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Taxation and the Constitution: Recent Articles

By Erik M. Jensen

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In this article, Jensen highlights recent law review literature on the U.S. Constitution and taxation.

This article highlights some of the significant law review articles published (or at least disseminated) in the last couple of years on the U.S. Constitution and taxation — in particular, the constitutional provisions that deal explicitly with the national taxing power and limitations on that power.

The Constitution can affect taxation in many ways, of course, but I generally limited my search to articles dealing with the origination clause, the taxing clause, the uniformity clause, the direct tax clauses, the 16th Amendment, and the export clause. Not all of those subjects were represented in the recent law review literature, but what was there was enough to keep me busy (or as busy as an academic ever gets).

Largely because of my own ignorance, I did not look for articles discussing other connections between the Constitution and taxation. For example, with one exception, I do not report on articles that deal primarily with federalism issues, even if there’s a taxation subtext, such as the burgeoning literature on the Supreme Court’s decision in United States v. Windsor. Constitutional limitations on states’ taxing powers are also outside my expertise, although this important subject is of continuing interest, as a recent Supreme Court decision illustrates. Some other constitutional issues that I did not include in this project are set out in the footnote below.

133 S. Ct. 2675 (2013). Under the Defense of Marriage Act, Edith Windsor’s same-sex marriage, which was valid under state law, wasn’t recognized for federal purposes, and Windsor had therefore been denied the federal estate tax exemption for surviving spouses. So, in a sense, Windsor was a tax case. The issue wasn’t the federal taxing power per se, however. It was whether the federal government can, for tax and other purposes, define marriage in a way inconsistent with the definition in some states. (The answer was no.)

Taxes are, after all, a matter of national concern, so it’s important for the Constitution to play a role in defining marriage.

See, e.g., Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015) (holding that a tax on the income of Maryland residents violated the dormant commerce clause to the extent the income taxed was earned outside Maryland, and the taxpayer wasn’t entitled to a credit against Maryland taxes for taxes paid to other states). For a fascinating look at the federalism issues implicated by use of the general welfare and necessary and proper clauses — what Alison L. Lacroix refers to as “shadow powers” — see Lacroix, “The Shadow Powers of Article I,” 123 Yale L.J. 2044 (2014).

The distinction between taxation and a taking is fascinating, but it’s a subject unlikely to come up very often, except as a throwaway argument. But see Karl Manheim, “The Health Insurance Mandate — a Tax or a Taking?” 42 Hastings Con. L.Q. 101 (2015) (an extended discussion of what distinguishes taxes from takings).

I also didn’t focus on articles arguing that statutes or regulations are unconstitutional because they were improperly adopted. See, e.g., Linda D. Jellum, “Dodging the Taxman: Why the Treasury’s Anti-Abuse Regulation Is Unconstitutional,” 70 U. Miami L. Rev. 152 (2015) (arguing that reg. section 1.701-1, the partnership antibuse provision, is unconstitutional because Congress neither explicitly nor implicitly delegated to Treasury the authority to codify the antibuse doctrines).

Finally, I love the so-called parsonage allowance (see section 107) (excluding from the gross income of a “minister of the gospel” the rental value of a home provided or the allowance (Footnote continued on next page.)
Finally, everyone knows but sometimes forgets that not all tax disputes rise to constitutional levels. Most disputes don’t, of course, even those of enormous importance. For example, the survival of Obamacare may well have depended on the result in King v. Burwell, and that case will be a subject of commentary for years to come. But King involved statutory interpretation issues, not constitutional ones, and I’ve therefore not included articles on that case, nor have I included works on the tax Anti-Injunction Act, a statute often treated as if it were quasi-constitutional. The Anti-Injunction Act may have constitutional overtones, but it, too, is just a statute.

A. The Origination Clause

Let’s begin at the origination. The origination clause provides that “all Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”

This clause, seemingly requiring that bills that would impose additional taxes (or other revenue-generating charges) must have their origins in the House, generally isn’t a subject of controversy. That’s partly because the clause really doesn’t seem to matter and partly because Congress and a few courts have come to accept a subterfuge as satisfying the clause’s requirements.

The origination clause doesn’t seem to matter because the House has to agree on any legislation anyway, whether dealing with revenue or not. If the House signs off on revenue-raising legislation that originates in the Senate — or, for that matter, in the executive department or the faculty lounge at Harvard Law School — why should anyone else care? (If the House is willing to waive its constitutional prerogatives, what business is it of ours?) Yes, folks should generally follow the rules, even stupid rules, but if a rule seems to make no difference, why not just ignore it?

And many, maybe most, of the original justifications for the clause are suspect. One justification was that the House would be closer to the people than the Senate would be, and that closeness would prevent Congress from acting oppressively. But seven states today have only one representative in the House. Was Sen. Bernie Sanders, for example, really closer to the people when he served as Vermont’s sole representative than he is now as one of two senators from that state?

To be sure, Congress generally does go through the motions of adhering to the origination clause, and here’s where the subterfuge comes in. If the Senate substitutes its revenue-raising language for language in a bill that bears a House number, the general understanding is that the constitutional requirements are met, even if the House was basically a spectator in the process — at least insofar as the House-originated form of the bill involved raising revenue. (The Senate amendment must be germane to be permitted under the origination clause. For example, the Senate can’t add or substitute a revenue-raising provision in a bill declaring National Dogcatchers’ Day.) Under the language of the origination clause, “the Senate may propose or concur with Amendments as on other Bills,” and substituting new tax language for old tax language is arguably merely an amendment to an existing bill for raising revenue.

The origination clause seemed to have assumed new importance after the Supreme Court’s decision in National Federation of Independent Business (NFIB) v. Sebelius. Yes, there were some openly revenue-raising provisions in the Obamacare legislation, but the tax nature of the legislation was heightened when the Court held that the individual mandate penalty was itself a tax, authorized by the taxing clause of the Constitution, rather than what Congress had called it: a penalty for failure to acquire health insurance. Because the sharply divided

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provided to acquire a home and associated furnishing and appurtenances). Even with “minister of the gospel” necessarily (and wonderfully) interpreted to include rabbis and imams, the provision is subject to constitutional attack. The issues are largely under the First Amendment, however, and are not attributable to the taxing power.

13 See section 7421(a) (providing that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed”).

Court concluded that Congress had no power under the commerce clause to require folks to acquire a particular product like insurance, a penalty to enforce an unconstitutional requirement would itself have been unconstitutional.17

Recharacterizing the penalty as a tax has led to the argument that the Obamacare legislation, at least in significant part, was a measure to raise revenue. The Affordable Care Act, as enacted, did bear a House number (H.R. 3590), but the Senate had made major modifications to the original form of the legislation. (H.R. 3590 began as a six-page measure intended to “amend the Internal Revenue Code of 1986 to modify the first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees, and for other purposes.”)18) The ACA was not, the argument goes, merely an amendment to a revenue-raising bill.

Whether the origination clause governed a final bill that contained revenue-raising measures but was not primarily designed to raise revenue was a matter of debate. It had been understood for a long time that a bill for which raising revenue was incidental was not subject to the clause. In this case, however, everyone agreed, I think, that the individual mandate penalty, although a small part of a voluminous bill, was central to the legislation. Without the penalty (the “tax”) in place, the increase in health insurance coverage necessary for Obamacare to work — pushing more healthy people to acquire insurance that they were likely to make little use of — would not have happened. So maybe the ACA language consisted of revenue-raising language that was substituted for revenue-raising language in the original House version of H.R. 3590, but the connection was tenuous at best.

That issue has probably gone away in the real world, at least for a while, now that the Supreme Court has denied certiorari in a case that raised, at the trial court level, precisely that origination clause issue.19 But the intellectual issues remain, and they are masterfully addressed in several recent articles.

17Only Roberts seemed to be enthusiastic about evaluating the legislation in this way, but he was able to get four other justices to grudgingly accept this analysis. For those four, this was the only way to save the individual mandate.


19See Hotze v. Sebelius, 991 F. Supp.2d 864 (S.D. Tex. 2014) (rejecting various challenges to the ACA, including one under the origination clause, and concluding, in the alternative, that the act was not primarily one for raising revenue, or, if it was, that the origination clause’s requirements were satisfied because the legislation bore a House number), vacated and remanded sub nom., Hotze v. Lew, 784 F.3d 984 (5th Cir. 2014) (concluding that the district court had no jurisdiction to hear the case because the

Footnote continued in next column.)
power to amend a House revenue-raising bill by adding nontax provisions to it.

In Natelson’s view, a “bill for raising Revenue” is a bill to impose a tax, a tax for which there would be no constitutional authority other than the taxing clause. The individual mandate penalty, as a tax (if that’s what it is), could properly be included in a Senate amendment to a House-originated revenue measure, but the Senate did not have the power to add new regulatory and appropriation provisions to House legislation that fit the origination clause’s definition of a bill for raising revenue. Natelson therefore concludes that origination clause attacks on Obamacare have focused on the wrong issues. The problem with H.R. 3590, as enacted into law, isn’t the taxing provisions added by the Senate; it’s the other stuff the Senate stuffed into the bill.

Natelson’s argument is formidable, but there’s no plausible reason, I think, to believe a court today would be any more sympathetic to enforcing his conception of the origination clause than courts have generally been to enforcing the clause as more generally understood.21

3. Steven J. Willis and Hans G. T anzler IV, “The Wrong House: Why ‘Obamacare’ Violates the U.S. Constitution’s Origination Clause,” Washington Legal Foundation Working Paper Series No. 189 (Jan. 2015).22 This article doesn’t seem to have made its way into traditional print yet, but then traditional print seems to be disappearing for most purposes. In any event, the article is easily available online (even though it may still be a work in progress).

Willis and Tanzler unabashedly argue that the origination clause has content — enforceable content that matters today — and that the taxation provisions of the Obamacare legislation violated the clause. Their argument is that courts have improperly applied a primary purpose test to determine whether a tax provision hidden in an omnibus piece of legislation should be treated as subject to evaluation under the origination clause. Under that judicial understanding, if the original House bill or the Senate amendment includes a few taxation provisions that are part of a larger piece of legislation with a primary purpose other than raising revenue, the original bill or the amendment doesn’t implicate the clause. Willis and Tanzler argue instead that individual taxation provisions in a Senate amend-

21I don’t mean that as a criticism. I love academic arguments that are unlikely to affect the real world. Indeed, I’ve made many myself.

22Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2507867. (If I am citing to something other than the most recent version of this article, I apologize.)
taxes. And some of its discussion raises the question whether the meaning of direct taxes has continuing relevance.26

1. John T. Plecnik, “The New Flat Tax: A Modest Proposal for a Constituionally Apportioned Wealth Tax,” 41 Hastings L.Q. 483 (2014). Because all or almost all the founders assumed that a tax on real estate would be direct,27 the assumption has generally been that a wealth tax would be a direct tax that would have to be apportioned under the direct tax clauses to be constitutional.28 And apportionment would generally defeat the purpose of a wealth tax.29

Professor Plecnik nevertheless has made an imaginative attempt to craft a wealth tax that could be apportioned without absurd effects. He argues for a wealth tax that would be imposed at a uniform rate across the country, with the federal government retaining each state’s share of the tax determined by applying the apportionment rule. The excess for any state would be refunded to the state through a state-level pickup tax. The bottom line: Taking into account the working of the “new flat tax” as a whole, each state would bear only its apportioned share of the national wealth tax. Constitutional problem solved, although whether the proposal is politically possible is another matter. I think not.30

2. Natelson, “What the Constitution Means by ‘Duties, Imposts, and Excises’ — and ‘Taxes’ (Direct or Otherwise),” 66 Case W. Res. L. Rev. 297 (2015). This second Natelson article is filled with insights about the original understanding of those various terms — meanings he ties to the Court’s analysis in NFIB. Natelson concludes that the original understanding of direct taxes was much broader in scope than today’s conventional wisdom would suggest: that the term was understood to include not only capitations and taxes on property but also taxes on businesses and trades, and taxes on income of all kinds. One thing that means is that the Supreme Court got it right in 1895 in concluding that the 1894 income tax was invalid because it was a direct tax that had not been apportioned.31 If Natelson is correct on the income tax point, as I think he is (but almost no one else does), the 16th Amendment was necessary, as a matter of constitutional law, to have an unapportioned income tax. (As would be true with a national wealth tax, an apportioned income tax would be an absurdity.)32 Natelson also concludes that the penalty at issue in NFIB was not a tax to begin with; it was what Congress called it: a penalty. But if it was a tax, it should have been characterized as a direct tax subject to the apportionment rule. Because Congress didn’t apportion the penalty tax (doing so would have defeated the purpose of the penalty), the individual mandate “penalty” failed as a matter of constitutional law.

C. The General Welfare

One question that has never resulted in an answer accepted by a consensus of commentators is whether the general welfare clause of the Constitution — part of the taxing clause or, if you prefer, the taxing and spending clause — provides independent authority for the enactment of, or restrictions on, taxing legislation.33 Two recent articles focus on general welfare as a possible limitation on, or expansion of, the taxing power.

1. Jonathan S. Sidhu, “For the General Welfare: Finding a Limit on the Taxing Power After NFIB v. Sebelius,” 103 Cal. L. Rev. 103 (2015). Despite the title, this interesting article is more about federalism than the general welfare clause. I earlier said that I was ignoring articles on federalism, with one exception. This is the exception.34 Sidhu argues that courts should treat congressional authority over the states in the same way for purposes of both the taxing clause and the commerce clause, at least in general. (That proposition is rebuttable, but, Sidhu argues, the presumption should be that a divergence from commerce clause principles is unlawful.) Congress should generally

27All the justices who wrote opinions in the great case of Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), accepted that point, and other founding documents, including the Federalist Papers, assumed that a real estate tax is direct. Several Hylton justices in dicta suggested that the only direct taxes are capitations and taxes on real estate, an understanding that controlled for almost a century and, in the minds of many, continues to control today. In fact, beginning in 1798, Congress apportioned several federal taxes on real property.
28See supra note 4.
29If states A and B have the same population but A has twice as much wealth as B, the tax rates in A, the richer state, would have to be lower than those applicable in state B. That would be absurd, generally meaning that Congress is almost certainly not going to enact a wealth tax today unless there is some way to avoid this problem.
30But see supra note 21.
31See Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429 (1895) (holding an unapportioned tax that reached income from real estate unconstitutional), modified on reh’g, 158 U.S. 601 (1895) (extending the Court’s principle to income from personal property and rejecting the entire 1894 tax). There were two sets of opinions because the case was reargued.
32Cf. supra note 29. To make the numbers come out right, rates would have to be higher in a low-income state than in a high-income state.
33The taxing power is to be used “to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. Const. Art. I, section 8, cl. 1.
34For another quasi-exception, see supra note 8.
be unable to ignore limits on the commerce power by invoking the taxing clause, which is in effect what happened, or what was deemed to have happened, in NFIB.

Sidhu provides a three-part test to determine whether taxes are inconsistent with the commerce clause and should therefore be treated as unlawful. The Sidhu approach requires looking at (1) whether the purported tax in fact raises revenue (a traditional test in this area, but one for which the Supreme Court has required only that minimal revenue be raised); (2) whether the purported tax is coercive (Roberts in NFIB had concluded that the individual mandate penalty was really a tax because it gave Americans a choice — it was an inducement rather than a punishment); and (3) whether the subject matter of the purported tax belongs to the states (hence the connection with federalism). On that last point, the concern is that Congress should not be able to usurp powers reserved to the states under the Constitution by invoking the taxing clause as justification for its actions.

One example Sidhu provides in support of this analytical framework is a purported tax on guns carried near school zones — which would be a clear attempt to use the taxing power to circumvent the Supreme Court’s decision in United States v. Lopez.35 In Lopez, the Court invalidated the Gun Free School Zones Act of 1990, which made carrying firearms in “school zones” (as defined in the act) a federal offense, in that the act exceeded Congress’s powers under the commerce clause. In Sidhu’s view, the hypothetical tax should fail as well.

2. Mark Klock, “The Taxing Power of the Federal Government and the General Welfare: What Are the Limits in the Wake of NFIB v. Sebelius?” 76 U. Pitt. L. Rev. 325 (2015). Professor Klock not unreasonably argues that the taxing power and the spending power must be read in tandem. In that regard, “provid[ing] for the common Defence and general Welfare of the United States” is certainly broad in scope, and courts should give significant deference to congressional enactments. But congressional power isn’t limitless. For example, Klock posits, although spending on defense and, say, the interstate highway system arguably benefit the general welfare, spending on benefits that accrue to individual households might not, in some circumstances, be sufficiently tied to that general welfare.

This particular distinction might not be accepted by courts, but Klock has to be right that the taxing power is not limitless, that not every tax provides for the general welfare. However, he concludes the article with a suspect point: that “no matter how you parse it, a penalty on going without health insurance is not a tax on income.” That may be true enough (although not everyone would agree36), but it’s not what the Court said in NFIB.37

D. Taxing Power Articles Not Focused on NFIB

The Constitution requires that “Duties, Imposts and Excises [generally referred to as indirect taxes in founding debates] . . . be uniform throughout the United States,”38 but direct taxes (other than taxes on income, which are governed by the 16th Amendment) must be apportioned among the states on the basis of population.39 Whether a tax goes into the direct tax box or the indirect tax box is therefore critically important.

Although Congress did apportion several real estate taxes between 1798 and 1861, no tax has been apportioned since then, and it’s almost inconceivable that Congress would attempt to apportion a tax today. Classifying a proposed tax as direct, and not exempted from apportionment by the 16th Amendment,40 would probably kill the legislation in Congress.

But that’s unlikely to be a problem, except perhaps with a proposed tax on wealth. That’s partly because the early Supreme Court gave a cramped interpretation of direct taxes, leaving the apportionment rule to apply to very little.41 Moreover, for taxes that are unquestionably direct taxes — such as taxes on property42 — the apportionment requirement makes those taxes generally unworkable.

1. Evgeny Magidenko, “Classifying Federal Taxes for Constitutional Purposes,” 45 U. Balt. L. Rev. 57 (2015). This article is a useful catalog of the important judicial decisions over the years dealing with what distinguishes direct taxes from indirect taxes. And it’s an interesting attempt to categorize several proposed taxes as either direct or indirect, and, if


36The amount of the individual mandate penalty applicable to a person who doesn’t acquire health insurance does depend on the person’s income.

37The Court concluded that the individual mandate penalty, although a tax, wasn’t a direct tax. As a result, there was no reason to consider whether the penalty was a tax on income. The 16th Amendment matters only if the apportionment requirement would otherwise apply — that is, if the tax is a direct tax that would otherwise have to be apportioned.

38See supra note 3.

39See supra notes 4-5.

40See supra note 5.

41See supra note 27 (discussing Hylton, 3 U.S. (3 Dall.) 171).

42The Supreme Court, in Farmers’ Loan & Trust, extended the Hylton proposition that a tax on real property is direct to apply to a tax on personal property as well (and to the income from property of any kind). See supra note 31. Roberts seems to have blessed that understanding in NFIB. See NFIB, 132 S. Ct. at 2598.
direct, whether the apportionment rule might not apply because of the 16th Amendment.

The second Natelson article cited above, although presumably motivated by NFIB, has a discussion of the classification of governmental charges that is relevant in many contexts other than those similar to NFIB. As noted earlier, Natelson concludes that the category of direct taxes includes a lot more than most commentators have suggested — and, for that matter, more than the Supreme Court has hinted at over the years.

E. Other Articles of Note

A couple of other articles on taxation and the Constitution struck this reader’s fancy.

1. James R. Hines Jr. and Kyle D. Logue, “Delegating Tax,” 114 Mich. L. Rev. 235 (2015). This piece is an extended argument in support of the proposition that Congress should have the same power to delegate its taxing power to administrative agencies that it has in general to delegate rulemaking authority. Taxation is not sui generis. The assumption over the years has been that Congress may not delegate its taxing power, and it’s probably a good idea that delegation, if it is to occur at all, should be an unusual occurrence. But in special circumstances, the argument of professors Hines and Logue could add legitimacy to delegations that today’s conventional wisdom would characterize as invalid.

2. Adam Rosenzweig, “The Article III Fiscal Power,” 29 Const. Comm. 127 (2014). The taxing clause is part of Article I, right? Yes, but Professor Rosenzweig argues that in some special circumstances, the Supreme Court can, under its Article III powers, “impose taxes and borrow money, wholly separate from the powers of Congress to do so under Article I [that is, the taxing clause] or any potential powers of the President to do so under Article II.” The special circumstances would arise if Congress authorizes spending by statute, the executive takes steps to execute the law, but Congress then withdraws the president’s power to do so. If not spending the money would violate the Constitution, the Court should have the power to order the president to raise the funds and spend them, or even to raise the funds itself through either taxation or borrowing.

Whether any of this would actually happen is another question, of course. But one of the merits of his analysis, Rosenzweig argues, is that the president and Congress, knowing that this important residual power lies in the Supreme Court, would be less likely to take steps that would lead to stalemate in the first place.

* * * *

The articles I reference are all worth a look. I’m sure I missed other articles of merit on taxing power issues, including some must-reads, and I probably missed a few constitutional arguments hidden in articles whose focus was not the taxing power. Further, I admit that my views about constitutional issues are idiosyncratic, so you might consider my choices bizarre. I apologize to everyone whose work ought to be noted here but isn’t. If it’s any consolation, must-reads will, by definition, eventually be read. And I’m sure that Tax Notes would welcome letters pointing out other meritorious works (and trashing — politely, I hope — the list I have compiled here).

4329 Const. Comm. at 128.
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