, but he argues that this was last followed in the same text with the Uniformity Clause, which means that they may not be read separate. As a result, federal business transactions are governed under one federal tax system, in which such system should achieve equality.

2.3. Export Clause: A Minimum Restriction

Congress's power on taxing is clear in Article I, Framers intended to grant Congress such power for many reasons, as we described above. However, Framers were aware of the importance of separation of powers along with checks and balances, as a result, they establish the federal government in its three branches to work together with limits on their powers.

Export Clause provides another limit on Congress's taxing power. As stated in Article I, Section 9, Clause 5, that "No Tax or Duty shall be laid on Articles exported from any State." This clause is different from Import-Export Clause in Article I, Section 10, Clause 2, which limits states' power on laying imposts or duties on imports or exports.[68] As this clause (Import-Export Clause) curbs state's protectionism in favor of the Congress.[69]

Basically, Export Clause prevents Congress from imposing taxes on exports during the course of exportation.[70] Clearly, the tax imposed by Congress on exports is unconstitutional, whether it discriminates against exports or not. Moreover, the phrase "exports" includes services and activities that is closely related to exportation process.[71] More precisely, whatever the Congress called such tax, goods cannot be taxed once they enter the course of exportation,[72] but the prohibition includes taxes not fees on exports during the course of exportation, as the difference between tax and fee is clear, courts can identify each one's characteristics to determine the nature of such duty.[73] Thus, Congress may

68 U.S. Const. art. I, § 10, cl. 2, states that: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

69 Chemerinsky, *supra* note 11, at 351.

70 Erika K. Lunder, Congressional Research Service, Export Clause: Limitation on Congress's Taxing Power 1-2 (2012).

71 *Id.*; U.S. v. International Business Machines Corp., 517 U.S. 843, 846-47 (1996).

72 A.G. Spalding & Bros. v. Edwards, 262 U.S. 66, 69 (1923).

73 U.S. v. U.S. Shoe Corp., 523 U.S. 360, 368-69 (1998); National Federation of Independent Business v. Sebelius, 567 U.S. 519, 563-64 (2012).

impose taxes on goods before they enter the course of exportation, but cannot do so after that.

In 1996, Export Clause came under the limelight again, while congressional taxing power could be described as "plenary"[74] after the historical Supreme Court decision in Butler. In fact, the Judiciary regained its "actual" judicial review power over congressional taxing power after its decisions in *U.S. v. International Business Machines Corp*. [hereinafter, *IBM case*] in 1996, and *U.S. v. U.S. Shoe Corp*. [hereinafter, *Shoe case*] in 1998. In these two cases, the Court recognized that despite the Framers knew that the federal system is necessary instead of the confederation for the uniformity of taxes with respect to foreign nations, they also intended to create some limits on Congress's taxing power.

In *IBM case*, the Court held that the tax imposed by the federal government on IBM's insurance premiums remitted to foreign insurers is unconstitutional and violates the Export Clause. In its holding, the Court said: "the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit."[75] In fact, the Court had previously ruled that the tax imposed on exports during the course of exportation is unconstitutional based on Export Clause,[76] so what makes this decision exceptional?

IBM case's Court said that: "[Export Clause] prohibits Congress from regulating international commerce through export taxes,"[77] as the Court struck down government's attempt to narrow the scope of the Export Clause, instead the Court held that despite the Framers intention of the Export Clause to "narrowly alleviate the fear of northern repression through taxation of southern exports by prohibiting only discriminatory taxes,"[78] the Framers created this clause in a broad language[79] because they aimed to "alleviate their concerns by completely denying to Congress the power to tax exports at all."[80]

By such declarations, the Court in *IBM case,* aborted any possibility of governmental attempt to argue that Export Clause could allow government in any way to impose tax on exports during the course of exportation. In fact, the Court's use of these "extreme" expressions, aiming to prevent any future governmental arguments, was necessary in this case, as if government could have succeeded in narrowing the scope of the Export Clause, then Congress would, literally, have no actual limitations on its taxing and spending power.

In addition, in *Shoe case*, the Court struck down the harbor maintenance tax ruling that it is unconstitutional because it violates the Export Clause. More importantly, the Court confirmed that the language of the Export Clause applies to taxes imposed during the course of exportation, but it does not include fees or other duties that could be imposed on goods before or during the exportation.[81] In its 1875 decision, *Pace v. Burgess*, the Court distinguished the differences between tax and fee[82] and

74 Erik M. Jensen, *The Export Clause*, 6 Fla. Tax Rev. 1, 3 (2003).

75 *International Business Machines Corp.*, 517 U.S. at 863.

76 *See*, *e.g.*, Fairbank v. U.S., 181 U.S. 283 (1901); U.S. v. Hvoslef, 237 U.S. 1 (1915).

77 *International Business Machines Corp.*, 517 U.S. at 859.

78 *Id.* at 861.

79 *Id.*

80 *Id.*

81 U.S. v. U.S. Shoe Corp., 523 U.S. 360, 368-69 (1998).

82 Pace v. Burgess, 92 U.S. 372, 376 (1875); In *Pace*, the Court said that: "having due regard to that latitude of discretion

determined what is considered as fee. The fee, unlike a tax, is "(1) proportional to the government services or benefits received by the payor and (2) not determined solely on an ad valorem basis."[83]

The Export Clause aims to "encourage industry and competition,"[84] as investors always look for the best friendly tax environment to conduct their business. Without limiting Congress's taxing power of imposing taxes on exports, investors would be considering moving their business outside the United States to get rid of such heavy duty, it is not just a matter of international trade encouragement, in fact, it is a matter of U.S. domestic economy in the first place.

Conclusion

The separation of powers is the main question when it comes to the powers of one of the three branches; however, the issue of the limitations of such powers remains essential. As Congress has broad taxing powers and the Supreme Court affirmed this rationale in many cases,[85] it also confirmed that there are some limits that constrain Congress's taxing power to ensure good economic performance.

Congress, alone, has the power to levy taxes, and such power is faced with basic limitations headed by the Export Clause, which is considered as the last line of defense in front of Congress's broad taxing powers. This clause prevents Congress from taxing exports during their course of exportation.

Court's language in *IBM case* and *Shoe case* was clear enough to notice that such limitation on congressional taxing power cannot be overruled because it is in consistence with the Framer's intention.[86] However, the concern in *Shoe case* was about the difference between the fee and the tax, as Congress may impose fees on goods during the course of exportation, and the Court in *Pace* provided a test for such distinguishing, despite this, the question still exists of whether the federal government could pass a legislation that imposes a duty which is tax in its economic nature but considered as a fee for constitutional purposes.

The author believes if the Supreme Court were clearer in setting up the rules of Congress tax powers, such debate will not be raised, but making it hard for tax courts and Congress and even for the Supreme Court itself in the future reviews made it unclear. The author believes that the Supreme Court should find a more accurate interpretation and more easy linking of the taxation clauses in order to define a clear taxing power of the Congress.

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which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government."

83 Lunder, *supra* note 69, at 3.

84 Claire R. Kelly & Daniela Amzel, *Does the Commerce Clause Eclipse the Export Clause: Making Sense of United States v. United States Shoe Corp.*, 84 Minn. L. Rev. 129, 145 (1999).

85 *See*, *e.g.*, U.S. v. hler 297 U.S. 1 (1936).

86 U.S. v. International Business Machines Corp., 517 U.S. 843, 861 (1996).

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