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## For the General Welfare: Finding a Limit on the Taxing Power after NFIB v. Sebelius

Jonathan S. Sidhu

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# For the General Welfare: Finding a Limit on the Taxing Power after *NFIB v. Sebelius*

Jonathan S. Sidhu\*

*In National Federation of Independent Business v. Sebelius, the Supreme Court held that the Affordable Care Act's individual mandate violated the Commerce Clause but upheld the mandate under the Taxing Power. While the Court's decision has radically foreclosed congressional action under the Commerce Clause, it has allowed congressional authority under the Taxing Power to expand beyond the Commerce Clause. This departure from previous Supreme Court jurisprudence is significant.*

*There has been much debate about how far congressional power under the Commerce Clause should extend. This Comment will make only a modest claim: regardless of your position on the Commerce Clause, the Court should treat congressional authority over the states the same under both the Commerce Clause and the Taxing Power. Because the power to tax can be used in a functionally identical way to regulating conduct, Congress can simply bypass limits on the Commerce Clause by using taxes. My claim that the Taxing Power should track the Commerce Clause is based on the text, structure, and history of the Constitution, as well as the Court's Taxing Power jurisprudence. I will argue that the Court's jurisprudence on the limits of the Taxing Power converges on two prominent themes: (1) subject matter that is reserved for the states, and (2) the extent of coercion or inducement of the tax in question. While some have questioned whether the Court, rather than another political branch, should be the one to decide, I will argue that judicial review of this and other federalism questions is necessary. I will situate my argument within the relevant academic literature, which is*

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*particularly on point for the distinction between taxes and penalties within the context of the Taxing Power and Commerce Clause.*

*Drawing from this material, I will propose a doctrinal test for defining the limits of the Taxing Power. This test will presume that taxes that diverge from the Commerce Clause are unlawful unless rebutted after evaluating three criteria: (1) whether the exaction raises revenue, (2) whether the exaction is coercive, and (3) whether the subject matter in question belongs to the states. Lastly, I will apply the proposed test to hypothetical examples to demonstrate its contours, strengths, and weaknesses.*

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#### INTRODUCTION

In *National Federation of Independent Business v. Sebelius*, the U.S. Supreme Court held that the Patient Protection and Affordable Care Act’s individual mandate was not a valid exercise of congressional authority under the Commerce Clause, but the Court ultimately upheld the mandate under Congress’s authority to “lay and collect Taxes.”<sup>1</sup> The Court’s decision to uphold the individual mandate under the Taxing Clause, while finding it unconstitutional under the Commerce Clause, is a kind of reprise, but an inversion, of the Court’s *Lochner*-era decisions in *Hammer v. Dagenhart* and *Bailey v. Drexel Furniture Co.*<sup>2</sup> In *Dagenhart*, the Court frustrated Congress’s attempts to restrict interstate transport of goods created by child labor, determining that the regulation of child labor was purely governed by state authority.<sup>3</sup> When Congress attempted to circumvent this limit by taxing companies that used child labor instead of directly regulating them, the Court in *Drexel Furniture* undermined the legislature, declaring that “Congress in the name of a tax which on the face of the act is a penalty seeks to do the same thing, and the effort must be equally futile.”<sup>4</sup>

Unlike *Drexel Furniture*, the Court in *Sebelius* allowed congressional authority under the Taxing Power to diverge from the Commerce Clause. While

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1. 132 S. Ct. 2566 (2012). U.S. CONST. art. I, § 8 begins, “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.”

2. See *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100, 116–17 (1941); see also *United States v. Darby*, 312 U.S. 100, 116–17 (1941) (“The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.”).

Both *Dagenhart* and *Drexel Furniture* occurred before the Court’s famous accommodation of President Roosevelt’s New Deal, apparently in response to a plan to pack the Court. See, e.g., Alpheus T. Mason, *Harlan Fiske Stone and FDR’s Court Plan*, 61 *YALE L.J.* 791 (1952). Subsequent jurisprudence ushered in a rapid expansion of the Commerce Clause power, beginning with *NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1 (1937). From the New Deal until the 1990s, the Commerce Clause had been interpreted as an expansive power. See *infra* note 5.

Even though *Drexel Furniture* occurred before a significant shift in Supreme Court jurisprudence in 1937, it appears to still be relevant, especially because *Sebelius* draws so heavily from it. See *Sebelius*, 132 S. Ct. at 2599–600.

3. *Dagenhart*, 247 U.S. at 276.

4. *Drexel Furniture*, 259 U.S. at 39 (“The analogy of the *Dagenhart Case* is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. . . . [H]ere the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution.”).

the Court has begun to foreclose congressional action under the Commerce Clause,<sup>5</sup> it has allowed congressional authority under the Taxing Power to expand beyond the Commerce Clause. Because the power to tax can be used in functionally identical ways as regulating conduct, Congress can simply bypass limits on the Commerce Clause by using taxes rather than directly regulating conduct. There has been much debate about how far congressional authority under the Commerce Clause should extend,<sup>6</sup> and I take no position on the limits of that power in this Comment. Instead, I make only a modest claim: regardless of your position on the Commerce Clause, the Court should treat congressional authority over the states the same under both doctrines.

My claim that the Taxing Power should track the Commerce Clause is based on the text, structure, and history of the Constitution, as well as the Court's jurisprudence on the Taxing Power. Some might, understandably, question the relevance of history and the Framers' intent to constitutional analysis.<sup>7</sup> I propose that regardless of your methodological persuasion, this discussion is useful because every current Supreme Court Justice appears to ground his or her analysis of the issues at least in part in history.<sup>8</sup> To meet the

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5. From the New Deal until recently, the Court has generally upheld an expansive Commerce Clause power. *See, e.g.*, *Heart of Atl. Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that provisions of the Civil Rights Act of 1964 are valid under the Commerce Clause); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that Congress can regulate a farmer's production of wheat even for personal consumption). More recently, the Court has begun to rein in this view of the Commerce Clause. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress may not regulate noneconomic violent criminal conduct under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress cannot regulate possession of a gun in a school zone under the Commerce Clause). *But see* *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding Congress's power to regulate the local cultivation and use of marijuana).

Indeed, Justice Ruth Bader Ginsburg accused the majority in *Sebelius* of using a pre-1937 conception of the Commerce Clause. *Sebelius*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in the judgment in part and dissenting in part) ("THE CHIEF JUSTICE's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it.") (internal citations omitted).

6. *See, e.g.*, Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731 (2003); *see generally*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843 (2000); Louis H. Pollak, Symposium, *Reflections on United States v. Lopez: Foreword*, 94 MICH. L. REV. 533 (1995).

7. *See, e.g.*, JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1997) (arguing in part that originalism often fails to consider the complexity of history, the challenges of finding definite textual meaning, or ascertaining original intent). *But see* Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 531 (1998) ("Put simply, without originalism we have to believe that lawmakers codify words but not meaning *and* we have to suppose that we sensibly can recognize some set of words as law, but supply our own meaning.").

8. In *Sebelius*, for example, every Justice signed on to an opinion that relied at least to some degree on history and the Framers' intent. The use of history, it would seem, is not limited to Republican-appointed Justices or those who might be associated with originalism. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2616 (2012) (Ginsburg, J., concurring in the judgment in part and dissenting in part) (Disputing the majority's limitation on the Commerce Clause

Court on its own terms, therefore, it seems that a historical discussion is necessary. Core debates about the scope of the federal government inform the limits on the Taxing Power. These conversations are attributed to Alexander Hamilton, James Madison, others in pre-ratification debates, and discussions surrounding legislation early in this Nation's history.

The Court's jurisprudence on the limits of the Taxing Power converges on two prominent themes: (1) subject matter that is reserved for the states, and (2) the extent of coercion or inducement of the tax in question. A natural question is whether the Court, rather than another political branch, should be the one to decide this and similar federalism issues. I argue that for normative and constitutional reasons, judicial review of federalism questions is necessary. There is much literature on conditional spending and the Commerce Clause, some literature on the relationship between taxation and spending, and particularly on-point work evaluating the distinction between taxes and penalties within the context of the Commerce and Taxing Clauses.<sup>9</sup> The differences between these categories—spending, direct regulation, and taxation—might initially seem like an exercise in taxonomy. But these distinctions matter for constitutional reasons because the Constitution, core debates surrounding the powers it provides, and the Court's jurisprudence all provide distinct scopes of authority and mechanisms for each of these powers—and they each have different implications for our system of federalism. My argument is situated within this literature, drawing from *Sebelius* and the issues it raises.

Based on this literature and the Court's jurisprudence, I will propose a doctrinal test for the limits of the Taxing Power, which will presume taxes that diverge from the Commerce Clause to be unlawful unless rebutted after evaluating three criteria: (1) whether the exaction raises revenue, (2) whether the exaction is coercive, and (3) whether the subject matter in question belongs to the states. Finally, I will apply the proposed test to hypothetical examples to demonstrate its contours, strengths, and weaknesses.

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power, she states, "Consistent with the Framers' intent, we have repeatedly emphasized that Congress'[s] authority under the Commerce Clause is dependent upon 'practical' considerations, including 'actual experience.'"; *id.* at 2592 (Roberts, C.J.) (discussing Madison and Hamilton's conceptions of the General Welfare Clause); *id.* at 2588–89 (Roberts, C.J.) (discussing Framers' conceptions of the Commerce Clause and its limits). Indeed, the block of Justices we might expect to most use history relies on it less here than the others do. *Id.* at 2643–47 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (mentioning Madison's conception of the Taxing Power and the reach of the Commerce Clause).

9. See generally Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994); Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975 (2011). I will closely evaluate this literature later in the paper.

I.  
LEGAL BACKGROUND

A. NFIB v. Sebelius

*National Federation of Independent Business v. Sebelius*, as Supreme Court cases go, was a blockbuster, generating much interest from scholars and the public at large. What is most important for our purposes is *Sebelius*'s consideration of the constitutionality of the individual mandate of the Patient Protection and Affordable Care Act.<sup>10</sup> The individual mandate requires most Americans to maintain minimum health insurance and, with certain exemptions and exclusions, requires a “[s]hared responsibility payment” for non-compliance.<sup>11</sup> According to the Court’s calculations, this payment in 2016 would be no less than \$695 per year, but no more than 60 percent of the average yearly premium for standard health insurance.<sup>12</sup> The Court evaluated the individual mandate under both the Commerce Clause and the Necessary and Proper Clause. Finding that it failed constitutional scrutiny, the Court ultimately held the mandate lawful under the Taxing Clause.<sup>13</sup>

1. *Commerce Clause*

The Court rejected the individual mandate under the Commerce Clause based on its analysis that the mandate regulated inactivity. The Court found that Congress has never compelled individuals not engaged in commerce to purchase an unwanted product.<sup>14</sup> The Constitution grants Congress the power to “regulate Commerce,” which, according to the Court, presupposes commercial activity that can be regulated.<sup>15</sup> The Court noted that to “regulate Commerce” cannot include the power to “create it,” without rendering other provisions and enumerated powers in the Constitution extraneous.<sup>16</sup> Judicial precedent focuses on “activity,” and the individual mandate does not regulate “existing commercial activity” but “instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.”<sup>17</sup> In particular, the Court looked to *Wickard v. Filburn*,<sup>18</sup> where it upheld a penalty against a farmer for growing wheat for consumption on his own farm because the farmer’s conduct allowed him to avoid purchasing wheat on the open market.<sup>19</sup> In *Wickard*, the farmer was

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10. *Sebelius*, 132 S. Ct. at 2580.

11. *Id.*

12. *Id.*

13. *Id.* at 2591–95.

14. *Id.* at 2586.

15. *Id.*

16. *Id.*

17. *Id.* at 2587.

18. 317 U.S. 111 (1942).

19. *Sebelius*, 132 S. Ct. at 2587–88.

actively engaged in producing wheat, but in *Sebelius*, upholding the individual mandate under the Commerce Clause would mean that the government could regulate individuals under the Commerce Clause “whenever enough of them are not doing something the Government would have them do.”<sup>20</sup>

When distinguishing between activity and inactivity, the Court noted that an economist might find no difference in the measurable economic effects on commerce, but that as “practical statesmen,” and not “metaphysical philosophers,” the Framers prescribed clear language to regulate commerce rather than compel it.<sup>21</sup> In sum, the Court found that “[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.”<sup>22</sup>

## 2. Taxing Power

The Court determined that the shared responsibility payment was a tax for constitutional purposes, rather than a penalty, by drawing on a “functional” approach to the practical characteristics of a tax, highlighted in *Drexel Furniture*.<sup>23</sup> Three characteristics of the payment mattered: first, that for most Americans the amount due is far less than the price of insurance; second, that there is no scienter requirement; and third, that the payment is collected solely by the Internal Revenue Service (IRS).<sup>24</sup> Though the Court acknowledged that the purpose of the payment was to expand health insurance coverage, it noted that historically Congress has often used taxes to influence conduct.<sup>25</sup>

When the Court compared Congress’s authority for the individual mandate under the Commerce and Taxing Clauses, it drew a sharp distinction between the two, focusing on the specificity of the individual mandate, especially with respect to compelling activity. The Court anticipated objections: “If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.”<sup>26</sup> The Court, however, provided several reasons why the Taxing Clause, as opposed to the Commerce Clause, could support the individual mandate. The Constitution allows taxation of inactivity—for example, a capitation.<sup>27</sup> The Court curiously called the validity of the mandate under the Commerce Clause a “question about the scope of federal authority,” but explained that using the Taxing Clause to require individuals to purchase something is not new.<sup>28</sup>

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20. *Id.* at 2588.

21. *Id.* at 2589.

22. *Id.* at 2591.

23. *Id.* at 2595.

24. *Id.* at 2595–96.

25. *Id.* at 2596.

26. *Id.* at 2599.

27. *Id.*

28. *Id.*



The Court, aware that its opinion might portend an unlimited Taxing Power, determined that Congress's power to influence behavior with taxes has limits, though it was coy about what those limits might be. The Court recounted that it has invalidated "punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority."<sup>29</sup> This statement is puzzling because here the Court found the individual mandate outside the scope of the Commerce Clause, which would seem to mean that the scheme also regulates behavior "beyond federal authority." Further, the Court did not clarify what a "punitive exaction" is or what it means for something to be "obviously designed" to regulate behavior that is beyond federal authority. Determining whether an exaction is "obviously designed" for some purpose implies that the Court will consider the intent of Congress in circumventing Commerce Clause restrictions with taxes. The Court referred to a quotation from *Drexel Furniture*: "But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."<sup>30</sup> The Court, however, declined to decide the "precise point" at which an exaction becomes so punitive that the Taxing Power does not authorize it, nor did it provide criteria for evaluating how to find this point.<sup>31</sup> We are, instead, left to speculate where the Court draws this line and how it might evaluate when the line is crossed.

The Court determined that the Taxing Clause does not give Congress the same level of control over individual behavior as the Commerce Clause does, and it looked primarily at the sanctions levied for failure to comply to support its proposition. The Court appeared especially concerned with the direct power to regulate under the Commerce Clause, noting that the Commerce Clause allows Congress to simply command individuals to behave in a certain way.<sup>32</sup> A decision under the Commerce Clause can bring the federal government's "full weight to bear," and non-compliance, according to the Court, can result in criminal sanctions, which include not only fines but also imprisonment and "being branded a criminal."<sup>33</sup>

In contrast, according to the Court, the Taxing Power only requires that individuals pay money into the Treasury, and if they pay their taxes, Congress does not have the power to punish them.<sup>34</sup> An obvious counterpoint to this is that those who do not pay their taxes *do* face being branded as criminals. In response, the Court explained that a tax leaves one with the lawful choice to either act or not act. While one may face prosecution for failing to pay a tax,

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29. *Id.* (citing *United States v. Butler*, 297 U.S. 1 (1936); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922)).

30. *Drexel Furniture*, 259 U.S. at 38.

31. *Sebelius*, 132 S. Ct. at 2600.

32. *Id.*

33. *Id.*

34. *Id.*

choosing to forgo activity is distinguishable from the decision not to pay a tax.<sup>35</sup> This is a peculiar defense because people most likely choose to pay taxes in part because of the fear that non-compliance would result in criminal sanctions (if taxes were simply voluntary or unenforced, it is unlikely anyone would regularly pay them). Therefore, it does not seem as easy to separate whether or not one does the underlying act and whether or not one pays the accompanying tax. In any case, the Court's emphasis on whether those who fail to comply with taxes or regulations face sanctions is a very imprecise way to evaluate what level of control Congress has on the individual. We can imagine, for example, that a particularly burdensome tax would have a greater effect on behavior than a measly fine.

### *B. The Scope of the Taxing Power*

There are many unanswered questions about how the Court sees the Taxing Power after *Sebelius*. In addition to the Court's own jurisprudence, it is useful to return to first principles to understand the scope of the Taxing Power. Article I, Section 8, Clause 1 of the Constitution reads, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."<sup>36</sup> The Taxing and Spending Clause is the first clause of Congress's enumerated powers, which are listed in Article I, Section 8. Subsequent clauses in this Section include the power to borrow money,<sup>37</sup> the Commerce Clause,<sup>38</sup> the power to mint money,<sup>39</sup> declare war,<sup>40</sup> raise and support an army,<sup>41</sup> and the Necessary and Proper Clause,<sup>42</sup> among other enumerated powers. A key structural consideration about the Taxing and Spending Clause is whether it has any relationship with the subsequent clauses in Article I, Section 8, especially the Commerce Clause and Necessary and Proper Clause, or whether it stands alone. A related concern is the relationship between two components of the Taxing and Spending Clause, the power to lay and collect taxes and the power to provide for the general welfare. The scope of the Taxing and Spending Clause<sup>43</sup> has been the subject of considerable debate and historical analysis, and the Framers' debates have been central to this inquiry. It is also useful to

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35. *Id.*

36. U.S. CONST. art. I, § 8, cl. 1.

37. U.S. CONST. art. I, § 8, cl. 2.

38. U.S. CONST. art. I, § 8, cl. 3.

39. U.S. CONST. art. I, § 8, cl. 5.

40. U.S. CONST. art. I, § 8, cl. 11.

41. U.S. CONST. art. I, § 8, cl. 12.

42. U.S. CONST. art. I, § 8, cl. 18.

43. For our purposes, we care most about limitations created by the General Welfare Clause. There are, of course, limits related to geographical uniformity (U.S. CONST. art. I, § 8), apportionment of direct taxes (U.S. CONST. art. I, § 9, cl. 4), and limits on taxing exports from states (U.S. CONST. art. I, § 9, cl. 5). These other limitations, while important, are less relevant to the discussion surrounding using taxes to circumvent the Commerce Clause.

look at examples of the Nation's early tax legislation and debates surrounding the scope of the federal government when the Bank of the United States was chartered.

*1. Hamilton or Madison?*

Commentators, including the Supreme Court, have framed the scope of the Tax and Spending Clause as a dispute between Alexander Hamilton and James Madison.<sup>44</sup> Under this view, Madison believed Congress could tax and spend *only* to further the specific powers granted in Article I, Section 8 while Hamilton believed Congress could tax and spend for anything that served the general welfare, so long as it did not violate another part of the Constitution.<sup>45</sup> Although it is true that Hamilton and Madison had different views on the scope of the Taxing and Spending Clause, their views were not the only reasonable interpretations of the Clause's language and were not entirely diametrically opposed (indeed, in some ways, they overlap). Nonetheless, it proves useful to closely examine what they, and other commentators, have said on the matter.

Justice Joseph Story's *Commentaries on the Constitution of the United States* is a good starting point for framing the debate on the scope of the Taxing and Spending Power.<sup>46</sup> Story presented a bifurcation on the scope of the power:

Do the words, "to lay and collect taxes, duties, imposts, and excises," constitute a distinct substantial power; and the words, "to pay the debts and provide for the common defence and general welfare of the United States," constitute another distinct and substantial power? Or are the latter words connected with the former so as to constitute a qualification upon them? This has been a topic of political controversy, and has furnished abundant materials for popular declamation and alarm.<sup>47</sup>

Story explained that, if the former definition were correct, then the federal government would be one of "general and unlimited powers," regardless of the enumeration of specific powers.<sup>48</sup> But if the latter definition is correct, then the power to tax must only be limited to objects of "national character."<sup>49</sup>

Notice how Justice Story's two prominent categories are slightly different than the conventional viewpoints attributed to Hamilton and Madison. According to the conventional narrative, Hamilton and Madison were concerned about whether the enumerated powers of Article I, Section 8 restricted the scope of the Taxing and Spending Clause, but Justice Story

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44. See generally *United States v. Butler*, 297 U.S. 1, 65–66 (1936); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 3.4.1 (4th ed. 2011).

45. See *supra* note 44.

46. 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 907 (Melville M. Bigelow ed., Boston, Little, Brown, & Co. 5th ed. 1891).

47. *Id.*

48. *Id.*

49. *Id.*

instead focused on whether to “provide for the common defen[s]e and the general welfare” does or does not modify the power to “lay and collect taxes.”<sup>50</sup> Story subsequently adopted the second viewpoint, that the power to lay and collect taxes was *for the purpose* of paying the public debts and providing for the common defense and general welfare.<sup>51</sup> Story clarified that Congress did not have an “unlimited power of taxation” but was limited to “specific objects,—the payment of the public debts, and providing for the common defen[s]e and general welfare.”<sup>52</sup> If Congress laid a tax for any other purpose, according to Story, it would be unconstitutional and an “excess of its legislative authority.”<sup>53</sup>

The Supreme Court in *United States v. Butler* later endorsed Justice Story’s view as Hamiltonian,<sup>54</sup> a categorization that appears incomplete. Justice Story did not clearly endorse Hamilton’s view but instead took the position that the power to tax must be in pursuit of the “common defen[s]e and the general welfare”—that the power to tax was not an independent power separate from the enumerated powers.<sup>55</sup> Indeed, Story appeared to disfavor a standard Hamiltonian interpretation, explaining that if the entire Taxing Clause is construed as an independent grant of power, it “not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers, but it plainly extends far beyond them and creates a general authority in Congress to pass all laws which they may deem for the common defen[s]e or general welfare.”<sup>56</sup> Therefore, Story suggested that there must be constraints on the Taxing Clause that are partially grounded in preserving the limits of the enumerated powers.

James Madison, however, clearly believed in a much more constrained Taxing Power than both Hamilton and Justice Story. In *The Federalist No. 41*, Madison argued that the Constitution provided clear constraints on the scope of the Taxing Clause because of the presence of subsequent enumerated powers. Madison debunked concerns that the Taxing Clause amounted to “an unlimited commission” to exercise any power that might be “alleged to be” necessary for the common defense or general welfare.<sup>57</sup> Madison pointed to the existence of other enumerations and definitions of congressional power to prove that the power to tax was limited in scope, provocatively asking, “For what purpose could the enumeration of particular powers be inserted, if these and all others

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50. *Id.* §§ 907–08.

51. *Id.* § 907.

52. *Id.* § 908.

53. *Id.*

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

55. STORY, *supra* note 46, § 907.

56. *Id.* § 909. *See generally id.* §§ 907–933 for an examination of many arguments surrounding the scope of the Taxing Clause.

57. THE FEDERALIST No. 41, at 258–59 (James Madison) (Clinton Rossiter ed., 2003).

were meant to be included in the preceding general power?”<sup>58</sup> Indeed, Madison noted that such an expansive view of the Clause would undermine other rights found in the Constitution, such as First Amendment rights and the right to a trial by jury, which would render the protections of the Constitution obsolete.<sup>59</sup>

Unlike James Madison, Alexander Hamilton did not explicitly address the “general welfare” language in *The Federalist Papers*, but he did hint at it in *The Federalist No. 33*.<sup>60</sup> After the Constitution was ratified, Hamilton described the taxing power as plenary.<sup>61</sup> In discussing the last clause of Article I, Section 8, the Necessary and Proper Clause, Hamilton asked, “What is the power of laying and collecting taxes but a *legislative power*, or a power of *making laws* to lay and collect taxes?”<sup>62</sup> More explicitly, Hamilton wrote “a power to lay and collect taxes must be a power to pass all laws *necessary* and *proper* for the execution of that power.”<sup>63</sup> From this language, it would seem that Hamilton believed in a near-limitless power to tax, similar to legislative powers, which is only limited by what is necessary and proper. In *The Federalist No. 31*, Hamilton confronted abstract concerns about a general power of taxation, providing a few reasons for its necessity, focusing on the importance of generating revenue.<sup>64</sup> It seems relevant that taxes mattered to Hamilton for money-raising concerns, especially related to security and national defense issues, but not for behavior modification.<sup>65</sup> When Hamilton discussed concerns that the federal government might usurp state authority by taxing, and interfering with state taxes,<sup>66</sup> he was mindful of how the fortunes of a sovereign can rise and fall with its purse. Yet, he assumed that state governments would more powerfully influence the people than the national

58. *Id.*

59. *Id.* (“It has been urged and echoed, that the 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,’ amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction. Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms ‘to raise money for the general welfare.’”).

60. THE FEDERALIST No. 33, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 190–91.

65. *Id.*

66. *Id.* at 191 (“Revenue is as requisite to the purposes of the local administrations as to those of the Union . . . . It is, therefore, as necessary that the State governments should be able to command the means of supplying their wants, as that the national government should possess the like faculty in respect to the wants of the Union. But an indefinite power of taxation in the *latter* might, and probably would in time, deprive the *former* of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature.”).

government, and that it would remain up to the people to police the dialogue between the states and national government with respect to taxes.<sup>67</sup> Therefore, Hamilton suggested that taxation might indeed be an “indefinite power” but that it would be grounded in a constitutional equilibrium between the states and national government, which would be policed by the people.<sup>68</sup> After ratification, in Hamilton’s often-cited *Report on the Manufactures in 1791*, he argued that the “general welfare” language provided a plenary power.<sup>69</sup> While Hamilton articulated a near-limitless Taxing Power, he appeared to believe that it paralleled “legislative power” in its vastness, implying that both the Commerce Clause and Taxing Power should be equally broad.

## 2. Early Legislation and the Bank of the United States

The ratification and post-ratification debates, however, might not be as persuasive as legislative conduct during the Nation’s early years. We can consider Madison and Hamilton’s views within the context of debates surrounding early U.S. legislation, particularly the First Congress, which was concerned with the scope of the Taxing Power. As documented by David Currie in *Constitution in Congress*, the House debated protective tariffs in April 1789, whose stated goals were to protect and encourage production within the United States.<sup>70</sup> Currie notes that, while there were many objections to the tariff suggestions, no one denied the constitutionality of Congress using tariffs to stimulate domestic production.<sup>71</sup> Congressman Thomas Fitzsimons of Pennsylvania, according to Currie, suggested that purpose and effect, not form, could make a measure count as a regulation rather than a tax in this context.<sup>72</sup> The First Congress also adopted a duty system where foreign-built and foreign-owned ships paid a greater duty than American-built and American-owned ships per ton, and the members who debated the measures found it acceptable to use taxes for goals unrelated to revenue generation.<sup>73</sup>

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67. *Id.* at 193 (“But it is evident, that all conjectures of this kind, must be extremely vague and fallible . . . . Every thing beyond this, must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped, will always take care to preserve the constitutional equilibrium between the general and the state governments. Upon this ground, which is evidently the true one, it will not be difficult to obviate the objections which have been made to an indefinite power of taxation in the United States.”).

68. *Id.*

69. ALEXANDER HAMILTON, REPORT ON MANUFACTURES (Dec. 5, 1791), available at [http://press-pubs.uchicago.edu/founders/documents/al\\_8\\_1s21.html](http://press-pubs.uchicago.edu/founders/documents/al_8_1s21.html) (“These three qualifications excepted [uniformity, limits on capitations, no state export taxes], the power to raise money is plenary, and indefinite; and the objects to which it may be appropriated are no less comprehensive, than the payment of the public debts and the providing for the common defen[s]e and ‘general Welfare.’”) (bracketed comments added).

70. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 56–57 (1997).

71. *Id.* at 57.

72. *Id.*

73. *Id.* at 58–59.

Currie explains that it was less threatening to the States to find an essentially unlimited tax power, which might be used for “ulterior ends,” than to find Commerce Clause justifications for duties designed to promote production at the time of debate.<sup>74</sup> Further, in pursuing high taxes to discourage consumption of alcohol and tobacco, products that elicited disappointment, Congress, according to Currie, seemed to believe that taxes could be levied even if they had no revenue purpose.<sup>75</sup> These examples, according to Currie, do not prove that legislators believed they could use taxation to subvert direct regulation, but show that “the First Congress took a broad view of the purposes for which it could regulate commerce; and those who would later argue that the tax power could be exercised only for revenue purposes would have a good deal of explaining to do.”<sup>76</sup>

The debate surrounding the constitutional authority for the Bank of the United States raises questions about the scope of the Taxing Power as well. In December of 1791, Hamilton produced a report that urged Congress to create a national bank.<sup>77</sup> As Currie notes, Fisher Ames in the House championed Hamilton’s cause for the national bank, arguing that the power to create a bank was implicit in the power to regulate commerce.<sup>78</sup> He also noted that the power was implicit in the various war powers because a bank would facilitate raising money.<sup>79</sup> Finally, Ames also argued that the Necessary and Proper Clause provided congressional authority to do whatever necessary to accomplish goals incident to the Commerce Power.<sup>80</sup>

Madison, however, strongly opposed the bill, arguing that it was not supported by the Taxing Power or the power to borrow and that the General Welfare Clause was not an independent grant of power but a limitation on the purposes of collecting a tax.<sup>81</sup> Madison felt that measures such as a bank that were merely related to the exercise of some express authority would not pass constitutional muster, and that a national bank was not necessary.<sup>82</sup> In a February 2, 1791, speech in the U.S. House of Representatives, Madison argued that the Bank would give Congress unlimited power, infringing on authority reserved to the states.<sup>83</sup> In the same speech, Madison argued that the

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74. *Id.*

75. *Id.* at 59.

76. *Id.* at 60.

77. *Id.* at 78.

78. *Id.* at 79.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 79–80.

83. JAMES MADISON, *Speech in the U.S. House of Representatives (February 2, 1791)*, in LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY 38 (Jefferson Powell ed., 1991) (“To understand these terms in any sense that would justify the power in question, would give to Congress an unlimited power; would render nugatory the enumeration of particular powers; would supersede all the powers reserved to the State Governments.”).

“essential characteristic” of the government was one of limited and enumerated powers, which would be undermined by the Bank Bill. To create a bank would mean Congress may do “any thing whatever creative of like means.”<sup>84</sup>

Thomas Jefferson, in a February 15, 1791, opinion requested by George Washington on the matter, broadly supported Madison’s position on the Bank. Jefferson explained that the congressional authority assumed in the bill had not been delegated to the United States by the Constitution, as it was not among the specifically enumerated powers—to lay taxes, to pay debts, to borrow money, or to regulate commerce.<sup>85</sup> As to whether the bill fit within the scope of the Commerce Clause, Jefferson explained that “[t]o erect a bank and to regulate commerce are very different acts. He who erects a bank creates a subject of commerce in its bills . . . . To make a thing which may be bought and sold is not to prescribe regulations for buying and selling.”<sup>86</sup> Jefferson’s opinion also revealed his analysis of the General Welfare Clause, which is consistent with a traditional Madisonian reading.<sup>87</sup> Jefferson explained that to provide a “distinct and independent power” would render the previous enumerations “completely useless” and create a “Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please.”<sup>88</sup> Jefferson, focusing on the language of the Necessary and Proper Clause, argued that, even if a bank facilitated collecting taxes, the Constitution “allows only the means which are ‘necessary’ not those which are merely ‘convenient’ for effecting enumerated powers.”<sup>89</sup>

Alexander Hamilton, in contrast to Madison and Jefferson, strongly supported the constitutionality of the Bank. Hamilton explained that the general authority to “erect corporations,” like the Bank, is “*inherent* in the very *definition* of *Government*” and “*essential*” to the progress of the United States.<sup>90</sup> Next, Hamilton attempted to debunk limitations on the “necessary” aspect of the Necessary and Proper Power, arguing that *necessary* “often means no more than *needful, requisite, incidental, useful, or conducive to,*” and that the “whole turn of the clause containing it, indicates, that it was the intent of the convention, by that clause to give a liberal latitude to the exercise of the

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84. *Id.*

85. THOMAS JEFFERSON, *Opinion on the Constitutionality of the Bill for Establishing a National Bank (February 15, 1791)*, in LANGUAGES OF POWER, *supra* note 83, at 42.

86. *Id.*

87. *Id.* (“For the laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. They are not to lay taxes *ad libitum* [at pleasure] *for any purpose they please but only to pay the debts or provide for the welfare of the Union.*”).

88. *Id.*

89. *Id.*

90. ALEXANDER HAMILTON, *Opinion on the Constitutionality of an Act to Establish a Bank (February 23, 1791)*, in LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY 44 (Jefferson Powell ed., 1991).



specified powers.”<sup>91</sup> Hamilton argued that the power of the Bank was grounded in finances and the general interest in trade.<sup>92</sup> In sum, Hamilton perceived a broader authority for the Bank, “arising from an aggregate view of the constitution,” based on the “general power” of laying and collecting taxes, coining money, and rules respecting property, which, when combined, “vest in congress all the powers requisite to the effectual administration of the finances of the United States.”<sup>93</sup>

In practice, however, the Court has resolved this dispute between Hamilton and Madison over the scope of the Taxing Clause, in more muddled ways. In *United States v. Butler*, the Court tackled this tension, explaining that since the Founding, there has been significant disagreement about the meaning of the phrase.<sup>94</sup> Madison, the *Butler* Court explained, found that the scope of the “general Welfare” was only a reference to the powers enumerated in the same section, and that taxing and spending must be confined to these enumerated powers.<sup>95</sup> Hamilton, in contrast, asserted that the Taxing Power was separate from the enumerated ones, not restricted by it, and that Congress is limited in its power to tax only by the requirement that it provide for the general welfare of the Nation.<sup>96</sup> Drawing from the commentaries of Justice Story, the Court explicitly stated that Hamilton’s reading was the correct one.<sup>97</sup> Subsequently, the *Butler* Court stated that while the power to tax is not unlimited, “its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the legislative powers of the Congress.”<sup>98</sup>

Despite explicitly endorsing Hamilton’s views, the *Butler* Court ultimately applied a Madisonian reading to the facts, as David Engdahl has pointed out.<sup>99</sup> *Butler* struck down the Agricultural Adjustment Act for invading “the reserved rights of the states” because agriculture was beyond the powers delegated to the federal government.<sup>100</sup> This reasoning, understandably, seems inconsistent with a Hamiltonian view, which should reject the limits of enumerated powers on the Taxing Power. Instead, based on a Hamiltonian reading, reserved rights of the states should play no role in striking down a tax,

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91. *Id.* at 46.

92. *Id.* at 48–49 (“Whatever relates to the general order of the finances, to the general interests of trade & being general objects are constitutional ones for *the application of money*.”).

93. *Id.*

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

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See Engdahl, *supra* note 9, at 36–37. Engdahl has rightly argued that “Justice Roberts, writing for the Court, proceeded to demonstrate that he simply did not understand what he—or Hamilton—had said. . . . The rule of decision in *Butler*, in other words, is precisely Madison’s view, applied notwithstanding the Court’s simultaneous nominal endorsement of Hamilton’s view. The majority’s seeming obliviousness to this flagrant self-contradiction makes its opinion in *Butler* one of the few truly ridiculous opinions delivered in two centuries of Supreme Court jurisprudence.” *Id.*

100. *Butler*, 297 U.S. at 68.

and the Taxing Power should be limited only to what furthers the general welfare, a position the Court endorsed a few pages prior. While *Butler*'s logic seems severely flawed, this reading appears to be good law, even though the decision came down before the reversal of New Deal Supreme Court cases related to congressional power. Indeed, four justices dissenting in *Sebelius* forcefully supported *Butler*, even noting that the case had resolved the debate between Madison and Hamilton in favor of Hamilton.<sup>101</sup>

### C. Relevant Case Law

*Sebelius* comes within the backdrop of an unsatisfying dearth of case law on the limits of the Taxing Power, especially in ways where it tracks and intersects with the Commerce Clause. These cases are informed by these core debates—whether attributed to Hamilton, Madison, or someone else—about the scope of the Taxing Power. The cases in this Section fall into two categories: pre-*Steward Machine Co. v. Davis*<sup>102</sup> and post-*Steward Machine Co.* After a close analysis of these cases, two key themes emerge. Prior to 1937, the Court was concerned with the subject matter that Congress could target with the Taxing and Spending Clause, cautious of attempts to undermine the Tenth Amendment. Afterwards, the Court appears more concerned with a Taxing and Spending Power that moves from inducement to coercion, though the Court has refrained from offering clear lines.

*Bailey v. Drexel Furniture Co.* and *United States v. Butler* reveal an early Court that was concerned with certain subject matter traditionally reserved for the states and off-limits to the Taxing and Spending Clause.<sup>103</sup> In *Drexel Furniture Co.*, as mentioned previously, the Court struck down a tax on companies that employed children, finding that it was intended to regulate, not tax under the Taxing Power.<sup>104</sup> At question was the Child Labor Tax Law, which generally taxed profits of companies that used child labor, at 10 percent.<sup>105</sup> The Court found that if it were to uphold this tax, Congress could in the future simply enact detailed regulation but enforce it with a “so-called tax,” usurping jurisdiction reserved to the states by the Tenth Amendment.<sup>106</sup> *Drexel Furniture* was particularly concerned about the “motive” and “character” of legislation in question, explaining that “there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us.”<sup>107</sup> As mentioned previously,

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101. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2657–58 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

102. 301 U.S. 548 (1937).

103. See generally *Butler*, 297 U.S. 1; *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

104. *Drexel Furniture*, 259 U.S. at 39.

105. *Id.* at 35–36.

106. *Id.* at 38.

107. *Id.*

the Court in *Drexel Furniture* found that the power over interstate commerce when “within its proper scope” is “just as complete and unlimited” as the power to tax.<sup>108</sup> But in *Drexel Furniture*, the Court characterized the child labor tax as a “penalty” to “coerce” people of a state to act as Congress wanted “in respect of a matter completely the business of the state government under the Federal Constitution.”<sup>109</sup>

Like *Drexel Furniture*, *Butler* overturned a federal law that encroached on subject matter that was reserved to the states—agriculture. The Agricultural Adjustment Act taxed farm processors and then provided federal payments to farmers if they agreed to reduce acreage under production.<sup>110</sup> The Court struck down the law as invading “the reserved rights of the states” because it sought to “regulate and control agricultural production, a matter beyond the powers delegated to the federal government.”<sup>111</sup> Focusing on the doctrine that the United States is a government of delegated powers, and the adoption of the Tenth Amendment, the Court stated that “powers not granted are prohibited” and that no power to regulate agricultural production was given.<sup>112</sup>

All of this changed the following year. The Court in *Steward Machine Co.*<sup>113</sup> abruptly shifted course from earlier jurisprudence, focusing on a distinction between unlawful power and inducement, but the case is unsatisfying because it fails to address many questions about the boundaries of the Taxing Power. In *Steward Machine Co.*, the Court upheld a federal scheme that incentivized states to create an unemployment program by taxing all employers and then returning revenue to those states that had unemployment schemes.<sup>114</sup> When the Court addressed *Butler*, it narrowly distinguished the

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108. *Id.* at 39–40.

109. *Id.*

110. *United States v. Butler*, 297 U.S. 1, 53–54 (1936).

111. *Id.* at 68.

112. *Id.*

113. *See Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *see also Helvering v. Davis*, 301 U.S. 619, 640 (1937) (“Congress may spend money in aid of the ‘general welfare.’ There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”) (citations omitted); *Sonzinsky v. United States*, 300 U.S. 506, 513–14 (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. . . . Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.”) (citations omitted).

114. *Steward Mach. Co.*, 301 U.S. at 590–93.

employment tax from the agricultural tax at issue in *Butler* on technical grounds: (1) there was not an earmark for a special group, (2) the states had agreed to comply with the law in question, and (3) there was no irrevocable agreement in question.<sup>115</sup> As for its treatment of *Drexel Furniture*, the Court in *Steward Machine Co.* maintained generalities, stating that it “leave[s] many questions open” and that Congress presently does not intrude upon “fields foreign to its function.”<sup>116</sup> The “purpose” of this congressional action was “to safeguard its own treasury” and, “incident to that,” to put states on a “footing of equal opportunity.”<sup>117</sup> As in previous cases, the Court was concerned with the subject matter the tax targeted, finding that it would be problematic to stimulate or discourage conduct that is unrelated to the fiscal needs of the tax, or to “any other end legitimately national.”<sup>118</sup> In this situation, according to the Court, “inducement or persuasion does not go beyond the bounds of power.”<sup>119</sup> While the Court declined to “fix the outermost line,” it explained for “present purposes that wherever the line may be, this statute is within it.”<sup>120</sup>

A final modern case that is worth considering is *South Dakota v. Dole*, where the Court upheld the constitutionality of a federal statute that conditioned federal highway funds on states’ adoption of a minimum drinking age of twenty-one.<sup>121</sup> While this case primarily dealt with a spending issue, it illuminates principles that relate to the scope of the Taxing Power as well. The Court characterized congressional action as operating “indirectly” under its Spending Power to induce uniformity in drinking ages across the states.<sup>122</sup> The Court found it particularly relevant that Congress acted indirectly via the Spending Power even though Congress could not constitutionally regulate drinking ages directly.<sup>123</sup> Drawing from *Butler*, the Court reiterated that congressional moves to authorize spending are not limited by the “direct grants of legislative power found in the Constitution.”<sup>124</sup> Therefore, the Court determined that Congress could still use the Spending Power and conditional grants of federal funding to obtain objectives that are “not thought to be within” Article I’s “enumerated legislative fields.”<sup>125</sup>

While the Court in *Dole* found that the Spending Power has certain limits, it did not provide much concrete guidance about where these limits might reside. The Court provided four limitations on this power that were derived

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115. *Id.* at 592–93.

116. *Id.* at 590.

117. *Id.* at 590–91.

118. *Id.*

119. *Id.*

120. *Id.*

121. 483 U.S. 203, 205 (1987).

122. *Id.* at 206.

123. *Id.*

124. *Id.* (quoting *United States v. Butler*, 297 U.S. 1, 66 (1936)).

125. *Id.* at 207.

from its case law: (1) spending must be in pursuit of “the general welfare,” (2) conditional spending must be done unambiguously so states can knowingly exercise their choice, (3) conditions on federal grants might be illegitimate if unrelated to the federal interest in national projects, and (4) other constitutional provisions might independently bar conditional spending.<sup>126</sup> Beyond these limitations, the Court, as it did in *Steward Machine Co.*, reiterated that at some point a financial inducement becomes too coercive. The *Dole* legislation, however, did not reach that point.<sup>127</sup> While the Court was not particularly precise about why this inducement was mild, the Court’s loose language suggests something particular about this scheme that saved it: that this is about the minimum drinking age, about losing a “relatively small percentage” (5 percent) of “certain” federal highway funds, and that a conditional grant of “this sort” is not unconstitutional.<sup>128</sup> This raises many questions; for example, would a greater percentage of highway funds, perhaps conditioned on something of more gravity than drinking age, mean the Court would be less inclined to uphold the law? Instead, the *Dole* Court characterized this move by Congress as a “relatively mild encouragement” to the states.<sup>129</sup>

## II.

### JUDICIAL REVIEW AND FEDERALISM: SHOULD THE COURT DECIDE?

The role of the Court on matters of federalism—whether pursued through direct regulation and the Commerce Clause, taxation, or spending—has been the subject of much scholarly debate. Should the judiciary, rather than another political branch, be the one to decide these issues? Does the Court, rather than Congress, have the institutional expertise to evaluate questions that implicate federalism? Are there perhaps better mechanisms than judicial review to address the balance of power between the federal government and the states? This Section will evaluate these questions, discussing the prominent political safeguards thesis, associated with Herbert Wechsler and Jesse Choper. While the Wechsler-Choper theory is compelling as a matter of constitutional interpretation, critics of the theory rightfully argue that it is not rooted in the text, structure, or history of the Constitution.

#### *A. The Political Safeguards Thesis*

In his seminal 1954 piece, *The Political Safeguards of Federalism*, Herbert Wechsler explained that because the national political process protects state interests through multiple mechanisms, intervention in state matters is

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126. *Id.* at 207–08.

127. *Id.* at 211.

128. *Id.*

129. *Id.* at 211–12.

“primarily” for Congress, not the Supreme Court.<sup>130</sup> More specifically, Wechsler claimed “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.”<sup>131</sup> Instead, Wechsler explained, the Court should only make “decisive judgment[s]” when Congress has not spoken on an issue.<sup>132</sup>

Institutional desirability aside, Wechsler provided little legal or constitutional support for his proposal. Wechsler rested the support of his analysis on broad, non-specific structural aspects of the Constitution, explaining that the clauses of the Constitution that foster federalism “have served far more to qualify or stop intrusive legislative measures in the Congress than to invalidate enacted legislation in the Supreme Court.”<sup>133</sup> Wechsler focused on the structural mechanisms of the Constitution that give tremendous power to the states, focusing on three pathways for federalism provided by the Constitution: (1) preserving states as separate sources of administration and authority, (2) providing states with a significant role in selecting the composition of the federal government, and (3) distributing scope to legal processes and enforcement between the Nation and states.<sup>134</sup>

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130. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

131. *Id.* at 559.

132. *Id.* at 560.

133. *Id.* at 558. While Wechsler makes passing reference to the “expectation of the Framers,” he provided minimal support for this proposition, only relying on an 1830 letter from James Madison to Edward Everett. *See id.*

134. *Id.* at 543.

Wechsler found that the national political process, through the Senate, House, and Executive, adequately protected state interests. *See id.* at 548. Wechsler pointed to the composition of the Senate, which requires protecting state interests, as well as a process of coalition-building and other more subtle procedural safeguards. *Id.*

Similarly, Wechsler explains that the House is “slanted somewhat” toward the states but less so than the Senate, through the indirect mechanisms of controlling voter qualifications and districting. *Id.* This argument feels dated when read today because of changes to voter laws since 1954, especially the federal oversight associated with voting after the Voting Rights Act of 1965, notwithstanding the ways in which that statute has been narrowed after *Shelby County, Alabama v. Holder*. *See* 133 S. Ct. 2612 (2013). Wechsler’s argument on the states controlling districting, however, is still compelling even if not entirely convincing. As Wechsler notes, the states control districting, which can have a significant impact on representatives. *Id.* at 550. He notes that one might be skeptical that this is a pathway to promote and preserve federalism values, but because districting has led to the loss of urban power for more rural or smaller towns, and these groups are “[t]raditionally, at least,” more resistant to federal intrusion, state control of redistricting promotes federalism values. *Id.* at 551–52.

Finally, Wechsler looks to states’ control of the Electoral College, and therefore, on the selection of the president, focusing on the fact that electors are appointed by state legislatures. *Id.* at 551. This feels like a dated argument because of the increasingly national nature of presidential elections and the fact that electors often just adopt a winner-take-all approach based on which candidate wins the popular vote in a state.

Jesse Choper has built upon Wechsler's thesis and more explicitly applied it to the Supreme Court and judicial review. In his highly influential 1980 book, *Judicial Review and the National Political Process*, Choper argues that the Court must exercise judicial review only when the political process cannot adequately resolve a constitutional issue, such as with individual rights. The Court, however, must refrain from judicial review where interests are well-represented in the political process, as they are with federalism.<sup>135</sup> Like Wechsler, Choper posited that several structural aspects of the political process protect state interests.<sup>136</sup>

This is not purely an intellectual or academic exercise. Choper's theory was explicitly adopted by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* when it held that the Commerce Clause allowed Congress to apply labor restrictions to state government employees.<sup>137</sup>

### B. Criticism: Judicial Review and Federalism

#### 1. Normative Arguments for Judicial Review

The strength of the Wechsler-Choper thesis notwithstanding, critics have made compelling normative arguments that the judiciary, not the political process, is best positioned to review federalism issues. Steven Calabresi has rebutted the Choper-Wechsler premise, attacking the claim that the Court's capacity to intervene in Commerce Clause cases is less robust than in individual rights cases.<sup>138</sup> Calabresi makes a normative case for federalism, arguing that it is more important to liberty than other structural aspects of the Constitution, including the Bill of Rights.<sup>139</sup> Calabresi especially succeeds in

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135. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 1–3 (1980).

136. The Senate represents states explicitly, and the House does so implicitly through districting, bargaining, and the fact that each state has at least one representative. *Id.* at 176–77. States also control certain electoral requirements, though Choper acknowledged some limitations on the power. *Id.* at 178. Senators and representatives have often previously served as state legislators, and the Electoral College places limits on the presidency. *Id.* at 179. Choper also identifies the role of advocacy groups and political parties. *Id.* at 180.

137. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985). As the Court made radical shifts in its Commerce Clause doctrine with cases like *United States v. Lopez* and *United States v. Morrison*, there has been renewed interest in the institutional role of the Court to review Commerce Clause issues and more generally weigh in on questions of federalism.

138. Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 753 (1995).

139. *Id.* at 756. Calabresi presents a number of normative arguments advocating the importance of the states, a federal government, and a joint integrated structure. States are responsive to local tastes, provide competition among jurisdictions, are laboratories of experimentation, and prevent attempts to benefit one region at the expense of others. *Id.* at 774–79. He argues that decentralization and the other advantages of states demonstrate that states should control certain educational, community, domestic law, and law enforcement matters. *Id.* at 787. Likewise, he argues, efficiency and economies of scale favor national control over things like defense, foreign policy, free trade, and certain environmental issues. *Id.* at 787.

criticizing the Wechsler-Choper thesis in identifying its shortcomings by describing modern political realities.<sup>140</sup> He challenges the idea that the Court is not capable of handling Commerce Clause cases because it routinely protects federalism interests in many non-controversial ways—for example, in diversity jurisdiction or conflicts-of-law cases.<sup>141</sup>

## 2. Text, Structure, and History Support Judicial Review of Federalism

Besides the normative case for judicial review of federalism questions, the Constitution’s text, history, and structure strongly support a role for the judiciary. As John Yoo argues, the Framers believed the political process would work alongside judicial review to maintain a balance between national and state interests.<sup>142</sup> Choper’s theory was a functional, albeit ahistorical approach, focusing on the belief that the theory worked in practice; it was not rooted in an interpretation of the text, its history, or structure.<sup>143</sup> The Constitution reflected Madison’s “compound republic,” which respected state sovereignty while vesting Congress with powers not found in the Articles of Confederation.<sup>144</sup> The Framers sought a balance of power between the national government and the states through various structural aspects of the Constitution like the Supremacy Clause or the “Great Compromise” resulting in a Senate that represented state interests.<sup>145</sup> The Constitution understood the political branches to protect federalism, but judicial review was also to play a prominent protective role.<sup>146</sup> Therefore, history suggests that the Framers, while

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140. Many of these points are quickly apparent to a modern reader who follows *Politico* regularly, but Calabresi provides a more systematic critique. Rural districts and state legislatures have less power and less control over redistricting. *Id.* at 792. Presidential elections are less state-centered and more national, based on the ubiquity of television, and the substitution of primaries for state caucuses. *Id.* at 792–93. The financing scheme for national political campaigns requires that a candidate spend a tremendous amount of time raising money, and national political action committees do not care about federalism. *Id.* at 795. Congressmen, rather than being concerned with federalism issues, may want to increase national power to increase the “pork” the national government returns to the states. *Id.* at 795–96. According to Calabresi, these handouts are further opportunities to fundraise and campaign for reelection.

141. *Id.* at 801. Judicial enforcement of the Commerce Clause prior to 1937 notwithstanding, Calabresi argues that the “line-drawing and fact-finding problems” in the federalism context are no different than those surrounding the impermissible endorsement of religion or the right to privacy. *Id.* at 804. Similarly, in the dormant clause context, Calabresi notes that the Court has no trouble striking down state laws with negative externalities against other states, and without any controversy, does so. *Id.* at 805.

142. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1313. (1997); see also Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003). *But see, e.g.*, Larry D. Kramer, *Forward: We the Court*, 115 HARV. L. REV. 5, 16 (2001).

143. Yoo, *supra* note 142, at 1320–21.

144. *Id.* at 1366–67.

145. *Id.* at 1368–72.

146. *Id.* at 1381. The Anti-Federalists, concerned with the tyranny of an all-powerful federal government, prodded the Federalists to articulate a theory of judicial review. Therefore, for example, James Wilson articulated a theory of the judiciary as holding the legislature accountable for



acknowledging the role of the political process, thought that the judiciary would also play a prominent role in safeguarding federalism.

*C. Ebbs and Flows of the Political Safeguard Theory*

Among scholars and Supreme Court Justices alike, the popularity of the political safeguards theory has ebbed and flowed in recent years. Scholars, for example, have debated the specifics of how particular aspects of the political process may be more or less likely to facilitate the safeguards thesis.<sup>147</sup> Nonetheless, the contours of the debate remain mostly the same, centering on (1) the normative value of federalism and (2) the support for the thesis in the constitutional history, text, and structure. Ultimately, however, constitutional interpretation supports the idea that judicial review must play a role, along with the political process, in preserving federalism.

III.

CONDITIONAL SPENDING, TAXING POWER, AND OTHER SCHOLARLY  
LITERATURE

With a few notable exceptions, there has been limited scholarship specifically on the role of the Taxing Power and its overlap with the Commerce Clause. However, there is a great deal of work on conditional spending and the Commerce Clause, and some work on the relationship between taxation and spending. Recent scholarship that tackles certain intersections of the Commerce Clause and Taxing Power is particularly relevant, and I will draw from this work for my proposed doctrinal test. The differences between these various categories of congressional action—direct regulation, taxation, and spending—matter because the Court has provided different scopes of authority for each of them. They are also important because some congressional conduct may be more likely to infringe on state sovereignty by directly targeting citizens as opposed to using states as intermediaries.

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encroachments before the Pennsylvania ratification convention. *Id.* at 1384. Similarly, in *Federalist No. 44*, James Madison argued that the federal judiciary, along with the President, would check congressional encroachments into state sovereignty. *Id.* at 1385. Other examples abound of the dialogue between Anti-Federalists and Federalists on this point. Future Chief Justice John Marshall, for example, explained in the Virginia ratifying convention that judges would declare void congressional overstepping, in regards to general legislation passed throughout the country. *Id.* at 1387.

147. See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (arguing in part that while the Founders did not anticipate political parties, these parties would preserve state sovereignty by connecting state and federal officials). *But see* Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

*A. Spending and the Commerce Clause*

Because few works examine the relationship between the Taxing Power and the Commerce Clause, I will rely closely on work that evaluates how Congress uses its Spending Power to bypass the Commerce Clause—notwithstanding the differences between the Spending and Taxing Powers, which I will explore below. Lynn A. Baker, writing against the backdrop of *United States v. Lopez*, where the Supreme Court struck down the Gun-Free School Zones Act, noted that just three days after the ruling, President Clinton proclaimed that he would ban guns from school zones by tying federal funds to the enactment of bans on guns in school zones.<sup>148</sup> In some ways, this example is reminiscent of Congress circumventing the Court’s rulings in *Hammer v. Dagenhart* and then *Bailey v. Drexel Furniture*, where it tried to use a tax to get around the foreclosure of direct regulation, or similar to *Sebelius* simultaneously upholding the individual mandate under the Taxing Power while rejecting it under the Commerce Clause. Baker argued that the “the *Lopez* majority should reinterpret the Spending Clause to work in tandem, rather than at odds, with its reading of the Commerce Clause.”<sup>149</sup> She noted that any appropriate standard must protect state autonomy and a federal government of enumerated powers—by preventing Congress from using conditional offers in ways that it could not directly mandate—but that such a standard must allow spending for reimbursement rather than regulatory legislation.<sup>150</sup>

Baker offered three arguments for why the Court should presume invalid conditional funds that allow Congress to regulate in ways it could not otherwise do via direct mandate. First, she argued that the federal government has “monopoly power” over various avenues of state revenue, which renders such power presumptively coercive.<sup>151</sup> Next, she argued that conditional funding schemes are often effective only when oriented at a small minority of states that cannot protect themselves in the political process from an oppressive majority.<sup>152</sup> Finally, she argued that conditional spending is likely to reduce aggregate social welfare, by limiting diversity among states in the services and rights they offer to residents and potential residents.<sup>153</sup>

Baker offered a two-part test to assess the validity of conditional federal spending. First, the condition of funds to regulate a subject that Congress cannot directly mandate is presumed invalid. Next, that presumption is rebutted after determining that the funds constitute “reimbursement spending” rather

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148. Baker, *supra* note 9, at 1913.

149. *Id.* at 1916.

150. *Id.*

151. *Id.* at 1935–37.

152. *Id.* at 1939–47.

153. *Id.* at 1947–54.

than “regulatory spending.”<sup>154</sup> “Reimbursement spending,” according to Baker, means legislation that explains what states must spend federal funds on, serving to reimburse them for their expenditures for that purpose.<sup>155</sup> To evaluate whether something is “regulatory spending” as opposed to “reimbursement spending,” she proposes a “germane” test.<sup>156</sup> A reimbursement spending law must provide the purpose for which the funds are to be spent and the amount offered cannot exceed the amount necessary to reimburse the state.<sup>157</sup>

## B. Taxes

### 1. Taxing Versus Spending

While conditional spending shares much in common with taxes, the two types of congressional action diverge in some ways. Noting the scholarly attention given to conditional spending and federalism, Ruth Mason argued that because Congress can use taxes to regulate areas “traditionally or constitutionally” reserved to the states, taxes can raise the same kinds of federalism issues raised by conditional spending.<sup>158</sup> Mason explained that, because commentators have focused on the federalism concerns of conditional spending, they should have the same concerns about the Taxing Power.<sup>159</sup> The federal government can use the Taxing Power for regulatory influence beyond the enumerated powers, preventing states from competing with each other as laboratories.<sup>160</sup>

The key difference between the Spending and Taxing Powers is whether the State must serve as an intermediary to federal influence, something like direct, as opposed to indirect, regulation. Mason distinguished the Taxing Power from the Spending Power on the issue of federalism in five ways: (1) tax incentives, as opposed to federal conditional spending, target private taxpayers rather than states;<sup>161</sup> (2) conditional grants generally require state involvement in adopting legislation whereas states are not responsible for enforcing federal tax initiatives;<sup>162</sup> (3) conditional spending “harnesses the entire state regulatory apparatus,” which includes courts and agencies, while taxes narrowly tend to focus on private taxpayers;<sup>163</sup> (4) federal tax incentives are limited to those who have income tax liabilities;<sup>164</sup> and (5) there are different political safeguards for

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154. *Id.* at 1962–63.

155. *Id.* at 1963.

156. *Id.* at 1966.

157. *Id.* at 1967.

158. Mason, *supra* note 9, at 977.

159. *Id.*

160. *Id.* at 993–94.

161. *Id.* at 1008–09.

162. *Id.* at 1010–12.

163. *Id.* at 1014–16.

164. *Id.* at 1015–16.

spending as opposed to taxing.<sup>165</sup> Despite these differences, Mason ultimately concluded that the Court should treat the Spending and Taxing Powers equally broadly.<sup>166</sup>

### 2. *The Limits on the Taxing Power*

When we bridge the gap between the conditional spending and taxing literature as Mason has done, the natural question is, where do we draw the limits on the Taxing Power? Previously, the Court distinguished between direct and indirect taxes, and revenue raising and regulatory taxes, to determine their constitutionality. But these historical distinctions are no longer good law.<sup>167</sup> Similarly, the Tenth Amendment generally does not serve as a specific check on either the Tax or Spending Powers, as both are generally considered “plenary,” notwithstanding less relevant limitations related to uniformity, apportionment with direct taxes, and refraining from taxing state exports.<sup>168</sup>

Nonetheless, two primary themes emerge from an analysis of the Court’s jurisprudence: the Court was cautious of undermining the Tenth Amendment and was concerned about taxes that move from mere inducement to coercion, even though the Court has refrained from offering clear boundaries.<sup>169</sup>

### 3. *Penalties*

Because the Commerce Clause only allows regulation of interstate commerce, but the Taxing Clause allows Congress to tax any kind of conduct, a central question is what is a tax as opposed to direct regulation that constitutes a penalty under the Commerce Clause. Robert D. Cooter and Neil S. Siegel provide a compelling “effects theory” for distinguishing between a tax and a penalty.<sup>170</sup> Cooter and Siegel provide a spectrum for their theory, focusing on three classes of conduct, “pure penalty,” “pure tax,” and “exaction.”<sup>171</sup> A pure penalty “condemns” conduct with a high cost and raises little revenue.<sup>172</sup> By contrast, a pure tax permits the targeted conduct, exacts a low cost, and generates revenue.<sup>173</sup> The authors distinguished pure taxes and penalties primarily on two criteria: coercion, which is key to a penalty, and revenue-

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165. *Id.* at 1016–17.

166. *Id.*

167. *See generally* CHEMERINSKY, *supra* note 44, § 3.4.2; JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 5.6(a) (8th ed. 2010).

168. NOWAK & ROTUNDA, *supra* note 167, § 5.2.

169. *See supra* Part I.C.

170. Cooter & Siegel, *supra* note 9, at 1198.

171. *Id.* at 1223–24.

172. *Id.*

173. *Id.*

raising potential, which is key to a tax.<sup>174</sup> They identified a third category, the mixed exaction, which has mixed characteristics from both a tax and penalty.<sup>175</sup>

Cooter and Siegel argue that their analysis is grounded, in part, in American history, as taxes have been used to raise revenue and to also discourage certain behavior throughout the Nation's history.<sup>176</sup> In terms of Supreme Court doctrine, the authors found three trends in the jurisprudence to differentiate taxes from penalties. First, the difference between a tax and a penalty has often turned on the role of coercion, with taxes being less coercive than penalties.<sup>177</sup> One can imagine, for example, that a tax can be a more circuitous way to modify behavior than direct regulation, especially for individuals that are not sophisticated actors like corporations. Second, after 1937, Supreme Court decisions distinguishing taxes from penalties have not depended on whether the exaction raised revenue or affected behavior.<sup>178</sup> Finally, the decisions mostly support the principle that for tax law, substance matters more than form.<sup>179</sup>

For the final, mixed category of exactions, the authors advocate looking closely at their effects: whether they prevent conduct, and are therefore penalties, or whether they dampen conduct while raising revenue.<sup>180</sup> Importantly, like Justice Roberts in *Sebelius*, the authors argue that "materiality" for evaluating a mixed exaction is key; that is, it does not matter if Congress calls an exaction a regulation, penalty, or a tax. What matters is how the exaction functions.<sup>181</sup> Cooter and Siegel offer three criteria to evaluate the material characteristics of an exaction:

- (1) Is the amount of the exaction so high that it exceeds the expected benefit from engaging in the assessed conduct for almost everyone?
- (2) Does the exaction's amount depend on whether the assessed individual has a certain mental state, especially the intention to perform the assessed conduct?
- (3) Does the amount of the exaction increase with repetition of the assessed conduct?<sup>182</sup>

Under this theory, clear answers of "yes" to all of these questions indicate that an exaction is a penalty, clear answers of "no" mean that the exaction is a tax, and some combination of both may require further inquiry.<sup>183</sup>

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174. *Id.*

175. *Id.* at 1225.

176. *Id.* at 1206–10.

177. *Id.* at 1220.

178. *Id.*

179. *Id.*

180. *Id.* at 1226.

181. *Id.* at 1227–28.

182. *Id.* at 1230.

183. *Id.* at 1230–32.

## IV.

## FINDING A LIMIT ON THE TAXING POWER

Much of the academic literature on the intersection of the Commerce Clause and the Taxing Clause has been insightful, but the scholarship lacks a robust test for delineating the limits on the Taxing Power, especially as the Power converges on direct regulation. Baker illuminates the problems with a freewheeling Spending Power.<sup>184</sup> Mason argues that, like conditional spending, the Taxing Power should also be consistently applied with the Commerce Clause because it can be used to circumvent federalist principles.<sup>185</sup> Siegel and Cooter provide an especially powerful framework in their robust “effects test” for distinguishing between penalties and taxes. But this work does not provide a comprehensive test to resolve situations where a scheme may fail scrutiny under the Commerce Clause but survive under the Taxing Power, as occurred with the individual mandate in *Sebelius* or other situations where Congress may circumvent the Commerce Clause.

To address these limitations, I propose a two-part test to delineate the limits of the Taxing Power, drawing from the aforementioned scholarship, the Court’s case law, and foundational principles about the scope of this Power. The Court, not another political branch, should review federalism issues for both normative and constitutional reasons. For the sake of readability, I will call these schemes at question “exactions,” drawing from Cooter and Siegel’s paper, and I will clarify below when they become “taxes” as opposed to “penalties,” and vice versa.<sup>186</sup> Like Baker’s similar test, this two-part test presumptively finds exactions that are unlawful under the Commerce Clause also illegal under the Taxing Clause. However, like Baker, I believe this presumption can be rebutted, especially because taxes differ in key ways from direct regulation. To determine if this presumption can be rebutted, we must evaluate three criteria at the core of the exaction and its relationship to federalism: whether the exaction raises revenue, whether it is coercive, and whether the subject matter in question belongs to the states.

*A. Diverging from the Commerce Clause: Presumptively Unlawful*

The Court should presume that any exaction that cannot survive under the Commerce Clause is presumptively unlawful under the Taxing Clause. The Taxing Clause should track the ebbs and flows of congressional authority under the Commerce Clause. This point is similar to the one that Baker made with respect to conditional spending, and it is not materially different when applied to the Taxing Power. Similar concerns arise that majoritarian coalitions of

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184. Baker, *supra* note 9, at 1935–54.

185. Mason, *supra* note 9, at 977.

186. I agree with Cooter and Siegel that this is a question about materiality, not what labels Congress or others prescribe for certain conduct. See Cooter & Siegel, *supra* note 9, at 1220.

states could oppress minority states. And an expansive interpretation of the Taxing Power could reduce diversity among states—preventing them from functioning as “laboratories” for social policy because the taxes compel them to follow the will of the federal government.<sup>187</sup>

There may be reasonable debate about whether the Framers intended the enumerated powers to limit the Taxing Power, and whether the General Welfare Clause modified the Taxing Power (through restricting or promoting it).<sup>188</sup> But all the sources explored—Story, Madison, Hamilton at times, debates surrounding early federal legislation, and the *Butler* Court—placed some restrictions on the Taxing Power that were rooted in conceptions of how the federal government interacted with the states. Discussions regarding these limitations paralleled the debates surrounding congressional authority under other Article I, Section 8 powers, like those that authorized the Bank. Story recognized such limits when he said a federal tax must be limited to “specific objects” of “national character,” including paying public debts and providing for the common defense and general welfare.<sup>189</sup> Madison supported restrictions on the Taxing Power when he wrote in *Federalist No. 41* that the enumerated powers could serve no purpose if they could just be subsumed in a plenary Taxing Power.<sup>190</sup> There is no escaping Hamilton’s views that the Taxing Power was plenary, but even he, in *Federalist No. 33*, compared the Taxing Power to other types of legislative actions and other appropriate powers vested in Congress by the Constitution, like the Commerce Clause. Therefore, Hamilton would likely find that the Taxing Clause must broadly follow the fortunes of the Commerce Clause, even if he believed both should be vast powers.<sup>191</sup> The *Drexel Furniture* Court held that the power over interstate commerce when “within its proper scope” is “just as complete and unlimited” as the Taxing Power.<sup>192</sup> When the Court in *Butler* claimed to endorse Hamilton’s views but struck down the Agricultural Adjustment Act, it did so because the legislation invaded the right to agriculture, which is “reserved” to the states under the Tenth Amendment.<sup>193</sup> Even the *Steward Machine Co.* Court found that Congress did not intrude upon “fields foreign to its function,” suggesting that circumventing reasons that are “legitimately national” would be improper.<sup>194</sup> The Taxing Power, therefore, must have restrictions rooted in how the federal government interacts with the states, paralleling other congressional authority under Article I, Section 8.

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187. See Baker, *supra* note 9, at 1935–54, 1965 n.257.

188. See *supra* Part I.B.

189. See STORY, *supra* note 46, §§ 907–908.

190. See THE FEDERALIST No. 41, at 258–59 (James Madison) (Clinton Rossiter ed., 2003).

191. See THE FEDERALIST No. 33, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

192. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 39–40 (1922).

193. *United States v. Butler*, 297 U.S. 1, 68 (1936).

194. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590–91 (1937).

### *B. Rebutting the Presumption*

Even though we should presume that the Taxing Clause tracks the Commerce Clause, taxes and direct regulation are not the same policy tools, differ in key ways, and should be treated differently in limited contexts. The key difference is that taxes raise revenue, but as Cooter and Siegel have also noted, coercion as opposed to inducement, and the role of retributive punishment might also play a role in evaluating the distinction.<sup>195</sup> Taxes can regulate inactivity like a capitation and provide less granular control over individual behavior. And when we compare taxes with spending, we broadly see that taxes tend to more directly target individuals, while states serve as the intermediaries to federal regulation.<sup>196</sup> Other key distinctions include the fact that the IRS plays the role of the intermediary for taxing. For less sophisticated actors—regular individual tax-filers as opposed to corporations—the inducement aspects of a tax can be less discernable and more attenuated.

Given these differences between taxes and direct regulation, in what limited situations are we willing to allow a tax to rebut this presumptive unlawfulness? I propose we reevaluate this presumption based on (1) whether the exaction generates revenue, (2) whether it coerces or merely induces action, and (3) whether it encroaches on an area traditionally reserved to the states.

#### *1. Generating Revenue*

The Constitution grants the federal government the power to collect money in pursuit of the general welfare and common defense, and the Framers perceived this as an important power of the purse.<sup>197</sup> The Court's decisions in *Drexel Furniture* and *Butler* reflected a concern about allowing genuine revenue-generating goals while outlawing pure penalties. The challenging question, however, is determining where we draw the line between revenue-generating and punitive conduct. Cooter and Siegel were on point with their questions about differentiating between penalties and taxes on revenue-generating grounds.<sup>198</sup> The key consideration is whether the exaction exceeds the expected benefit from engaging in the assessed conduct for almost everyone (or perhaps on average). It may also be worth considering whether mental state plays a role, or whether the exaction increases with continued repetition, suggesting a punitive function.

The relevance of congressional intent, however, is a bit more complicated to ascertain. In *Drexel Furniture* and *Butler*, the Court considered the

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195. Cooter & Siegel, *supra* note 9, at 1230.

196. Mason, *supra* note 9, at 1008–17.

197. *See, e.g.*, THE FEDERALIST No. 31, at 190–91 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“As revenue is the essential engine by which the means of answering the national exigencies must be procured, the power of procuring that article in its full extent must necessarily be comprehended in that of providing for those exigencies.”).

198. *See generally* Cooter & Siegel, *supra* note 9, at 1230.



“character” and “motive” of the legislation in question.<sup>199</sup> It is unclear if this means a contextual reading of the legislation in question or diving into congressional intent, which can be a challenging methodological inquiry. When we think of some of the more nefarious examples of Congress circumventing the Commerce Clause, we can imagine that establishing congressional intent can bring us closer to preventing congressional overstepping of the Commerce Clause. For example, a prohibitive federal sales tax on sodas greater than 16 ounces, say of 50 percent, where Congress explicitly stated public health aims, as opposed to raising money, would be unconstitutional. Most examples, however, will likely not be as clear-cut.

Congressional intent might be difficult to determine, it may be obfuscated, or there may be a range of intent and interests;<sup>200</sup> these are all legitimate issues to grapple with but do not foreclose the value of considering intent in determining whether a scheme is revenue-generating. These concerns, however, suggest that it will not be an easy inquiry. Another way to think about the role of intent with evaluating the purpose of a tax is to do so as the Court did in *Steward Machine Co.* In that case, the Court found that the “purpose” of congressional action was to safeguard its treasury and that other results were merely incident to that.<sup>201</sup>

## 2. *Coercion or Inducement?*

Taxes have long been used to influence behavior, and mere inducement should not be unlawful. However, if an exaction is overwhelmingly coercive as opposed to inducing, it should fail an attempt to rebut a presumption of unlawfulness. There are obviously challenges here about line drawing. Clearly destroying rights or preventing conduct would be coercion while a miniscule tax might be mere inducement. The challenge is what to do about everything in between. The key question is to determine how much opportunity an exaction forecloses and what other options may remain—necessarily a fact-intensive inquiry. But the Court in *Dole* considered the withholding of a “relatively small percentage” (5 percent) of only “certain” highway funds constitutional, suggesting that a greater percentage or a greater foreclosure of opportunity would fail constitutionality.<sup>202</sup> This should turn on the specificity of the congressional action in question, especially for less clear conduct.

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199. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922).

200. *See, e.g.*, Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 424 (1988) (arguing, in part, against public choice scholarship that suggests that congressional action reflects “private interest deals, re-election posturing, or arbitrary outcomes”); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005) (discussing modern textualist views on legislative intent).

201. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590–91 (1937).

202. *See South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

### 3. State Subject Matter

The final, and most important, criteria for evaluating whether an exaction can rebut presumptive unlawfulness should be the subject matter in question and whether it is traditionally reserved to the states. While Baker, Mason, Cooter, and Siegel do not focus on this aspect, the Court's jurisprudence and the core debates on the Taxing and Spending Clauses require consideration of it. In *Drexel Furniture*, the Court was concerned about Congress usurping subject matter with a "so-called tax" from the states, reserved to them under the Tenth Amendment.<sup>203</sup> Likewise, in *Butler*, the Court found that agriculture was a matter "beyond the powers delegated" to the federal government.<sup>204</sup> Finally, in *Dole*, the Court suggested that the subject matter of the conditional spending was not of serious consequence as the federal government was "only" directing states to establish a minimum drinking age.<sup>205</sup>

The relevance of reserving certain subject matter to the states in our system of federalism appears to be of lasting importance to the Court. Recently, in *United States v. Windsor* the Court struck down § 3 of the Defense of Marriage Act (DOMA) as an unconstitutional deprivation of due process and equal protection.<sup>206</sup> In its analysis, the Court explained that the definition and regulation of marriage is within the "authority and realm of the separate States."<sup>207</sup> However, in limited situations where the federal government "acts in the exercise of its own proper authority," such as when providing federal program benefits, or when determining federal immigration law, the federal government could regulate marriage to further federal policies.<sup>208</sup> While state laws on marriage must "respect the constitutional rights of persons," the subject matter has long been regarded as "a virtually exclusive province of the States."<sup>209</sup> But the *Windsor* Court did not stop at regulating marriages. It explained that the power to define marriage is part of the states' "broader authority" to regulate the subject of domestic relations as it relates to offspring, property interests, and marital responsibilities.<sup>210</sup> The Court spent considerable time reaffirming that, consistent with our history and its jurisprudence, domestic relations, including the relationship between parents and children, belong to the states.<sup>211</sup> With regard to DOMA, the Court explained that New York's power to define marital relations is of "central relevance" in this case, where it used its "historic and essential authority" to define marital relations in

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203. *Drexel Furniture*, 259 U.S. at 38.

204. *United States v. Butler*, 297 U.S. 1, 68 (1936).

205. *Dole*, 483 U.S. at 211.

206. 133 S. Ct. 2675 (2013).

207. *Id.* at 2690.

208. *Id.*

209. *Id.* at 2691 (internal quotation marks omitted).

210. *Id.*

211. *Id.*

the way it did.<sup>212</sup> The *Windsor* Court's analysis demonstrates that the Court recognizes the importance of preserving at least certain subject matter for the states.

## V.

### APPLYING THE DOCTRINAL TEST

To more concretely illustrate how this proposed doctrinal framework could work in practice, I will apply it to several hypothetical examples below. This is a relevant exercise because Congress may be inclined to pursue policies under the Taxing Power that would not pass muster under the Commerce Clause, to wedge open the crack the Court has opened after *Sebelius*. For ease of application, these examples will be stylized as taxes similar to the penalty in *Sebelius*, rather than deductions or credits. Additionally, because *Sebelius* focused on the distinction between activity and inactivity, I will focus on examples that inhibit activity, rather than those that encourage activity.<sup>213</sup> Finally, one might say these examples are unlikely or far-fetched policy outcomes, or that they are stylized and light on details. However, they have been chosen more to illustrate the contours of the test than to enumerate actual examples of congressional policy.

#### A. Taxing Gun Ownership near Schools

Perhaps we can start with what may seem like a fairly easy example of the doctrinal test. After *Lopez*, President Clinton proclaimed that he would ban guns from school zones by tying federal funds to the enactment of such bans.<sup>214</sup> Suppose instead that Clinton encouraged Congress to pass a special tax on gun ownership near school zones. This tax would provide permits to carry guns near school zones for a predetermined annual penalty of \$695, or tax those who possessed guns and lived within a certain vicinity of schools.

Under the doctrinal test proposed above, this tax would be presumptively unlawful as it diverges from the Commerce Clause. If Clinton had pursued a tax after the Court had just struck down the statute in *Lopez*, this tax would be presumptively unlawful, as the conduct in *Lopez* was determined to exceed Commerce Clause authority. The starting point of the test, therefore, would require a greater burden to prove the lawfulness of the tax.

The next consideration is whether the tax generates revenue or acts as a penalty, which is closely related to whether it constitutes mere inducement or coercion. It is almost certainly the case that the exaction exceeds the expected

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212. *Id.* at 2692.

213. The distinctions between activity and inactivity, and taxes, deductions, and credits may be about mere nomenclature or marginal differences in implementation. This is a legitimate criticism. But, because *Sebelius* was careful about its taxonomy, and for doctrinal consistency, I will adhere to this methodology.

214. Baker, *supra* note 9, at 1916.

benefit of possessing a gun near a school, unless perhaps one is a school security guard.

It may also be useful to look at congressional intent, and as described in Baker's example, Clinton most certainly sought this as a means to inhibit behavior rather than to collect revenue. The final concern is one of subject matter. According to the *Lopez* Court, education and the police power, which most certainly would cover the tax at issue here, belong to the states.<sup>215</sup>

In short, it appears that this would be a clear example of the federal government bypassing the Commerce Clause under the guise of passing a tax.

### *B. Taxing Adoptions of Children*

A tax related to guns in school zones, however, is a fairly easy example because we can look to *Lopez* for initial guidance. The test becomes harder to apply in less charted waters, demonstrating some of the challenges of finding the boundaries of the Taxing Power. Because *Windsor* so clearly delineated family issues, including those related to relations and children, it may be helpful to explore how the test applies to a tax on adopting children, where a parent pays a one-time exaction to adopt a child.

After *Windsor* and the Commerce Clause cases leading up to and including *Sebelius*, such a policy would almost certainly be unconstitutional as direct regulation under the Commerce Clause because it would not be considered economic activity capable of aggregation as in *Wickard* or *Morrison*. Thus, it is likely that such a tax would be unlawful under the Commerce Clause, which leads us to ask whether we can rebut this presumption using the criteria outlined above.

We must therefore ask whether the tax is about revenue or penalty, and how this plays into inducement or coercion. Adoption does not seem like an especially lucrative activity that could be taxed. We might initially think this is about penalizing conduct. Ultimately this inquiry will be tremendously fact-specific. We might want to know how common adoption is, and how inhibiting the tax is (for example, \$200 as opposed to \$15,000). If we assume the tax is punitive, this would almost certainly fail the test because the tax involves subject matter reserved to the states, likely coerces rather than induces behavior, and appears to be a mere exaction rather than a revenue generator.

As for the question of state subject matter, *Windsor* clearly tells us that the subject matter of families, especially adoptions, belongs to the states, not the federal government. Unless this somehow implicated another power of the federal government, perhaps related to immigration and adopting foreign children, it appears that this subject matter belongs to the states.

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215. See *United States v. Lopez*, 514 U.S. 549, 580 (1995) (“An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States.”).

*C. Taxing Homeschoolers*

A final example to consider is a tax on homeschooling.<sup>216</sup> Such a tax could be levied annually against parents that opt to homeschool their children, perhaps ostensibly to induce them to send their children to public schools to maintain school quality. More attenuated Commerce Clause arguments might place this within economic activity that can be aggregated, but after *Lopez*, as well as *Morrison* and *Sebelius*, this would presumably fail because it would likely not be found as substantially related to interstate commerce, even when the conduct is aggregated because it relates to education. So we should presume that this is unlawful.

Education, after *Lopez*, is subject matter that belongs to the states. Therefore the constitutionality of this tax under the test would turn on whether it generates revenue or serves as a penalty, and whether it merely induces, rather than coerces. On one hand, it might be a tax with the intent to raise revenue, perhaps to fund public schools. If it were less than \$1,000 a year, for example, it would likely be a mere inducement. If, however, it were a tax that reflected intent to quell homeschooling and was a significant burden, say \$15,000 a year, it would not pass constitutional muster. While I use specific figures in the example, drawing precise numerical lines is likely not fruitful, but merely instructive. Nonetheless, as these examples demonstrate, it is very challenging to draw lines.

## CONCLUSION

Core debates on the Constitution's history, structure, and text suggest that Congress cannot merely bypass the Commerce Clause with a tax. Justice Story, Madison, Hamilton, and the Supreme Court at times have all placed some restrictions on taxes rooted in federalism, paralleling debates about congressional authority under other Article I, Section 8 powers. The Supreme Court, commentators, and the Constitution have identified key differences and similarities between spending, direct regulation, and taxation. For taxation, I have argued that we should use a test that presumes a tax that diverges from the Commerce Clause is unconstitutional unless it can be rebutted by evaluating three criteria: (1) whether the exaction raises revenue, (2) whether it is coercive, and (3) whether its subject matter is traditionally controlled by the states. This preliminary framework raises many questions for further inquiry, some of which may be dependent on the Court's future cases. Among the most important are determining when a scheme is a penalty or a revenue generator, especially when it might be appropriate to evaluating congressional intent. Another area for further exploration is the difference between inducement and coercion. While the Court might be reluctant to draw a hard numerical line, it

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216. For purposes of this hypothetical, I will not consider any First Amendment issues this may raise.

began to do so when calling the percentage of highway funds in *Dole* relatively small.

Core debates on the Constitution's history, structure, and text suggest that the Taxing Power should broadly track the Commerce Clause. But there are legitimate areas where a tax should be treated differently. This proposed test attempts to address these areas, but such a test also raises many future questions about application, especially around the edges.

