2024

The Commerce Clause Doesn’t Override Rules Governing the Taxing Power

Erik M. Jensen
Case Western University School of Law, emj@case.edu

taxnotes federal

Volume 182, Number 9 ■ February 26, 2024

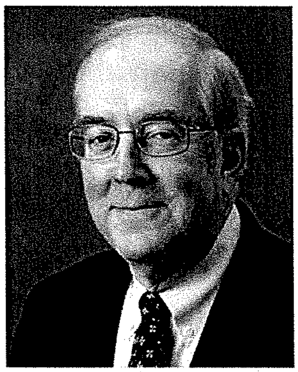
The Commerce Clause Doesn't Override Rules Governing the Taxing Power

by Erik M. Jensen

Reprinted from *Tax Notes Federal*, February 26, 2024, p. 1603

The Commerce Clause Doesn't Override Rules Governing the Taxing Power

by Erik M. Jensen


Erik M. Jensen

Erik M. Jensen is the Coleman P. Burke Professor Emeritus of Law at Case Western Reserve University.

In this article, Jensen challenges the argument that limitations on the taxing power in the Constitution can be ignored if a specific tax can be considered a regulation of commerce, and he examines the implications for *Moore*.

Libin Zhang has taken the position that the government missed the opportunity in *Moore*[1] to argue — in briefs and during the December 5, 2023, oral argument — that the Supreme Court should uphold the mandatory repatriation tax (MRT) as a valid exercise of congressional power under the foreign commerce clause.[2] That "clause" isn't really a clause; it's part of the commerce clause, which gives Congress the power "to regulate Commerce with Foreign Nations, and among the several States, and with the Indian tribes."[3] Zhang's more general point is that "taxes justified by the commerce clause are not subject to the same constitutional limitations . . . that apply to taxes justified by other constitutional clauses."[4]

Indeed, Zhang says, "the courts have found taxes justified under the commerce clause which fail as taxes for want of uniformity as excise taxes, or apportionment as direct taxes, or because they were taxes on exports."[5] (Those three sets of limitations on the taxing power are set out in the footnote below.[6]) If correct, that understanding would have permitted the Court in *Moore* to create a "limited holding" — lots of folks seem to want and expect a limited holding — "that would have avoided the thorny realization questions under the 16th Amendment and would have no implications for more domestic taxes such as a mark-to-market income tax or an annual wealth tax."[7]

I'm not convinced.

The 'Question Presented' in *Moore*

To begin, the question presented in *Moore* — the question guiding the briefing and oral argument — was, as noted in the petition for certiorari, "whether the Sixteenth Amendment

[1] *Moore v. United States*, No. 2:19-cv-01539 (W.D. Wash. 2020), *aff'd*, 36 F.4th 930 (9th Cir. 2022), *reh'g denied*, 53 F.4th 507 (9th Cir. 2022), *cert. granted*, No. 22-800 (U.S. 2023).

[2] Libin Zhang, "*Moore* Implications From Forgetting the Foreign Commerce Clause," *Tax Notes Federal*, Feb. 5, 2024, p. 1031. The MRT in section 965 was added to the code by the Tax Cuts and Jobs Act of 2017.

[3] U.S. Const. Art. I, section 8, cl. 3.

[4] Zhang, *supra* note 2, at 1031.

[5] *Id.* at 1033.

[6] The uniformity rule for indirect taxes: *see* U.S. Const. Art. I, section 8, cl. 1 (requiring that "all Duties, Imposts and Excises shall be uniform throughout the United States"). That requirement has been understood to mean that the rates and definition of the tax base must be the same in every state. The apportionment rule for direct taxes: *see* U.S. Const. Art. I, section 2 (requiring that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers"); Art. I, section 9, cl. 4 (requiring that "no capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken"). The export clause: *see* U.S. Const. Art. I, section 9, cl. 5 (providing that "no Tax or Duty shall be laid on Articles exported from any State").

[7] Zhang, *supra* note 2, at 1031.

authorizes Congress to tax unrealized sums without apportionment among the states."[8] The Moores were taxed in 2017 under the MRT — a one-time tax — on their shares of the undistributed, post-1986 earnings of a controlled foreign corporation in which they were shareholders. They claimed that they had realized no income within the meaning of the 16th Amendment because they had received no distributions from the corporation. They were being taxed, they argued, on something that wasn't income.

If the MRT was a direct tax (and not a "tax on incomes" within the meaning of the 16th Amendment) and wasn't apportioned among the states on the basis of population, it was invalid.[9] But if the MRT was a tax on incomes (or part of a tax on incomes), the apportionment requirement didn't apply. The realization question is the issue on which the Court granted cert, and it is the question on which the arguments — most of them, anyway — proceeded.[10]

I suppose the Court can decide a case on whatever grounds it wishes, even if a specific position wasn't fleshed out in briefs or in oral argument.[11] But the Court should pay attention to the procedural posture of a case. And the procedural posture of *Moore* at the time of oral argument ensured that the foreign commerce clause wasn't the center of attention.[12] If the government was going to advance that argument, as Zhang thinks it should have, it should have done so when resisting the grant of certiorari.

A 'Tax' Must Meet the Requirements for Taxes

Let's move on to the merits of Zhang's idea that Congress can enact a tax that isn't subject to the limitations otherwise applicable to taxation as long as the tax can be construed as a regulation of commerce.

I concede that, even if the Constitution included no taxing clause, Congress would have the power under the commerce clause to impose all sorts of levies. For example, an impost — a duty on imports — is specifically mentioned in the taxing clause,[13] but even without the taxing clause, Congress could presumably enact tariffs under its commerce power. Indeed, with the taxing clause in the Constitution, many levies can be seen as authorized by more than one clause in that document.

Zhang discussed *National Federation of Independent Business*,[14] the first Obamacare case, in which the Supreme Court held that the shared responsibility payment (SRP) (also known as the individual mandate penalty) — the charge for failing to acquire suitable health insurance set out in the original Obamacare legislation — was valid as a tax but outside Congress's commerce power.[15]

In that discussion of *National Federation of Independent Business*, Zhang wrote that "the renowned constitutional law professor Erwin Chemerinsky said [in 2009] the tax 'is so clearly within Congress's commerce power that it is not

[8] *See* Petition for Writ of Certiorari at i, *Moore*, No. 22-800 (Feb. 21, 2023).

[9] The past tense is appropriate because the MRP isn't recurring, although it is still (obviously) the subject of litigation.

[10] Although not briefed, the issue arose at oral argument about whether income that had been realized by the corporation could be attributed to shareholders like the Moores and meet 16th Amendment requirements. (Even if realization requires income, that was satisfied in *Moore*.) The solicitor general signaled that finding realization would be acceptable, although the government's primary argument was that realization just isn't constitutionally required to have a tax on incomes. Justice Neil Gorsuch seemed bothered, however, by the idea of deciding a case based on a position not presented in the briefs. *See* Transcript of Oral Argument at 64-80, *Moore* (U.S. argued Dec. 5, 2023). The "attribution" argument as applied to the MRT could result in attributing corporate earnings going back as far as 1987 to shareholders in 2017. Would 1987 earnings that had been reinvested in the corporation really be income in 2017, or would a 2017 shareholder tax on that income from prior years be a tax on property?

[11] In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, a majority of the Court held that the shared responsibility payment (SRP) imposed, under the Obamacare legislation, on taxpayers who didn't acquire suitable health insurance was authorized by the taxing clause, and that it wasn't a direct tax that had to be apportioned. The four dissenters on this point complained, in an opinion clearly written by Justice Antonin Scalia, about the Court's applying an analysis that received almost no briefing and consideration in oral argument. But the Court decided the issue anyway. Stuff happens.

[12] If the Court thinks that clause might be controlling, it should remand the case for consideration by the lower courts, or at least ask the parties for briefing on the issue before making a decision. As smart as they are, the justices must be able to consider the parties' best arguments. (The same point applies to the claim made in commentary that the MRT could be justified as an excise. That claim, too, wasn't fully briefed and argued.)

[13] The taxing clause gives Congress the "power to lay and collect Taxes, Duties, Imposts and Excises." U.S. Const. Art. I, section 8, cl. 1. And it is specifically mentioned as one of the indirect taxes (although that term isn't used) that must be "uniform throughout the United States." *Id.*

[14] *National Federation of Independent Business*, 567 U.S. 519.

[15] *See* section 5000A(c). In effect, the SRP was held to be a charge not to engage in commerce, not a regulation of commerce.

necessary to consider whether it fits within the taxing power.'"[16] I addressed the Chemerinsky point in these pages in 2009.[17] At the time that statement was made, most commentators assumed that Congress would characterize the SRP as an excise — hence Chemerinsky's reference to "the tax." Since the SRP wouldn't vary from state to state, it would satisfy the uniformity requirement for indirect taxes if it was, in fact, an excise.[18] But the Chemerinsky argument was that we shouldn't even have to worry about possible limitations on the taxing power if the SRP would be a regulation of commerce,[19] and that seems to be Zhang's position as well.

In Obamacare as enacted, however, Congress called the SRP a "penalty," not a tax. A majority of the Court in *National Federation of Independent Business* (Chief Justice John Roberts and the four other Republican appointees) concluded that imposition of such a penalty for failure to engage in commerce — that is, not securing adequate health insurance — is not authorized by the commerce clause.[20] It was the Chief Justice, with the reluctant concurrence of the four Democratic appointees, who decided that the SRP could be treated as an exercise of the taxing power. And that majority went on to conclude that the "tax" was indirect and therefore wasn't subject to apportionment.[21]

But suppose a specific charge might be considered as both a tax and a proper exercise of Congress's commerce powers, which was not the case in *National Federation of Independent Business.* I part company with Zhang in concluding that a tax, duty, impost, or excise is constitutionally valid simply because it arguably affects commerce.[22] If that were the case, the limitations on the taxing power in the Constitution — the uniformity rule for indirect taxes, the apportionment rule for direct taxes that are not taxes on incomes, and the prohibition against taxes on exported articles — could be easily circumvented.[23]

Here's a simple example. The export clause in Article I, section 9 provides that "no Tax or Duty shall be laid on Articles exported from any State."[24] Couldn't *any* tax or duty on exports be considered part of regulating foreign commerce? (That would be the point of taxing exports, wouldn't it?[25]) But under the Zhang analysis, such taxes would be constitutionally permissible — even though the export clause explicitly says otherwise. That can't be right; that understanding would read the export clause out of the Constitution.[26]

Article I, section 9, which also contains one of the two direct-tax clauses, sets out limitations on *all* congressional powers, not just on the taxing power. Why should we read the commerce clause — or any other grant of congressional power — as overriding a clear prohibition in section 9? The point of section 9 is to forbid some exercises of congressional power that might otherwise be seen as authorized by the grants of power in section 8.

[16] Zhang, *supra* note 2, at 1034 (citing Charles C. Clark, "Healthcare Reform Tax Constitutionality a Hot Topic," *Tax Notes*, Nov. 16, 2009, p. 734).

[17] *See* Erik M. Jensen, "The Commerce Clause Can't Trump Constitutional Limits on Taxation," *Tax Notes*, Nov. 30, 2009, p. 1031. Let the record show that the word "trump" was used long before the term had become a political lightning rod.

[18] If a proposed levy would be an indirect tax, we ordinarily wouldn't have to worry whether Congress's authority comes from the taxing clause or the commerce clause. When Congress has the power to regulate an activity, it can use an indirect tax to do so as long as the uniformity rule is satisfied. *See supra* notes 6 and 13. The appliable rates, for example, could not vary from state to state.

[19] That might have mattered if, characterized as a tax, the SRP varied from state to state. (It didn't.) And it certainly would have mattered if the SRP had been deemed a direct tax. (It wasn't.)

[20] *National Federation of Independent Business*, 567 U.S. at 546-561.

[21] *Id.* at 561-574.

[22] Several cases in the late 19th and early 20th centuries considered whether the taxing clause provided independent authority to regulate some activities when there was doubt about the scope of the commerce clause. As the Supreme Court expanded its conception of the commerce power, however, the significance of that issue diminished. *See* Jensen, "Would a Tax on AIG Bonus Recipients Really Be a Tax?" *Tax Notes*, May 25, 2009, p. 1033. But to my knowledge no one had seriously argued that a regulatory *tax* would be exempt from the uniformity requirement if it were also characterized as an exercise of the commerce power.

[23] *See supra* note 6.

[24] U.S. Const. Art. I, section 9, cl. 5.

[25] A note on the meaning of the phrase "Articles exported from any State": What constitutes exportation wasn't obvious to all at the time of the founding. *See, e.g.*, Act of July 6, 1797, ch. 11, section 1, 1 Stat. 527, 528. But it's now clear the reference is "only to exportation to foreign countries" (*United States v. Hvoslef*, 237 U.S. 1, 13 (1915)), not to transfers across state lines. (It was the "staple states" — states with substantial exports — that were being protected by the export clause, which is probably the reason for the phrase "from any State" in the clause.) Similarly, the term "imports" in the import-export clause. U.S. Const. Art. I, section 10, cl. 2, refers to goods coming from foreign nations, not from other states. *See Woodruff v. Parham*, 75 U.S. 123 (1868).

[26] *See* Jensen, "The Export Clause," 6 *Fla. Tax Rev.* 1, 45 (2003) ("A congressional attempt to use the *taxing* power to achieve a goal otherwise permitted by the Commerce Clause would be precluded by the Export Clause. At a minimum, the Export Clause cuts down on the options available to Congress to affect exportation.").

(You don't need a limitation on a power that wasn't granted in the first place.) And, for that matter, why should we read the commerce clause as overriding the other direct-tax clause in Article I, section 2? If a tax is a direct tax (and not exempt from apportionment by the 16th Amendment), it must be apportioned to be valid — even if the tax is related to commerce.[27]

Yes, the 1961 memorandum from the Treasury general counsel to then-Treasury Secretary Douglas Dillon, discussed by Zhang at length — concluding that the proposed subpart F provisions would be constitutional even though no realization event was required — contains language supporting the Zhang position. But much of the case law he cited doesn't really provide support.

For example, Zhang quoted from the Sixth Circuit's 1943 opinion in *Rodgers*[28]:

> The constitutional limitation on which appellant relies [the direct-tax apportionment rule] relates solely to taxation generally for the purpose of revenue only, and not impositions made incidentally under the commerce clause exerted either directly or by delegation, as a means of constraining and regulating what may be considered by the Congress as pernicious or harmful to Congress.[29]

Rodgers was challenging the imposition of a significant penalty because he had cultivated and marketed cotton in amounts greater than quotas established by Congress — a penalty measured at a statutorily prescribed rate per pound.[30] But that discussion in *Rodgers* wasn't about how limitations on the taxing power go away if a tax can also be justified as an exercise of another enumerated congressional power.

The above passage was in support of the proposition that limitations on the taxing power — including the direct-tax apportionment rule — are relevant only for charges imposed by the federal government that are, in fact, taxes:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.[31]

In *Rodgers*, the conclusion from the application of the prescribed test was that no tax was involved:

> The imposition of a sanction of three cents a pound as a prerequisite to the right of the farmer to market excess cotton under the terms and purposes of the statute involved is not the levying of a tax under the government's taxing power, but a method adopted by the Congress for the express purpose of regulating the production of cotton affecting interstate commerce.[32]

If no tax has been imposed, no limitation on the taxing power is relevant. And in affirming the Sixth Circuit in *Rodgers*, the Supreme Court in 1947 accepted the lower court's characterization of the charge as an "imposition" and didn't discuss the relationship between the taxing power and the commerce power in the Constitution.[33]

Another case that Zhang cited — *Stangland*,[34] decided by the Seventh Circuit in 1957, also considering penalties under the statute

---

[27] Suppose Congress enacted a tax on vessels engaged in commerce, foreign or domestic, measured by the value of those vessels. Is that an exercise of the commerce power, or is it (here comes the right answer) a tax on property, which is a direct tax required to be apportioned among the states on the basis of population? *See supra* note 9.

[28] *Rodgers v. United States*, 138 F.2d 992 (6th Cir. 1943). He incorrectly credits the quoted language to the Supreme Court's 1947 opinion affirming the Sixth Circuit's decision.

[29] *Id.* at 995 (quoted in Zhang, *supra* note 2, at 1033).

[30] The statute was the Agricultural Adjustment Act of 1938, 52 Stat. 31.

[31] *Rodgers*, 138 F.2d at 994.

[32] *Id.* at 994. That language was quoted in *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957), another case cited by Zhang. See *infra* notes 34-35 and accompanying text.

[33] *Rodgers v. United States*, 332 U.S. 371 (1947).

[34] *Stangland*, 242 F.2d 843.

considered in *Rodgers* — simply quoted from the *Rodgers* opinion at great length.[35] Again, if there's no tax, limitations on the taxing power are beside the point.

The same point can be made — so I'm making it — about the case Zhang cited in support of the proposition that the 3-cent-per-pound penalty imposed on cotton being exported was not forbidden by the export clause. The Fifth Circuit in 1946, in *West Texas Cottonoil Co.*,[36] said that "upon no reasonable view can it be claimed that the excess cotton penalty is a tax on exportation. A penalty imposed on the marketing of excess cotton, it has for its object not the prevention or burdening of exporting, but the prevention of raising for market, and marketing, cotton in excess of the allotment."[37] A penalty isn't a tax, and the limitations on the taxing power just don't matter in evaluating the constitutionality of a penalty.

In all those cases, the conclusion wasn't that the commerce clause can override limitations on the taxing power; it was that taxation wasn't involved. In short, not all governmental charges are taxes subject to limitations on the taxing power. Some governmental charges might be penalties, others user fees,[38] and — who knows? — there might be other nontax categories as well. In any event, a case-by-case analysis is required to determine whether a charge is really a tax governed by the Constitution's rules on taxation.

Conclusion

Even if Zhang hadn't stretched the meaning of some cases to support his argument that the commerce clause can override explicit limitations on the taxing power, I would question that argument. It suggests that limitations on the taxing power can be easily circumvented, and that's not how a constitution should work. ■

[35] *See id.* at 848.

[36] *United States v. West Texas Cottonoil Co.*, 155 F.2d 463 (5th Cir. 1946).

[37] *Id.* at 465.

[38] *See* Jensen, *supra* note 26, at 35-43 (discussing *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), in which the Court concluded that the harbor maintenance tax (*see* section 4461 et seq.), as then in effect, was a tax on articles exported but taking seriously the argument that it might have been a user fee — even though Congress hadn't called it that); and Jensen, *supra* note 26, at 46-49 (arguing that the export clause prohibits only taxes or duties on articles exported, not all charges imposed by the federal government that affect exportation).