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Tax Aspects of Fiscal Federalism

A Comparative Analysis

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Tax Aspects of Fiscal Federalism: A Comparative Analysis

Why this book?
Tax Aspects of Fiscal Federalism: A Comparative Analysis provides a comprehensive survey of the distribution of the taxing authority among different levels of governments of a selection of countries. The survey is not restricted to the traditional federal countries, such as the United States and Switzerland, but also includes traditional unitary states (or forms of government), such as France and the United Kingdom. The detailed approach demonstrates the current historical trend towards a progressive increase in the local governments' (taxing) authority. In this way, the reaction to the crisis of the (tax) state, and the search for the highest level of public efficiency, pass through the devolution of the taxing powers.

This book aims to explain not only how the Constitution (or the Supreme Law) allocates taxing powers but, in particular, how these systems work in practice. Each country chapter discusses the constitutional structure of the state (or of the government) and looks at how it has been implemented as well as at the effects of this design on the form of the state (or government) and the tax system.

The structure of the book is simple and consistent. It begins with a methodological analysis for the comparison of different constitutional tax systems. This is followed by a description of the "fiscal federalism" systems of selected countries, beginning, for historical reasons, with the United States and concluding with a developing system, the People's Republic of China. The remaining country chapters are grouped according to either historical or geographical criteria. Also included is a chapter devoted to the European Union, a federal system in arms, in order to highlight its peculiarities and define the limits for the Member States' sovereignty.

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The United States

Walter Hellerstein*

1. Introduction

The most significant feature of fiscal federalism in the United States may well be the absence of a discrete body of explicit foundational rules governing the fiscal relationship between national and subnational governments.[1] For this reason, discussions of fiscal federalism in the United States typically have relatively little to say about specific constitutional mandates allocating taxing and spending powers among different levels of government.[2] Instead, they almost invariably focus on institutional arrangements derived from shared understandings regarding the allocation of fiscal authority, judicial interpretations of constitutional provisions addressed to concerns far broader than fiscal federalism, and historical practice. Indeed, when it comes to questions of American federalism, one is well advised to heed Justice Oliver Wendell Holmes's wise admonition that "a page of history is worth a volume of logic".[3]

The ensuing discussion necessarily reflects the untidy reality of American fiscal federalism. Sec. 2 of this chapter provides an overview of the formal US "Fiscal Constitution", such as it is;[4] Sec. 3 focuses in more detail on the constitutional distribution of taxing powers between federal and state governments and the relationship between the respective governments' exercise of such powers; Sec. 4 considers the federal government's control over

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1. See, e.g. K. W. Dam, "The American Fiscal Constitution", 44 *University of Chicago Law Review* 2 (1977) pp. 271-320.

2. See, e.g. W. Hellerstein, "The U.S. Supreme Court's state tax jurisprudence", in R. S. Avi-Yonah, J. R. Hines and M. Lang (eds.), *Comparative fiscal federalism*: *Comparing the European Court of Justice and the US Supreme Court's tax jurisprudence*, Alphen aan den Rijn: Kluwer Law International BV, 2007, pp. 66-118, at pp. 68-69; D. Super, "Rethinking Fiscal Federalism", 118 *Harvard Law Review* 8 (2005) pp. 2544-2652.

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

4. We put this term in quotes because, as Professor Dam (who coined the term) observes, "[t]he notion of an American Fiscal Constitution may strike American constitutional lawyers as odd". Dam, supra n. 1, p. 271. We explain the meaning of this term more fully in 2.1.

the exercise of state tax power and its coordination of the taxing power of the federal and state governments; Sec. 5 considers the effective distribution of taxing power between various levels of government in the United States; and Sec. 6 concludes.

2. The fiscal constitution

2.1. Overview

As we have already observed, the first point to make about the US fiscal constitution is that there is no US fiscal constitution in the sense of an explicit set of constitutional rules establishing the fiscal powers of the national and subnational governments and the relationship between them. In fact, the provisions in the US Constitution addressed explicitly either to spending or taxing are few and far between. Accordingly, in discussing the US fiscal constitution, we follow Dam[5] by using it to mean "the Constitution as a whole, considering provisions not specifically directed to fiscal matters and taking into account the federal structure … including both rules defining the fiscal competence of the branches of the federal government and rules allocating taxing and spending powers between the federal government and the states".[6]

2.2. Federal fiscal powers

Despite the absence of detailed constitutional provisions delineating the scope of federal fiscal powers, they may fairly be described as "comprehensive".[7] They include the power to tax, the power to spend, the power to coin money, and the power to borrow.

2.2.1. Federal taxing power

There are five provisions in the US Constitution explicitly addressed to the federal government's substantive power to impose taxes. There is also a "procedural" limitation on Congress's power to tax – "All Bills for raising

5. Dam, supra n. 1, p. 272.
6. Id.
7. R. D. Rotunda and J. E. Nowak, *Treatise on Constitutional Law*, Vol. 1, St. Paul: Thomson/West, 4th edn, 2007, p. 719.

Revenue shall originate in the House of Representatives"[8] – but this does not affect the scope of federal taxing power.

The most significant constitutional provision directed to the federal taxing power is the grant to Congress of the "Power to lay and collect Taxes, Duties, Imposts and Excises …".[9] This grant of power is limited in only three respects. First, there is an outright prohibition on taxation of exports;[10] second, federal taxes must be "uniform throughout the United States",[11] and third, no "direct" tax may be imposed unless it is apportioned among the states by population.[12] Finally, in response to a Supreme Court decision construing the "direct" tax limitation as effectively barring a federal tax on income,[13] the original Constitution of 1787 was amended in 1913 to grant Congress the power to tax income "without apportionment among the several States".[14]

In addition to the explicit limitations on the federal taxing power, the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall … be deprived of life, liberty, or property without due proc-

8. US Constitution, Art. I, § 7. The exclusive right of originating revenue measures was given to the House of Representatives "[t]o compensate the large states for the sacrifice they had made in giving the small states equal representation in the Senate". D. Hutchison, *The Foundations of the Constitution*, Secaucus: University Books, Inc., 1975, p. 73. In addition, granting the House the exclusive power to originate revenue measures conformed with historical tradition in Britain and in the American colonies, which allocated the power to originate money bills to the legislative body that was democratically elected. Id., pp. 73-74. In the original Constitution, only members of the House were directly elected; Senators were chosen by the state legislatures. In 1913, the Constitution was amended to provide for direct election of Senators, US Constitution, amendment XVII, but no change was made in the power to originate revenue bills. It is worth noting that the constitutional clause in question goes on to provide that "the Senate may propose or concur with Amendments, as on other bills". US Constitution, Art. I, § 7. Accordingly, the Senate is not without power to influence the final form of revenue legislation, as it frequently does.

9. US Constitution, Art. I, § 8, cl. 1.

10. US Constitution, Art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

11. US Constitution, Art I, § 8, cl. 1 ("[a]ll Duties, Imposts, and Excises must be uniform throughout the United States").

12. US Constitution, Art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be paid, unless in proportion to the Census or Enumeration herein before directed to be taken"); US Constitution, Art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States….").

13. This issue is considered further in 3.3.

14. US Constitution, amendment XVI.

ess of law",[15] has been construed to impose some very loose restraints on Congress's power to impose retroactive tax legislation[16] and to create tax classifications.[17]

2.2.2. Federal spending power

The federal spending power is granted as a condition on the federal taxing power: "The Congress shall have the Power To lay and collect Taxes … to pay the Debts and provide for the common Defense and general Welfare of the United States".[18] Although "[t]he spending power … is not unlimited",[19] the limits are relaxed at best. There have been no judicial decisions addressing the power to spend "for the common Defense".[20] There was a historical dispute over the question of whether the power to tax and spend to "provide for … the general Welfare" was simply a reference to other enumerated powers specifically granted to Congress by the Constitution or, alternatively, conferred "a power separate and distinct from those later enumerated".[21] Under this view, "Congress … has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States".[22] The Supreme Court resolved this controversy by adopting the latter view that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution".[23]

The leading modern case addressing the limits on the federal spending power, *South Dakota v. Dole*,[24] articulated a four-part test delineating those limits. First, "the exercise of the spending power must be in pursuit of 'the general welfare'".[25] This is essentially no limit at all, because the Court went on to say, effectively, that the "general welfare" is whatever Congress

15. US Constitution, amendment V. There is also a Due Process Clause of the Fourteenth Amendment, which imposes an analogous limitation on state powers. See 2.3.2.
16. See *United States v. Carlton*, 512 U.S. 26 (1994).
17. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983): "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."
18. US Constitution, Art. I, § 8, cl. 1.
19. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).
20. Rotunda and Nowak, supra n. 7, pp. 729-730.
21. *United States v. Butler*, 297 U.S. 1, 65 (1936).
22. Id., pp. 65-66.
23. Id., p. 66.
24. 483 U.S. 203 (1987).
25. Id., p. 207.

defines it to be.[26] Second, in a point that bears pointedly on fiscal federalism, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously…, enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation'".[27] Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs'".[28] Like the "general welfare" limitation, this restraint appears to lack much force in light of the leeway the Court grants typically grants Congress in choosing means to implement legitimate ends. Fourth, Congress may not authorize spending that violates other constitutional provisions that provide "an independent bar"[29] to the grant of federal funds. For example, Congress could not authorize funding confined to religious organizations because this would violate the First Amendment prohibition against "establishment of religion".[30]

In *South Dakota v. Dole*, the Court sustained Congress's authority to withhold federal highway funds from states that permit the purchase of alcohol by persons under the age of 21, even though the Constitution's Twenty-first Amendment gives the states complete control over the importation or use of liquor within their boundaries.[31] The Court found that the spending measure passed its four-part test. First, the spending measure promoted the general welfare, because " 'the concept of welfare or the opposite is shaped by Congress…'".[32] Second, "[t]he conditions upon which States receive the funds… could not be more clearly stated by Congress".[33] Third, there was a reasonable relationship between ends and means because "Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability

26. Id.: "In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." Indeed, the Court itself recognized that "[t]he level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all". Id., p. 207, n. 2.
27. Id., quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).
28. Id., quoting *Massachusetts v. United States,* 435 U.S. 444, 461 (1978), plurality opinion.
29. Id., p. 208.
30. US Constitution, amendment I.
31. US Constitution, amendment XXI. The Twenty-first Amendment, adopted in 1933, repealed the Eighteenth Amendment, adopted a mere 14 years earlier, that created the era of Prohibition during which the importation, manufacture, sale, or transportation of intoxicating liquor in the United States was barred.
32. *South Dakota*, 483 U.S., p. 208 (citation omitted).
33. Id.

to drive, and that this interstate problem required a national solution".[34] Fourth, with respect to the only controversial issue in the case, the Court found that there was no "independent constitutional bar"[35] to the spending measure, despite Congress's possible lack of power to impose a national drinking age under the Twenty-first Amendment: "Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in [the federal law] is a valid use of the spending power".[36] In short, although in some circumstances "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'",[37] the spending power is broad enough to allow Congress to accomplish indirectly what it might not be able to accomplish directly because of the federalism-based restraints on congressional power.

2.2.3. Other federal fiscal powers

Other federal fiscal powers, specifically, the power to borrow[38] and the power to coin money and regulate its value,[39] are generally considered to be unlimited.[40]

2.3. State fiscal powers

2.3.1. Overview

The first point to make about state fiscal powers and, indeed, about all state powers under the Constitution, is that the states, which existed as political entities prior to the adoption of the Constitution, retained all powers not delegated to the federal government in the Constitution. Indeed, the Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

34. Id.
35. Id., p. 209 (internal citations omitted).
36. Id., p. 212.
37. Id., p. 211 (citation omitted).
38. US Constitution, Art. I, § 8, cl. 2: "The Congress shall have Power … [t]o borrow Money on the credit of the United States."
39. US Constitution, Art. I, § 8, cl. 5: "The Congress shall have Power … [t]o coin Money, regulate the Value thereof, and of foreign Coin."
40. Rotunda and Nowak, supra n. 7, p. 764.

reserved to the States respectively, or to the people".[41] Accordingly, as to their taxing and spending power, the states retained all such powers normally associated with political sovereignty, except insofar as the Constitution explicitly provided otherwise. As Alexander Hamilton, writing in *The Federalist*[42] in 1788, declared:

> [T]he individual States should possess an independent and uncontrollable authority to raise their own revenues for the support of their own wants…. I affirm that (with the sole exception of duties on imports and exports) they would retain that authority in the most absolute and unqualified sense; and that any attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of the Constitution.[43]

Throughout American constitutional history the Supreme Court has made similar statements reflecting its view that the states' fiscal powers are critical to their separate existence and are an essential element of state sovereignty. Thus Chief Justice Marshall observed in 1824 that the states' "power of taxation is indispensable to their existence".[44] Fifty years later, the Court echoed these sentiments when it declared:

> That the taxing power of a State is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within its territorial boundaries of the State, except so far as it has been surrendered to the Federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in thus acknowledging

41. US Constitution, amendment X. The first ten amendments to the Constitution, the so-called *Bill of Rights*, were enacted in 1791, 2 years after the ratification of the original Constitution and are generally considered an integral part of the original constitutional framework.

42. *The Federalist* is a collection of 85 letters written (under the pseudonym of Publius) by Alexander Hamilton, James Madison, and John Jay to New York newspapers in 1787 and 1788 in support of the Constitution during the debate over its ratification. The "work has always commanded widespread respect as the first and still most authoritative commentary on the Constitution of the United States". C. Rossiter, "Introduction", *The Federalist Papers*, New York: New American Library of World Literature, Inc., 1962, p. vii.

43. *The Federalist*, No. 32, A. Hamilton, reproduced in id., pp. 197-201. Some of the more extravagant statements regarding the scope of the states' sovereign powers of taxation found in *The Federalist*, made to emphasize the importance of such powers to the states' independent political existence, are not accurate descriptions of the legal scope of such powers under current constitutional doctrine.

44. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824). See also *Weston v. City of Charleston*, 27 U.S. (2 Pet.) 449, 466 (1829): "The power of taxation is one of the most essential to a state, and one of the most extensive in its operation."

> the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence.[45]

The Court has reiterated these beliefs in its modern opinions: "When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests".[46]

The understanding that states' tax sovereignty is essential to their independent political status in the federal system has never been regarded as inconsistent with the view that the federal government likewise possesses sovereign tax powers. To draw once more on the words of Chief Justice Marshall:

> The power of taxation … is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to seeing it placed for different purposes, in different hands…. Congress is authorized to lay and collect taxes…. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States.[47]

2.3.2. State taxing power

Only two provisions of the Constitution speak directly to state tax power: The Import-Export Clause[48] and the Duty of Tonnage prohibition.[49] The former provides:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] Inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

The prohibition on state taxation of exports reinforced the parallel provision on federal taxation of exports,[50] which originated in concerns in the

45. *Railroad Co. v. Penniston*, 85 U.S. 5, 29 (1873).
46. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959).
47. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824).
48. US Constitution, Art. I, § 10, cl. 2.
49. US Constitution, Art. I, § 10, cl. 3.
50. See supra n. 10.

Southern states that giving Congress the power to tax exports would result in discrimination against their products in a legislature dominated by the other states.[51] In addition, states without ports of their own had concerns (based on their experience during the colonial period) that their products would be taxed by neighbouring states merely for the privilege of passing through such states. The "only way to meet such a situation was to deprive both the central and state governments of the power to tax exports".[52]

By contrast, the prohibition on state taxation of imports applies only to the states. This targeted restraint explicitly reflected considerations of fiscal federalism. One of major weaknesses of the federal system created by the Articles of Confederation, which governed the states from 1777 until the ratification of the Constitution in 1789, was that there was no secure source of revenue of the central government. The prohibition on state taxation of imports was a direct response to this consideration: "import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States".[53] By thus "committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power", the framers reserved for the central government what was at the time a principal revenue source. Indeed, customs duties were the most important source of federal revenues from 1789 until World War I.[54]

The Duty of Tonnage Clause was a much narrower restraint on state taxing authority. As the Supreme Court observed, "[i]t seems clear that the prohibition against the imposition of any duty of tonnage was due to the desire of the Framers to supplement [the Import-Export Clause], denying to the states the power to lay duties on imports or exports by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state".[55] It was also motivated by the "uncertainty as to whether the states were restrained from laying tonnage duties by the power given to Congress to regulate trade".[56]

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51. Hutchison, supra n. 8, pp. 143-144.
52. Id., p. 144; see also id., pp. 160-161.
53. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976).
54. L. A. Talley, "Federal Income Taxation: An Abbreviated History", 2001, congressional research service, available at: http://www.taxhistory.org./thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/2d52a4cfd2844fab85256e22007840e6?OpenDocument.
55. *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 264-65 (1935) (citations omitted).
56. Hutchison, supra n. 8, p. 161.

The most significant constitutional limitations on state tax power are derived from constitutional provisions directed to state action in general. Most of these restraints bear on "horizontal" rather than "vertical" issues of fiscal federalism, such as limitations on state taxation of interstate commerce,[57] territorial limitations on state taxation,[58] and a bar on discrimination against non-residents.[59] In addition, the states are limited in the power to classify the subjects for taxation, but under a forgiving standard that requires only that there be a "rational basis" for the classification.[60]

Apart from the Supremacy Clause, which we consider below in connection with intergovernmental tax immunities and the federal government's authority to limit and coordinate state taxing power,[61] perhaps the most significant clause of general application bearing on the relationship between federal and state tax powers is the Compact Clause, which provides that "[n]o State shall, without the consent of Congress … enter into any Agreement or Compact with another State …".[62] The Supreme Court has observed that congressional consent is required for the validity of a compact between states only if it "is directed to the formation of any combination tending to

57. The Commerce Clause of the US Constitution by its terms is no more than an affirmative grant of power to Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". US Constitution, Art. I, § 8, cl. 3. The US Supreme Court nevertheless has construed the clause as imposing implied limitations on state authority, even in the absence of congressional action, including restraints on state power to discriminate against or otherwise burden commerce through taxes or regulations. This "dormant Commerce Clause" doctrine is considered in detail in Hellerstein, supra n. 2.

58. The Due Process Clause of the Fourteenth Amendment provides that no state may "deprive any person of life, liberty or property without due process of law". US Constitution, amendment XIV. The Supreme Court has construed the clause to limit the territorial reach of state taxing powers. As noted above, there is a Due Process Clause of the Fifth Amendment that limits the powers of the federal government. See supra n. 15 and accompanying text.

59. The Privileges and Immunities Clause of Art. IV of the Constitution (the so-called "interstate" Privileges and Immunities Clause), US Constitution, Art. IV, § 2, provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States". The clause has been construed to forbid states from discriminating against non-residents in their taxing schemes. See Hellerstein, supra n. 2. The Fourteenth Amendment to the Constitution also contains a Privileges and Immunities Clause, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". US Constitution, amendment XIV, § 1, but this clause has not served as a restraint on state tax powers. See *Madden v. Kentucky*, 309 U.S. 83 (1940), overruling *Colgate v. Harvey*, 296 U.S. 404 (1935).

60. *Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103, 107 (2003) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992)).

61. See 2.4., 4.4.3. and 4.5.

62. US Constitution, Art. I, § 10, cl. 3.

the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States".[63] Accordingly, the Court rejected a Compact Clause challenge to the Multistate Tax Compact, which is designed to promote uniformity and cooperation among the states with regard to their tax systems and tax administration,[64] because it was designed merely to address issues of tax coordination among the states and did not implicate the allocation of the power of the states vis-à-vis the federal government.

2.3.3. State spending power

There are no explicit federal constitutional restraints on state spending power, although virtually all state constitutions contain requirements that spending be limited for "public purposes". The Supreme Court has likewise declared that, under the Fourteenth Amendment's Due Process Clause,[65] "state taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes".[66] Needless to say, the states, like the federal government, lack the power to spend for programmes that violate explicit "independent" constitutional norms, such as discrimination on the basis of race, creed or colour. Finally, the Constitution denies to the states the specific powers granted to the central government necessary to exercise their spending powers, including the power to "coin Money" and "emit bills of Credit".[67]

2.4. Intergovernmental tax immunities

For well over a century, one of the bedrock principles of the US Fiscal Constitution was that the federal and state governments, and their

63. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).
64. Multistate Tax Compact, Art. I, available at: http://www.mtc.gov. The purposes of the compact are to:
> "1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
> 2. Promote uniformity or compatibility in significant components of tax systems.
> 3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
> 4. Avoid duplicative taxation."

Id.
65. See supra n. 58.
66. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 514 (1937).
67. US Constitution, Art. I, § 10, cl. 1.

instrumentalities, were exempt from each other's taxes. The seminal case addressing the question of intergovernmental immunities, and one of the most important in the history of US constitutional jurisprudence, was *McCulloch v. Maryland*.[68] The case involved the attempt by the state of Maryland to impose a tax on the Bank of the United States. After concluding that Congress had constitutional authority to create the bank, the Court turned to the question of the state's power to tax it. Issuing its famous dictum that "the power to tax involves the power to destroy",[69] and observing further that "the power to destroy may defeat and render useless the power to create",[70] the Court concluded that Maryland's levy upon the bank was invalid under the Supremacy Clause.[71]

> The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land is empty and unmeaning declamation.[72]

Although the Supreme Court's decision in *McCulloch* was based on the supremacy of federal over state authority, the Court subsequently extended the principle to all assertions of intergovernmental taxing power. Thus when the federal government sought to impose an income tax on the income of a state judge, the Court declared:

> It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.[73]

68. 17 U.S. 316 (4 Wheat.) (1819).
69. Id., p. 431.
70. Id.
71. The Supremacy Clause, US Constitution, Art. VI, § 2, provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".
72. *McCulloch*, 17 U.S. (4 Wheat.), p. 433.
73. *Collector v. Day*, 78 U.S. 113, 127 (1870).

The intergovernmental tax immunity doctrine barred federal and state taxes on a broad range of activities related to the other government's functions, including government borrowing (taxes on government bond interest),[74] leasing (taxes on government land rentals),[75] and purchasing (taxes on sales to government).[76] However, as government's commercial role increased and with it the volume of activity exempt from taxation, the pressure on the Court to narrow the broad view it had taken of intergovernmental tax immunity intensified. Beginning in the 1930s, the Court reformulated the doctrine of intergovernmental tax immunity and dramatically cut back on its scope, especially with regard to the derivative immunity that the Court had accorded to the private sector in its dealings with the federal government and its agencies. In its modern cases, the Court has "consistently reaffirmed the principle that a non-discriminatory tax collected from private parties contracting with another government is constitutional even though part or all of the financial burden falls on the other government".[77] As the Court summarized the contemporary scope of intergovernmental tax immunity:

> [U]nder current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals…. The rule with respect to state tax immunity is essentially the same, except that at least some nondiscriminatory federal taxes can be collected directly from the States even though a parallel state tax could not be collected directly from the Federal Government.[78]

Despite these constitutional principles, Congress remains free (within broad limits) to expand or contract the scope of the immunity of the federal government and its instrumentalities from state taxation,[79] a matter we consider further below.

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74. *Weston v. City of Council of* Charleston, 27 U.S. (2 Pet.) 449 (1829) (federal bond interest immune from state taxation); *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429 (1895) (state bond interest immune from federal taxation).
75. *Gillespie v. Oklahoma*, 257 U.S. 501 (1922) (income derived from lease of federal lands immune from state taxation); *Burnet v. Coronado Oil*, 285 U.S. 393 (1932) (income derived from lease of state lands immune from federal taxation).
76. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928) (proceeds of sale of product to federal government immune from state sales tax); *Indian Motorcycle Co. v. United States*, 283 U.S. 570 (1931) (proceeds of sale of product to state immune from federal sales tax).
77. *South Carolina v. Baker*, 485 U.S. 505, 521 (1985).
78. Id., p. 523 (citations omitted).
79. As discussed in more detail below, Congress retains the authority to expand or contract the scope of its constitutional immunity through legislation. See 4., 4.4.3. and 4.5.

3. Fiscal federalism: Distribution of taxing powers

3.1. Overview

The constitutional principles described above establish the framework for the distribution of taxing powers between federal and state governments in the United States. The fundamental structural point to keep in mind is that, except for relatively limited constitutional restraints and narrowly circumscribed congressional legislation, both federal and state governments remain free to exercise their respective "sovereign" taxing powers as they see fit, even if those exercises of taxing authority overlap and even if they follow different rules. As the Supreme Court observed with regard to income taxes, "[c]oncurrent federal and state taxation of income, of course, is a well-established norm",[80] and, "[a]bsent some explicit directive from Congress, we cannot infer that treatment of … income at the federal level mandates identical treatment by the States".[81] Accordingly, from the perspective of the "tax assignment" problem in intergovernmental fiscal relations[82] – or "which level of government should tax what?"[83] – the United States has essentially embraced a laissez faire approach to tax assignment, with limited exceptions noted above and described in somewhat more detail below.

3.2. Property taxes

The most significant "tax assignment" in the United States relates to property taxes. As noted above, the Constitution forbids Congress from imposing any "direct" tax unless it is apportioned among the states by population.[84] The clause was inserted in the Constitution to protect the Southern states, which had vast tracts of thinly settled territory, from oppressive land taxes imposed by the federal government.[85] If no such provision had been included in the Constitution, Southern states feared that they "'would have been wholly at the mercy of the other states,' because Congress could then

80. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 448 (1980).
81. Id.
82. C. E. Jr. McLure, "The tax assignment problem: Ruminations on how theory and practice depend on history", 54 *National Tax Journal* 2 (2001) pp. 339-384.
83. Id., p. 339.
84. See supra n. 12 and accompanying text.
85. Hutchison, supra n. 8, p. 142.

have taxed … the land in every part of the union, whether poor or rich and highly productive at the same rate [at] '… so much an acre …'".[86]

To satisfy the apportionment requirement, a property tax imposed by the federal government must be levied so that the revenues derived from each state reflect its relative *population* rather than the relative value of property located in the state. There were in fact several historical examples of such taxes: a levy of two million dollars in 1798 in anticipation of a war with France; a levy of three million dollars in 1813 and six million dollars in 1815 in connection with the War of 1812 with England; and a levy of 20 million dollars in 1861 in connection with the Civil War.[87] Under these taxes, each state was required to contribute its aliquot amount necessary to raise the national total based on a state-specific valuation of the property within the state. Needless to say, these national property taxes were administratively cumbersome at best,[88] and, as a consequence, the federal government abandoned this method of raising revenue after the Civil War. In effect, then, the "direct" tax provision (with its requirement of apportionment) "assigned" property taxes to states and their political subdivisions.

The Import-Export Clause[89] has limited the states' power to impose personal property taxes on imported and exported goods. However, because the federal government cannot as a practical matter tax personal property at all, we consider the implications of the Import-Export Clause (as well as the bar on federal taxation of exports) for the distribution of taxing powers between federal and state governments in connection with our discussion of consumption and other excise taxes.

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86. Id., quoting from the opinion of Justice Patterson in *Hylton v. United* States, 3 U.S. (3 Dall.) 171, 177 (1796). Justice Patterson had participated in the Constitutional Convention.

87. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 572-73 (1895) (describing the taxes).

88. These difficulties are revealed by the Supreme Court's description of the 1798 levy (which was typical of these national property taxes): "[A] direct tax of two millions of dollars was apportioned to the states respectively … which tax was to be collected by officers of the United States, and assessed upon 'dwelling houses, lands, and slaves,' according to the valuations and enumerations to be made pursuant to [a related act]. Under these acts, every dwelling house was assessed according to a prescribed value, and the sum of 50 cents upon every slave enumerated, and the residue of the sum apportioned was directed to be assessed upon the lands within each state according to the valuation made pursuant to the prior act, and at such rate per centum as would be sufficient to produce said remainder". Id.

89. See 2.3.2.

3.3. Income taxes

Both federal and state governments enjoy broad power to tax income; indeed, in some major metropolitan areas even local governments (acting under state authority) impose income taxes.[90] Thus a resident of New York City pays income taxes to the United States, the State of New York, and the City of New York.

For a brief period of time from 1895 to 1913, the federal government was limited in its power to tax income from property, because the Supreme Court had construed the limitation on Congress's power to impose "direct" taxes as applying to income from real estate and personal property.[91] Accordingly, the tax on such income was invalid because it was not apportioned among the states by population.[92] In 1913, however, the Constitution was amended by the adoption of the Sixteenth Amendment, which provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration".[93]

The Supreme Court has construed Congress's power to tax income in expansive terms. Although some of the Court's earlier decisions scrutinized congressional legislation to determine whether it comported with the Court's view of "income" within the meaning of the Sixteenth Amendment, subsequent decisions have deferred entirely to Congress's judgment as to what constitutes taxable income.[94] In effect, Congress has virtually unlimited power to delineate the concept of taxable income.

The states are not limited by the US Constitution in their power to define and tax income, except insofar as they exceed "horizontal" restraints on their taxing authority with regard to extraterritorial income or income derived from interstate commerce.[95] Some state constitutions have been construed

90. These include Baltimore, Cincinnati, Cleveland, Detroit, Indianapolis, Kansas City (Missouri), New York, Philadelphia, Pittsburgh, St. Louis, and Washington, D.C. See W. Hellerstein, K. J. Stark, J. A. Swain and J. M. Youngman, *State and Local Taxation: Cases and Materials*, St. Paul: Thomson/West, 9th edn, 2009, p. 9.
91. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (initial decision), 158 U.S. 601 (1895) (decision on rehearing). The Court's opinion did not address the question of income from other sources, such as business profits.
92. See 3.2.
93. US Constitution, amendment XVI.
94. W. A. Klein, J. Bankman, D. N. Shaviro and K. J. Stark, *Federal Income Taxation*, New York: Aspen, 15th edn, 2009, p. 87.
95. See supra n. 57-59 and accompanying text.

to limit the states' power to tax income, but these are not restraints attributable to the federal system.[96]

3.4. Consumption and other excise taxes

Both federal and state governments have broad power to impose consumption and other excise taxes. Because such taxes are classified as "indirect" rather than "direct", the limitation on "direct" taxes imposed by the federal government has no application to such taxes.[97] Although the United States has no broad-based national consumption tax such as a value added tax or a retail sales tax, it does impose a number of selective excise taxes. The principal constitutional restraints bearing on the federal government's power to impose these levies are the requirements that the taxes be

96. Almost all the state constitutions contain some provision for uniform or equal taxes, although most of these are limited to property taxes. Hellerstein, et al., supra n. 90, at p. 229. A number of state courts, following the Supreme Court's characterization in *Pollock* of a tax on income from property as essentially a "direct" tax on the underlying property itself, see n. 91-92 and accompanying text, concluded that their state income taxes should be classified as property taxes and subject to state constitutional uniformity and equality requirements. The 1915 Advisory Opinion of the Massachusetts Supreme Court was an early landmark decision in this area. See J. W. Newhouse, *Constitutional Uniformity and Equality in State Taxation*, Buffalo: William S. Hein & Co., 2nd edn, 1984, Vol. II, pp. 1949-2025. Relying on the *Pollock* case, the court held that a tax on income from property would constitute a property tax; that it would be subject to the uniformity and equality clause; and, if graduated, it would be unconstitutional. *In re Opinion of the Justices*, 108 N.E. 570 (Mass. 1915). Holdings that a graduated income tax violated state constitutional restrictions have had their repercussions to this day and have thwarted the efforts of legislatures in Illinois, Massachusetts, New Hampshire, Pennsylvania, Washington and other states to adopt progressive income taxes. See, in addition to the Massachusetts case cited above, *Bachrach v. Nelson*, 182 N.E. 909 (Ill. 1932), overruled by *Thorpe v. Mahin*, 250 N.E.2d 633 (Ill. 1969); *Opinion of the Justices*, 113 A.2d 547 (N.H. 1955); *Kelley v. Kalodner*, 181 A. 598 (Pa. 1935); *Culliton v. Chase*, 25 P.2d 81 (Wash. 1933). Some states (including Alabama, Kentucky, and Wisconsin) dealt with the problem by adopting constitutional amendments explicitly authorizing the enactment of graduated net income taxes. The clear trend, as Prof. Newhouse points out, has been to exclude the income tax from the restrictive clauses. See Newhouse, supra, pp. 2019-2025.

97. There is a continuing debate in academic quarters over the characterization of certain forms of consumption taxes as either "direct" or indirect". Compare, e.g. E. J. Jensen, "The apportionment of 'direct taxes': Are consumption taxes constitutional?", 97 *Columbia Law Review* 8 (1997), pp. 2334-2419, with B. Ackerman, "Taxation and the Constitution", 99 *Columbia Law Review* 1 (1999), pp. 1-58, and L. Zelenak, "Radical tax reform, the Constitution, and the conscientious legislator", 99 *Columbia Law Review* 3 (1999), pp. 833-856. Even those taking a broad view of the "direct tax" limitation, however, concede that traditional consumption taxes (like the VAT and the retail sales tax) and other familiar excise taxes are "indirect" within the meaning of the Constitution.

"uniform throughout the United States"[98] and that they not apply to "Articles exported from any State".[99]

The only significant limitation on state consumption and excise taxes that bears on the distribution of taxing power between the federal and state governments is the prohibition of state "Imposts or Duties on Imports or Exports",[100] and, as we shall see, even that limitation is less significant than it once was.

3.4.1. Uniformity requirement for federal taxes

The uniformity requirement for federal taxes is directed entirely at the *geographic* uniformity of the tax throughout the United States.[101] It does not restrict Congress's general power to classify subjects for taxation, a power that is constrained only by the forgiving "rational basis" standard under which "classifications are valid if they bear a rational relation to a legitimate governmental purpose".[102] Nor does the clause bar a federal levy because of a lack of uniformity created by differences in the states' own laws.[103] "The Constitution does not command that a tax 'have an equal effect in each state'".[104]

In describing the purpose of the uniformity clause, Justice Story, one of the Constitution's most respected commentators, observed that its purpose

> was to cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist.

98. US Constitution, Art I, § 8, cl. 1.
99. US Constitution, Art. I, § 9, cl. 5.
100. US Constitution, Art I, § 10, cl. 3.
101. *Fernandez v. Wiener*, 326 U.S. 340, 359 (1945): "uniformity in excise taxes exacted by the Constitution is geographical uniformity, not uniformity of intrinsic equality and operation".
102. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983).
103. *Florida v. Mellon*, 273 U.S. 12, 17 (1927). The Court declared that "[t]he contention that the federal tax is not uniform, because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states, nor control the diverse conditions to be found in the various states, which necessarily work unlike results from the enforcement of the same tax. All that the Constitution … requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States". Id.
104. *Knowlton v. Moore*, 178 U.S. 41, 104 (1900).

> The agriculture, commerce, or manufactures of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors.[105]

Even the requirement of geographic uniformity is quite restrained, as the Supreme Court's decision in *United States v. Ptasynski*[106] reveals. The case involved an exemption that Congress provided from the former Crude Oil Windfall Profit Tax Act,[107] enacted in 1980 to capture the "windfall profits" that oil companies were expected to reap from the expiration of federal price controls on petroleum. The exemption applied to oil produced in specified geographic areas mostly in Alaska. Indeed, the statute explicitly referred to "exempt Alaskan oil".[108] The question before the Court was "whether excluding a geographically defined class of oil from the coverage of the Crude Oil Windfall Profit Tax violates the Uniformity Clause".[109]

In evaluating the exemption's compatibility with the Uniformity Clause, the Court observed that, despite the statute's reference to "exempt Alaskan oil", the statute in fact exempted only about 20% of Alaska's then-current oil production and also exempted certain non-Alaska oil produced offshore (and thus in no state). Accordingly, "[t]he exemption … is not drawn on state political lines".[110] The Court then turned to the specific question confronting it, namely, "whether the Uniformity Clause prohibits Congress from defining the class of objects to be taxed in geographic terms".[111]

The Court first concluded that there was nothing in the language of the clause or in the Court's prior decisions construing it that prohibited "all geographically defined classifications".[112] Rather, "[t]he Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems".[113] Nevertheless, where Congress does frame a tax in geographic terms, the Court

105. J. Story, "Commentaries on the Constitution of the United States", T. Cooley (ed.), 1873, § 957, quoted in *United States v. Ptasynski*, 462 U.S. 74, 81 (1983).
106. 462 U.S. 74 (1983).
107. 26 United States Code § 4986 (repealed).
108. Id., § 4994(e) (repealed).
109. *Ptasynski*, 462 U.S., p. 75.
110. Id., p. 78.
111. Id., p. 83.
112. Id., p. 84.
113. Id.

"will examine the classification closely to see if there is actual geographic discrimination".[114]

On the facts in *Ptasynski*, the Court found no such geographic discrimination. In the Court's eyes, Congress viewed "exempt Alaskan oil" as a unique class of oil that merited favourable treatment, because of the disproportionate costs and difficulties of extracting oil from this region. Under these circumstances, and in the absence of "any indication that Congress sought to benefit Alaska for reasons that would offend the purpose of the Clause",[115] the Court was unwilling to second-guess a congressional "determination, based on neutral factors, that this oil required separate treatment".[116]

In short, notwithstanding the Court's purported "close examination" of geographic classifications under the Uniformity Clause, the *Ptasynski* case suggests that there is less than meets the eye even to geographic classifications. As long as the geographic classifications do not track "state political lines",[117] and Congress has not evidenced an intent to favour some states *qua* states over others, the tax is likely to pass constitutional muster under the Uniformity Clause.

3.4.2. Prohibition on federal taxation of exports

Like the "direct" tax limitation described above,[118] the prohibition on federal taxation of exports had its historical origins in the fears of Southern states that the federal taxing power would be used to their economic detriment by a Congress dominated by the more populous Northern states.[119] The Framers of the Constitution responded to these concerns "by completely denying to Congress the power to tax exports at all".[120]

The prohibition against laying any "Tax or Duty … on Articles Exported from any State"[121] has served as a categorical, if narrow, limitation on federal taxing power. The Supreme Court has observed:

114. Id., p. 85.
115. Id., pp. 85-86.
116. Id., p. 86.
117. Id., p. 78.
118. See 3.2.
119. Hutchison, supra n. 8, pp. 143-144; see 2.3.2.
120. *United States v. International Business Machines*, 517 U.S. 843, 861 (1996).
121. US Constitution, Art. I, § 9, cl. 5.

> We have had few occasions to interpret the language of the Export Clause, but our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process. At the same time, we have attempted to limit the term "Articles exported" to permit federal taxation of pre-export goods and services.[122]

Under the clause, the Court has struck down federal excise taxes on the sale of goods in export transit,[123] on export bills of lading,[124] on charter parties for carriage of goods from state ports to foreign ports,[125] and on policies insuring marine risks of export shipments.[126] The prohibition extends to taxes on exports even though they may be non-discriminatory.

3.4.3. Prohibition on state taxation of imports and exports

At the time of its adoption, the prohibition against state taxation of imports and exports had a much more significant impact on the distribution of taxing powers between federal and state governments than it has today. First, taxes on imports and exports had been an important source of revenue for the states,[127] and the prohibition therefore deprived them of a major fiscal resource. Second, the limitation on *state* but not on *federal* taxation of imports allocated exclusive taxing power to the federal government over what was then – and until the 20th century remained – the federal government's principal source of revenue.

The diminished significance of granting the federal government the exclusive power to tax imports is attributable to two factors. First, despite the large role that import revenues played as a source of federal revenue for more than a century, such revenues today account for only 1% of federal revenues.[128] Second, the limitation on the states' power to tax imports has been narrowed by judicial construction of the Import-Export Clause.

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122. *International Business Machines*, 517 U.S., p. 846.
123. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923).
124. *Fairbank v. United States*, 181 U.S. 283 (1901).
125. *United States v. Hvoslef*, 237 U.S. 1 (1915).
126. *International Business Machines*, 517 U.S. 843; *Thames & Mersey Marine Insurance Co. v. United States*, 237 U.S. 19 (1915).
127. See *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976); Hutchison, supra n. 8, pp. 160-161.
128. In 2009, the federal government raised roughly USD 2.1 trillion in revenue of which approximately USD 22.5 million came from customs duties and fees. US Office of Management and Budget, *Budget of the United States Government: Historical Tables Fiscal Year 2011*, *Receipts by Source: 1934-2015*, Table 2.1, available at http://www.gpoaccess.gov/usbudget/fy11/hist.html; US Office of Management and Budget, *Budget*

For most of US constitutional history, the Supreme Court construed the prohibition on state taxation of imports to extend to imported goods still in their "original package".[129] The prohibition extended even to non-discriminatory property taxes on imported goods.[130] In its 1976 decision in *Michelin Tire Corp. v. Wages*,[131] however, the Supreme Court abandoned a century of precedent in holding that the Import-Export Clause does not bar a state from imposing a non-discriminatory ad valorem property tax on imported goods, whether or not they remain in their original packages. In so holding, the Court essentially narrowed the prohibition on state taxation of imports to levies that discriminated against goods by nature of their origin or that were imposed "on goods which are merely in transit through the State when the tax is assessed".[132] The Court applied this analysis to excise taxes in sustaining a non-discriminatory state sales tax applied to the transfer of cargo containers used exclusively for transporting goods in international commerce.[133]

Because the federal government no longer relies on import duties as an important source of revenue and because states rarely impose taxes that either discriminate against imports or that apply to goods in import transit, the ban on state taxation of imports has little practical impact on the allocation of revenue sources between the federal government and the states and does not significantly curtail the states' power to tax imported goods.

The prohibition on state taxation of exports complements the analogous bar on federal taxation of exports.[134] Rather than speaking to the distribution of taxing power between federal and state governments, it reflects the intent of the constitutional framers to deny the power to tax exports to all levels of government in the United States. Despite the parallelism between the constitutional bar on federal and state taxation of exports, the former prohibition has been construed more strictly, at least in recent years. While the Supreme Court has read the constitutional prohibition on federal taxation of exports to preclude even non-discriminatory taxes on exports,[135] it has fol-

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of the United States Government: Historical Tables Fiscal Year 2011, Composition of "Other Receipts": 1940-2015, Table 2.5, available at http://www.gpoaccess.gov/usbudget/fy11/hist.html.

129. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).
130. *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871).
131. 423 U.S. 276 (1976).
132. Id., p. 290. See generally W. Hellerstein, "*Michelin Tire Corp. v. Wages*: Enhanced state power to tax imports", *Supreme Court Review* (1976), pp. 99-133.
133. *Itel Containers International v. Huddleston*, 507 U.S. 60 (1993).
134. See 3.4.2.
135. Id.

lowed a path analogous to that described in the preceding discussion of state taxation of imports, concluding that non-discriminatory taxation of exports does not offend the clause.[136] It therefore sustained a non-discriminatory excise tax on the gross receipts from stevedoring activities (including the handling of exports).[137]

3.5. Wealth transfer taxes

Both federal and state governments have authority to impose wealth transfer taxes, such as estate, inheritance, and gift taxes, and they have exercised this authority concurrently during most of the past century. By contrast to the lack of federal-state tax coordination with regard to most taxes, federal-state tax coordination has played an enormous role in shaping the American wealth transfer tax structure, a matter explored below.[138]

4. Fiscal federalism: Control and coordination of taxing powers

4.1. Overview

Congress lacks authority to alter the fundamental (if somewhat diffuse) *distribution* of taxing powers reflected in the constitutional framework described above. For example, Congress could not constitutionally provide for a federal property tax unless it were apportioned among the states by population. Nor could Congress deprive the states of the power to tax property, income, or consumption altogether, wholly apart from the fact that any such action would be politically inconceivable.

Congress nevertheless possesses considerable authority to control and coordinate the *exercise* of federal and state taxing powers. The source of Congress's authority lies principally in its plenary power "[t]o regulate Commerce with foreign Nations, and among the several States …".[139] The Commerce Clause thus empowers Congress to require that state tax power

136. *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). See generally J. R. Hellerstein and W. Hellerstein, *State Taxation*, Vol. I, Valhalla: Thomson Reuters, 3rd edn., 1998 & Cum. Supp. 2010, § 5.03[2], pp. 5-14.
137. Id.
138. See 4.6.
139. US Constitution, Art. I, § 8.

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