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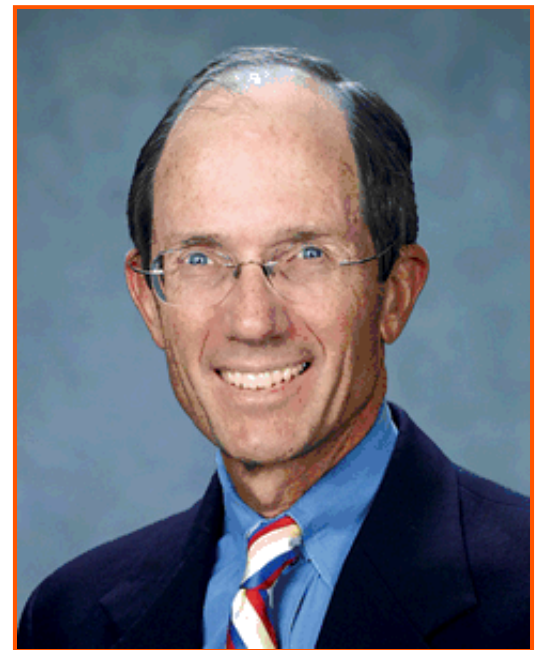
User Fees Versus Taxes

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by *Jasper L. Cummings, Jr.*

State tax lawyers have a panoply of weapons to deploy against state taxes, but may not be as ready to discern that a tax is really a user fee, or to attack the fee once identified. This article explains the U.S. Supreme Court's substantial case law addressing user fees and distinguishing them from taxes. It will provide a handy resource for defense against user fees.

A recent article in *State Tax Notes* explored the political economy of local user fees.¹ It did not cite a single court decision. An early article on the same topic was similarly focused on policy, citing only one case then pending in the Supreme Court.² In between, an article asserted that state-run lotteries were taxes, but did not contain a single case citation, again focusing on the views of economists and political scientists.³ Although politics and economics are above the paygrade of most practicing lawyers, court rulings are right down the middle of the fairway. Because there is no source of court decisions more probative than the Supreme Court, and because it has decided so many cases in this area, analysis of its decisions provides nearly all the lawyer needs to deal with state user fees.



Jasper L. Cummings, Jr.

User Fees for Benefits⁴

The issues are largely of characterization. It is important to start with the understanding that user fees and taxes are two of the four ways governments exact money from persons:

- taxes (including special assessments and franchise and privilege license taxes);
- user fees;
- civil regulatory penalties; and
- criminal penalties.

Overview

Both taxes and fees generally aim to raise revenue for government, which is the root cause of confusion about distinguishing one from the other.⁵ Although the possible recharacterization of a tax as a regulation is the more highly charged political issue,⁶ a more straightforward definitional attack on a tax is that it is really a user fee, and as such is too high relative to the cost of service, or unconstitutional for some reason that hinges on the fee characterization.

In general a fee is a voluntarily incurred governmental charge in exchange for a benefit conferred on the payer, which fee should somehow reasonably approximate the payer's fair share of the costs incurred by the government in providing the benefit.⁷ Thus, a fee shares some common features of license and franchise taxes (voluntarily incurred and benefit received); however, the government need not (and usually does not) incur a cost in providing a license or franchise, and the license or franchise tax amount need not (and usually cannot) be related in amount to a cost to the government. Also, user fees share some common features with special assessment taxes (benefits usually received and governmental costs incurred), but the special assessment may not be voluntarily incurred. A fee differs from a tax in that a tax is not voluntarily incurred (except for franchise and license taxes), nor does a tax have to produce any identifiable benefit to the payer or reflect governmental costs.

The alternative characterizations that can be applied to levies labeled user fees or taxes include:

- state fee (or inspection duty) versus an unconstitutional state import duty;⁸
- state fee versus an unconstitutional impediment to interstate commerce;⁹
- state fee versus an unconstitutional tonnage duty;¹⁰
- state fee versus a deprivation of property without due process in violation of the U.S. Constitution's 14th Amendment;¹¹
- federal fee versus a possibly unconstitutional tax on a state;¹²
- federal fee versus a tax that is not authorized by federal statute;¹³
- user fees, which must be a reasonable approximation of a fair share of government costs of benefit provided to avoid being a taking without just compensation, as contrasted with taxes, which are not subject to the taking clause;¹⁴ and
- federal fee versus an unconstitutional tax on exports.¹⁵

Sometimes the distinction makes no difference, despite being bruited in the opinion.¹⁶

Standards for User Fees

Evaluating the constitutionality of, and sometimes identifying, fees is made more difficult because the Supreme Court has created at least three different standards for fees under different parts of the Constitution, and the question arises under even more parts of the Constitution:

- Takings Clause: For purposes of just compensation, a user fee need only be a fair approximation of the cost of the benefits supplied.¹⁷ However, the applicability of the takings clause to user fees has not been clearly established.
- Commerce Clause: A more stringent standard may be applied when state user fees bear disproportionately on local and foreign users, as in the case of a flat vehicle fee that bears no relationship to the usage of the roads.¹⁸ More generally, the standard requires the fee

to bear some fair approximation to the amount of use, not discriminate against interstate commerce, and not be excessive in comparison with the benefits received.¹⁹ The commerce clause standard has been applied in an intergovernmental immunity case, because of the analogous concern with discrimination.²⁰ Of course, commerce clause case law is most important to state tax practitioners, but the commerce clause standards for fees and taxes on interstate commerce have additional features (nondiscrimination and relation of benefit to amount) that are not relevant to the constitutionality of fees generally (and will not be addressed in detail in this article).

- Export Clause: An alleged tax can be distinguished as a fee only if it does not vary in amount based on the size or value or other variable measuring the export and its amount is no more than necessary to recompense the government cost.²¹

None of these standards really fits as a generic definition of a user fee. The commerce clause concern with discrimination is absent from fees generally. Also, the commerce clause cases introduce the concept of relating the benefits enjoyed to the amount of the taxes,²² which is wholly absent from the general rule for setting fees: The amount is designed to recapture the government's costs from the users who choose to benefit from the thing for which the fee is charged, regardless of the relationship between the cost and hence the fee to the value of the benefit. The export clause is clearly a sui generis standard.

The takings clause comes closest, but applying just compensation case law generally is not appropriate: It runs the risk of focusing on the value of the benefit received for the fee -- that is, was the fee payer compensated properly for paying the fee? This is not the proper question. User fees are premised on the existence of some benefit, with the amount of the benefit being relatively unimportant, and the payment of a fee of some amount, with the amount and its relation to cost being very important.

The Court most recently stated its views on the transactions to which the takings clause is applicable in *Lingle*.²³ It described both physical and regulatory takings, but not monetary charges such as user fees. But in 1998 the Court came close to applying the takings clause on the basis of a money charge being a taking.²⁴ The Court struck down a statute requiring a coal company to increase its payments for prior workers' benefits after it had left the coal business. The plurality opinion did not discuss fees or taxes, but it indicated that a requirement to pay money could be a taking and was in that case. However, the opinion intermingled objections to the retroactivity of the charge, and the fifth vote of Justice Anthony Kennedy disavowed any application of the takings clause to the decision. The dissent pointed out that if the takings clause could be applied in the case, it could be applied to taxes.

Nevertheless, at least one opinion (not involving the additional issues raised by other constitutional concerns) has evaluated user fees under the takings clause, because that was the way the plaintiff framed the issue: *Sperry* approved what was in effect a user fee (a deduction from a recovery to pay the cost of the proceedings) in the context of the takings clause, but assumed rather than decided its applicability.²⁵ Instead, the *Sperry* Court cited an intergovernmental immunity user fee case for its "fair approximation of the cost of benefits supplied" test. That is as close as the Court has come to holding that the amount of user fees is regulated by the takings clause, even though the roles are reversed: What is usually an uncertain loss to the plaintiff is transposed into an uncertain cost to the government that is a proxy for the just compensation. *Sperry* relied on an intergovernmental immunity fee case for the fair approximation standard it applied to the fee.²⁶

The principle that a user fee must be designed to recover government costs can be traced to the one place a fee is discussed in the Constitution: A particular type of fee that the Constitution treats as a tax is the state inspection fee that can be imposed on imports and exports. Article I, section 10, clause 2, sometimes called the import-export clause, forbids state duties, except to the extent they are reasonable charges to pay for the "absolutely necessary" inspections of property imported and exported.²⁷ Therefore, even though those inspection fees are technically taxes under the historic constitutional view, they are analogous to nontax fees charged outside the import/export context. The clause requires the "net Produce" of such inspection fees to be paid to the United States. Presumably this refers to the gross fee less the government cost, with the excess being an import/export tax that only the United States can enjoy.

In the area of inspection fees, the Court has basically looked at the challenged inspection fee for indications that a state meant it for other than cost recovery,²⁸ which appears also to be the Court's approach to testing the amount of user fees generally.²⁹ One reason why the law is not better developed regarding federal fees is that since 1952, 31 U.S.C. section 9701 (and its predecessor) has directed federal agencies to charge for each service or thing of value, with the amount to reflect a variety of considerations, including cost and value. There is, however, substantial variability in the language used by the Court in evaluating (or refusing to evaluate) the amount of fees.³⁰

General Rule

The discussions in many opinions trying to distinguish fees from taxes are confused and confusing because the Court has sometimes used the terms "tax" and "fee" interchangeably, also referring to revenue, which, of course, is produced by both taxes and fees (though we more commonly think of tax revenue).³¹ However, a path through the thicket is discernable if one keeps in mind the core principles that:

- taxes are not required to have any relationship to whether the taxpayer receives a benefit (although taxes may be paid to obtain a benefit, in the cases of (a) special assessments, and (b) excise tax licenses and franchises for governmental privileges); but
- fees are always supposed to be imposed only on those receiving some benefit from a specific government action, and the fee amount should be a reasonable approximation of a fair share of the cost to the government of the action;³² and
- the amount of the benefit need not be measured, because the payer is presumed to be satisfied with the benefit, having elected to pay the fee in most cases; but
- fees may vary with usage of the government provided benefit (that is, the "fair share" aspect of the definition), although flat fees are permissible;³³
- the power to charge a user fee does not depend on the government having a property right in some property used, but rather on its incurring a cost to produce a private benefit;³⁴
- generally fees do not regulate as their primary purpose, although taxes can;³⁵ and
- there is no bright-line test for whether a levy imposed in title 26 is necessarily a tax because it is covered by title 26; rather the Court seeks to learn how Congress conceived the levy and if it has the indicia of a fee rather than a tax.³⁶

Because the incurrence of a fee is usually voluntary in whole or part, if the payer chooses to incur it, presumably the payer thinks the benefit is worth the fee. Therefore, the relationship of the amount of a fee to the governmental cost is more important than measuring the benefit and

frequently plays a role in distinguishing fees from taxes: If the fee has no relationship to the governmental cost, that fact tends to indicate it is not a fee but rather a tax (which is never expected to have a relationship to cost); and if the taxpayer need not benefit, the levy is not a fee. But the rule does not work in reverse: If a tax happens to have both a benefit to a taxpayer and reflect some cost to the government, it is nevertheless likely to be treated as a tax, particularly if it is one of those excise taxes that traditionally have been chargeable for voluntarily chosen benefits like government licenses.

Case Chronology

The best way to understand the fee versus tax argument is to avoid seeking the case on point and to review the entire chronology of the Supreme Court's decisions. Most of these cases involve state and local fees or taxes, and involve the Constitution's prohibition on state taxation of imports and exports and tonnage duties, as well as taxation of or interference with interstate commerce. States and localities are much more likely to charge fees for benefits or services, because two of their major functions as governments are to provide local services and improvements as proprietors of those improvements and to regulate through the police power. They are also much more likely to charge license and privilege taxes (which may be called fees but are treated as taxes because the rights are granted in the state's sovereign and not proprietorship capacity), because they traditionally license and authorize so many local occupations and undertakings.

The Court's decisions in the area are as follows. The list includes ambiguous charges found to be fees or taxes, usually license or franchise taxes. Some of the cases involved the import-export clause or the export clause, some interstate commerce, and the rest involve the reasonableness of the fee or right to impose a fee or tax without regard to another specific constitutional rule. After the chronology appears a summary of the factors distinguishing fees from taxes drawn from the cases:

- 1824 (state inspection fees for services): The seminal commerce clause opinion, *Gibbons v. Ogden*, did not involve a state tax or fee but discussed inspection fees as an aspect of a state's police power applied to commerce.³⁷ The Court struck down a monopoly license New York had granted on navigation in interstate commerce. The owner of the license argued that the Constitution's prohibition of state taxes on exports and imports showed that the states retained the power to regulate interstate commerce so long as they did not tax it. The opinion rejected this argument, saying that the import-export and tonnage clauses address the taxing power,³⁸ not the police power, and so proved nothing about the states' power to regulate commerce.³⁹ The opinion then turns to inspection laws, admitting that the Constitution permits states to have inspection laws, but ascribes them to the general police power ("system of police"), which Congress does not possess, and not as evidence of a power to regulate commerce among the states. Thus, the opinion differentiated the taxing power, the power over interstate commerce, and the police power to regulate matters internal to a state, and made an observation that explains the continuing confusion in the area: "All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality."⁴⁰ The Court ruled that New York could not restrict by license that subject (interstate commerce)

over which it had no power.

- 1827 (state "license" tax is a tax and not a fee for benefits): *Brown v. Maryland* ruled unconstitutional as a burden on foreign commerce a \$50 state license for selling "imported" items in the original package, in violation of Article I, section 10, clause 2: "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 its inspection Laws."⁴¹ Chief Justice John Marshall reasoned that an impost or duty is a tax, and an inspection duty on imports must be a tax on imports because of the interpretive rule that an exception must have been included in the group from which it was excepted.⁴² From that he reasoned that other charges (such as the license fee at issue) levied for events after the importation occurred must also be prohibited taxes on imports. In conjunction with *Cooley*, discussed below, and several other opinions, this decision illustrates the rule applied in practice that a license that grants a right to do something is not for a governmental service or benefit and so the cost is not a fee but a tax.
- 1847: *The License Cases* distinguished *Brown v. Maryland* and upheld state laws requiring licenses to sell products generally, some of which had come from interstate commerce.⁴³ The opinion did not discuss whether the \$1 Maryland license tax was a tax or fee, but treated it as a tax.
- 1849 (possible use of tax to provide possible benefit to taxpayer does not make state tax a fee): *The Passenger Cases, Smith v. Turner*, considered taxes charged by two ports on immigrants ostensibly for the operation of a marine hospital for their future benefit or some other vague protections.⁴⁴ In part because the use of the funds was not limited to any such purpose, the opinions of Justices John McLean and James Moore Wayne (who tried to list the salient points of the multiple opinions) did not even consider that the tax might be a fee for services, but struck the fee down as a tax on commerce.⁴⁵
- 1852 (state fees for services not taxes): *Cooley* interpreted the import-export clause not to prohibit state fees for pilots, wharfage, pilotage, and the service rendered to ships or cargo.⁴⁶ Thus, a distinction must be drawn between charges for inspection (at least of imports, under *Brown v. Maryland*) and charges for services. Presumably the Court thought inspection could not occur without an import or export, whereas the services are not so limited. *Cooley* is the first opinion to state clearly that fees for services are not taxes. It even allowed a half fee for ships that were offered and declined the pilotage. It has been cited many times for its definition of governmental services.
- 1867 (federal license tax that does not authorize anything is a tax): *The License Tax Cases* upheld the federal tax required for licenses to engage in intrastate activities, not interstate commerce, which the United States could not regulate (such as selling alcohol).⁴⁷ The tax could even fall on activities illegal under state law. The licenses did not purport to authorize the activities; rather, the person could be prosecuted by the United States if he performed the wholly intrastate activities without the federal license. Therefore, because the license granted no benefit (except protection from prosecution), it could not have been a fee (suggesting that privilege licenses charges are fees, which they are not) and was a tax that did not invade the state's rights. This opinion presents a startling, if now commonplace, usage of the term "license": a paper that does not grant a right (because the sovereign may not have the power to grant the right), but without which the licensee may be criminally charged.⁴⁸
- 1867 (a state fee must at least purportedly be for some benefit): A \$5 tax on all ships entering the port was an unconstitutional tonnage duty (tax) and not a fee.⁴⁹ It was not analogous to the half pilot fee allowed in *Cooley* even though no service was provided

there, because there a service was offered. In *S.S. Co.* no service was offered and the tax was said to be for the general support of the port warden; it evidently did not depend on wharfing, but solely entering the port. This case was appealed from Louisiana and bridged the Civil War from start to finish, which likely had something to do with the outcome.⁵⁰ See the inconsistent 1880 case below.

- 1870: The *State Tonnage Tax Cases* did not juxtapose a tax and a fee (while observing that a fee for inspection was proper) but ruled that a tonnage duty could not be disguised as a property tax based on tonnage.⁵¹
- 1873 (sovereignty versus proprietorship): The *State Freight Tax Case* found a state tax on freight shipped on railroads to be an unconstitutional burden on interstate commerce because it could not be a toll because the state did not provide the road.⁵² Thus, it could only be a tax, and as a tax it had the ability to be increased to any amount, which is why states can't tax interstate commerce.⁵³ This opinion originated the phrase and concept that taxation is a right of sovereignty, whereas a toll or charge for use of property requires acting as a proprietor of property.
- 1874 (state proprietorship charge for use of property not aspect of sovereignty): *Cannon* identified a category of government fees that were not taxes: fees charged by a proprietor, which happened to be a city, for use of improved city property, in this case a wharf.⁵⁴ The fact that the charge varied with the ship's tonnage did not make it an unconstitutional duty on tonnage because the charge was for a service that could reasonably relate to tonnage. But because the charge applied both to ships that used the dock and ships that docked on the riverbank, the charge was a duty on interstate commerce and void.⁵⁵
- 1874 (state inspection fee based on tonnage not an inspection fee): In contrast with the earlier 1874 case and the 1886 case below, *Peete* struck down as a tax an inspection fee to enforce a necessary quarantine, because it was measured by the ship's tonnage.⁵⁶
- 1875 (federal fee may be arbitrary in amount so long as not grossly excessive): *Pace* found to be a fee for service and not an unconstitutional tax on exports a 25-cent stamp that an exporter could affix to a package of any size to prove that it was for export and was not to be taxed under another provision.⁵⁷ The Court waived aside discussion of the actual cost of the stamp and said that the amount might be arbitrarily fixed so long as not obviously excessive. The opinion acknowledged that stamps usually were for taxes but not in this case.
- 1877 (state tonnage prohibition is particularly strict): A fee based on tonnage on all ships entering the port is an unconstitutional tonnage duty.⁵⁸ The fee may pay for important port regulation, but because it is measured by nothing but tonnage, it cannot be said to be compensation for anything.
- 1880: The Court upheld a wharfage duty of 7.5 cents per ton as a fee because it was reasonably related to the value of the benefit to the ship, the benefit being the generalized availability of a well-regulated harbor and not the specific use of the wharf.⁵⁹ The opinion also implied that the fee approximated the cost because it stated that the city was not trying to raise excess revenue. It did not mention the 1867 opinion that seems contrary, except that the charge there was not dependent on using the wharf and was a flat amount. It was not an unconstitutional tonnage duty.
- 1881 (state fees for improvements are not limited to one-time collections): The Court rejected the argument that the city could not continue to collect fees for docking after it had recovered the cost of the improvements; the fee could be paying for the ongoing costs of the wharf.⁶⁰
- 1883 (state inspection of exports): Outage charge levied for inspection of tobacco exports

was a permitted inspection duty.⁶¹

- 1883 (state inspection of imports): A New York law and fee were not for inspection of imports because that term applies only to inspection of property, and the law purported to inspect immigrants; moreover, the inspection involved taking testimony as to character and mental capacity.⁶²
- 1883 (state wharfage fee): In another case attacking a wharfage fee, the Court essentially refused to evaluate whether the fee was excessive, stating that was for the state to decide.⁶³
- 1886 (fee for quarantine): A ship could be made to pay a fee for its own inspection under quarantine laws.⁶⁴ *Peete* was distinguished as involving a fee charged whether any inspection was done or not. Also, the fee was a flat dollar amount per type of ship, not per ton as in *Peete*.
- 1887 (administrative power to fix tolls but not taxes): Toll is neither a tax nor is it a taking of property to which a due process claim could apply; it is a charge for a supposed benefit.⁶⁵ Not being taxes, tolls need not be set by the legislature.
- 1887 (excess funds from state fees): When neither interstate commerce nor the import-export clause was involved, the Court refused to declare a local wharfage fee to be excessive simply because excess funds were produced over and above the costs of maintaining the wharf and were paid into the state treasury. The opinion indicated that so long as the fee was not exorbitant under an undefined standard, a state could earn a profit on the fees that was used for general revenue purposes, and the fee would not be converted into a tax.⁶⁶
- 1888 (state privilege license fee is a tax): Ruled that a state license tax (fee) for the right to have an office in the state based on the amount of capital of a foreign corporation was a tax that did not violate the equal protection clause.⁶⁷
- 1892 (in case of regulated industry, state fee could reflect benefit to public and not business, but still be a fee): Railroads were made to pay the costs of the state railroad commissioners even though their activities were largely for the benefit of the public.⁶⁸
- 1893 (sovereignty versus property): The Court ruled that a city's charge per pole erected along streets by a telegraph company was not a privilege or license tax but was a charge for use of property -- the streets.⁶⁹ It stated that taxes are demands of sovereignty, whereas tolls (like this charge was found to be) are demands of proprietorship.
- 1898 (state inspection fee): The state could charge for quality inspection of imports, including imports from other states.⁷⁰
- 1906 (territorial inspection fee): The Court upheld a territorial inspection fee for exports and likened it to an inspection fee permitted under the import-export clause (which did not apply).⁷¹
- 1915 (auto licenses): Licensing vehicles for road use is a charge for use of the improvements made by the state to the roads and not a tax.⁷²
- 1928 (state excise tax that is for a privilege is a tax): State charged a 1-cent-per-mile excise "mileage tax" for the use of roads by interstate carriers, but carriers in intrastate travel paid a percentage of gross receipts.⁷³ The opinion ruled the tax constitutional; it viewed the taxes as for support of the roads but did not indicate it was other than a tax. *Spector* referred to it as an excise tax for use of the highways.⁷⁴
- 1928 (state occupation or privilege license tax a tax for a benefit): Justice Louis Brandeis examined a flat charge for the privilege of driving a bus in a city.⁷⁵ He found that it could not be a fee because it was not used to maintain the roads and was not said to do so and

was not proportioned to use. It could be an occupation tax (otherwise called a license tax or privilege license) if it did not discriminate against interstate travel, which it did because it applied solely to interstate transportation.

- 1929 (state franchise tax labeled a license fee): The Court treated as a franchise tax without discussion a license fee imposed on the capital of corporations by a state for the privilege of operating in the state.⁷⁶
- 1935 (state fee can be for general and not specific benefit): The *Clyde Mallory* opinion found a \$7.50 charge for large ships to defray the city's costs of policing the harbor to be a fee and not a duty of tonnage even though the benefit to the ship was only general.⁷⁷ It analogized the fee to the half fee for declined pilot services in *Cooley* as a "cost of regulation." The earlier opinions that ruled unconstitutional as taxes generalized fees for harbor tending may have been based on both lack of relation of the charge to the ship's size and to an evolving restriction of the view of tonnage duties by assessing the burden on commerce. The opinion explained that duties charged for the privilege of access to a port were taxes and were different from charges for services in the port. This reflects the general view that franchise taxes are taxes and not fees for a right.
- 1937 (state fee excessive as burden on interstate commerce): Because the state chose to label and defend as a fee a per-car charge for "caravanning" cars by dealers and could not trace the funds into a use for highway improvement, the Court held it to fail the stated purpose and found that because the cost of that purpose was about one-tenth of the sum raised, the fee was excessive and unconstitutional as a burden on interstate commerce.⁷⁸
- 1938 (federal tax for general regulation is not a fee): Although a levy was denominated a fee, the Court without hesitation treated it as a tax. It was a levy on gross income of shipping companies under the federal statute allowing public utility regulation and taxation for the support of public utility regulation by Hawaii. The taxpayer protested that the tax was out of proportion to the amount of regulation (that is, "benefit") the taxpayer received, but the Court said that was irrelevant because it found the tax to be a general tax for protection of the public and subject to the general rule that "a tax is not an assessment of benefits."⁷⁹ This reflects an extreme willingness to treat a federal exaction as a tax, despite (1) the failure to call it a tax, (2) the targeting of the fee at a limited number of payers, and (3) the intended use of the revenue in relation to the industry of the taxpayers. The Court was nevertheless willing to call the fee a general tax, which presumably is in contrast to a special assessment, although the opinion did not use that term.
- 1943 (state license fee charged to exercise civil rights is a tax if it is not a fee to defray costs of regulation): Justice William O. Douglas ruled that a city could not require payment of a license tax to go door to door because the requirement infringed the freedom of religion; if the charge had been for a right the city could grant, it would have been a valid license tax.⁸⁰ It was not a nominal fee to defray the costs of policing. Justice Felix Frankfurter dissented.⁸¹ As usual, Justice Robert H. Jackson's dissent in a companion case was more cogent.⁸² Among other things, Justice Jackson thought Justice Douglas's distinction between a nominal fee and the license tax failed. Jackson stated: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone."⁸³
- 1948 (fishing licenses taxes): The first of a series of cases on fishing license discrimination, which generally treat the license fees as taxes.⁸⁴
- 1951 (charge for privilege granted by state is a tax): *Spector Motor Service* treated a charge for the privilege of conducting interstate carriage in the state to be a tax for a

privilege the state could not grant.⁸⁵ It was later overruled by *Complete Auto Transit* (see 1977 below).

- 1952: Congress enacted the predecessor of 31 U.S.C. section 9701, which directs federal agencies to charge for each service or thing of value, with the amount to reflect a variety of considerations, including cost and value.
- 1972 (local airport fee): A \$1-per-passenger airport fee was a reasonable approximation of costs when it did not exceed the costs; it was not relevant that the funds were not earmarked for use in the terminals.⁸⁶
- 1974 (federal fees must be for benefits): The Court remanded for determination whether a 30-cent-per-customer fee for services charged by the Federal Communications Commission to cable TV operators was reasonable.⁸⁷ The FCC levied the annual fees, which were not for licenses, under 31 U.S.C. section 9701, which generally requires federal agencies to charge fees for services and "things of value" based on cost to government and value to the person. Primarily because the statute lets the agency set the fee, the opinion concludes it is a fee and not a tax. Arguably, based on an interpretation of the specific statute authorizing the fee, the Court determined that the fee improperly attempted to recover the entire costs of regulation even though part of the benefit of regulation went to the public. The Court later explained this case as saying that if the payer did not benefit, the levy might be a tax, and to avoid that possibility it interpreted the statute strictly.⁸⁸
- 1976: A federal "license fee" system for restricting oil imports was reasonable.⁸⁹ The Court said the fee was not a tax for purposes of the antitax injunction act because it was not enacted under title 26, but rather as part of the regulation of imports; but the Court did not specify if the fee was an import duty or a license tax or a fee.
- 1977 (new proportional use standard for commerce clause tax compliance by states): *Complete Auto Transit* overruled *Spector Motor Service* and stated: "If Mississippi had called its tax one on 'net income' or on the 'going concern value' of appellant's business, the *Spector* rule could not invalidate it. There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect."⁹⁰ The opinion established a four-prong test for commerce clause compliance that installs two requirements that are not normally associated with taxes versus fees: (1) they must be fairly apportioned and (2) they must be reasonably related to benefits provided.⁹¹
- 1978 (expansive view of federal fee): The United States could impose a flat "registration tax" on civil aircraft because it functioned as a user fee.⁹² The United States did not have to own the property of the airports in order to be able to charge a user fee, and the fact that the tax was flat did not prevent it from being a user fee so long as it was a fair approximation of the cost of the benefits. Because it was a fee, it was not subject to Chief Justice Marshall's fears about destructive taxes, and the amount could be set by the agency. The opinion unfortunately flips back and forth between tax and fee terminology, but it is clear that the Court treated the tax as a fee.
- 1987: The Court found flat taxes on trucks in interstate commerce to be discriminatory and in violation of the commerce clause.⁹³ The opinion consistently referred to the fees as taxes. Evidently the state made no effort to prove that the amount was a reasonable charge for use of the roads, and so waived the potential of calling the levy a fee; the focus of the opinion was on the discrimination, which resulted in the effective overruling of several earlier opinions.
- 1989 (no stricter standards for delegation of power to fix fees or taxes): The plaintiff argued

that federal fees for safety measures related to pipelines were actually taxes, and so subject to more strict non-delegation standards (as had been ruled in earlier cases).⁹⁴ The Court disagreed that there was a stricter non-delegation standard for taxes, ruling that it did not matter whether the fee was a tax because the standards for delegation of authority to the agency to fix the amount was the same and was met in this case (and did not decide whether the fee was a tax).

- 1989: Reasonable fees are not subject to just compensation as for a taking if imposed to recompense federal government cost.⁹⁵ The government does not need to record invoices and billable hours to justify its fee. All that is required is a fair approximation of the cost of benefits (citing *Massachusetts v. United States*). 1.5 percent of a recovery was not an excessive fee. Deduction of fee from funds to which the plaintiff was entitled did not make it more of a "taking." The user did not have to be willing. Retroactive application of the fee was permissible.
- 1996: *IBM* indicated that "imposts and duties" on imports is a narrower concept than taxes generally (which could mean that *Brown v. Maryland's* finding that an inspection fee was a tax is limited to an inspection fee on imports being an impost or duty).⁹⁶ The decision is important because it established that the United States cannot levy even a nondiscriminatory tax on exports.
- 1998 (fee amount not correlated to cost was a tax): The Court ruled the federal harbor maintenance fee to be an unconstitutional export duty and not a fee.⁹⁷ The fee was a fixed percentage of the cargo's value. It was deposited in the Harbor Maintenance Trust Fund from which Congress could appropriate money for harbor maintenance. The opinion distinguished *Pace v. Burgess* and said that the ad valorem fee did not correlate sufficiently with harbor maintenance costs to be a fee for purposes of the export clause, indicating that an unusually strict test should be applied in such cases.
- 1999 (license fee is a tax): A county could levy a license tax on a federal judge based on income because the tax applied to all judges in the county.⁹⁸ The Public Salary Tax Act was satisfied. The opinion implied that if the license had granted a right to be a judge or had involved a regulatory scheme, it would not be a tax, which is in contrast to other cases treating license taxes as taxes. But perhaps this statement is limited to the Public Salary Tax Act interpretation. The opinion disregarded the fact that the statute made it a crime to be a judge without paying the tax by stating that in practice the government only tried to collect the tax. The holding is essentially similar to that in the license tax cases.⁹⁹
- 2009 (services generally available to all taxpayers cannot be charged for by a fee). In an important tonnage tax case, the Court rejected a claim that a tax on ships taking on oil in a harbor was a fee for services rendered because it was for the general benefit of police, fire, environmental, and other services that are available to all taxpayers.¹⁰⁰ Therefore, it was an unconstitutional tonnage duty. Presumably, the case would have come out differently had the fee been for specific harbor maintenance.

User Fee Distinguishing Factors

Below are some of the criteria for distinguishing fees from taxes relied on by the Court in the preceding cases:

- Taxes are generally charged under the powers of a sovereign, while fees are generally charged in a proprietary status, like other private proprietors, which explains why privilege license taxes generally are taxes and not fees even though they grant a benefit to the payer.¹⁰¹ However, because a government can choose to impose the same fee as an excise tax or a fee, even the grant of a governmental privilege can be the basis of a fee.¹⁰²

- Terminology and labels don't control: It is the thing, not the name, that is to be considered.¹⁰³
- The Court will give credence to a commercial understanding of the difference between a fee and a tax (particularly in the context of the constitutional drafting).¹⁰⁴
- The Court will consider that the nature of an alleged fee is such that it obviously could not conform to the asserted constitutional tax rule.¹⁰⁵
- Relation of fee to permitted and denied measures: That a state fee is based on a ship's tonnage does not necessarily make it a tonnage duty if it is charged for a service that varies with tonnage.¹⁰⁶
- To be a fee, a charge must be in exchange for some actual benefit conferred, usually by the expenditure of state money, rather than for a right, as in the nature of a toll where there is no road.¹⁰⁷
- The relatively few opinions that say a fee must not be substantially out of proportion to the benefits provided are either very early cases or involved an issue of discrimination.¹⁰⁸
- The fees paid by a regulated industry normally can reflect benefits to the public from the regulation.¹⁰⁹
- The Court will consider the purposes behind the constitutional limits, such as hindering commerce, to determine whether the fee hinders or helps commerce.¹¹⁰
- Tolls are for the use of property or improvements thereon, and the amount is determined by cost and the need for return and is best left to administrators.¹¹¹
- The tendency of a fee to punish or promote an activity as opposed to charging for a benefit to the recipient (or as opposed to a benefit to the general public) may suggest it is a tax.¹¹²
- The amount of fees may be determined by an agency, but the amount of taxes usually is imposed by Congress, which previously at least implied a stricter non-delegation standard.¹¹³
- An exaction that does not have the potential to destroy and does not primarily regulate because it is linked to the benefit provided has the indicia of a fee and not a tax.¹¹⁴
- A fee need not be related to the amount of usage of a benefit.¹¹⁵
- But when the measure of the fee is unrelated to the benefit, it is more likely to be a tax in some cases.¹¹⁶
- A state cannot charge (a fee) for something that it does not own.¹¹⁷
- In a state tax case, the fact that half of the tax was paid into a trust fund did not prevent it from being a general revenue tax.¹¹⁸
- The fact that a fee produced revenue in excess of cost does not make it a tax.¹¹⁹
- An inspection fee per item may be commuted into a flat annual fee.¹²⁰
- When the question about a state inspection fee is interference with interstate commerce, a more strict limit to actual costs is applied.¹²¹

Conclusion

The economic squeeze on state and local governments has caused them to turn more and more to user fees as taxpayers become increasingly resistant to tax increases. Economically, it is all the same to the government, but optically it looks better to the electorate for taxes not to be increased. User fees can fly below the radar screen of politics, and when complained about, can be defended on the grounds that they are a way of making the people using the services pay for the benefit.

But sometimes the fees exceed both the cost of the benefit and the value of the benefit and may appear to be unfair for other reasons. "Fee-payers" may then turn more and more to the law of fee constitutionality and find that they have more weapons at their disposal than does the taxpayer seeking constitutional protection.

* * * * *

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FOOTNOTES

¹ Ross E. Coe, "Federalism's Vanguard: Local Government User Fees," *State Tax Notes*, Aug. 29, 2011, p. 561, *Doc 2011-15406*, or *2011 STT 167-2*.

² H. William Batt, "User Fees: The Nontax Revenue Alternative," *State Tax Notes*, Apr. 5, 1993, p. 787 or *93 STN 64-12*, citing cases decided as *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989) (declining to apply a stricter non-delegation standard to taxes or to user fees, and so not needing to resolve which the fee at issue was).

³ Alice Hansen, "State-Run Lotteries as a Form of Taxation," *State Tax Notes*, Nov. 28, 2005, p. 767, *Doc 2005-22159*, or *2005 STT 227-2*.

⁴ This article is an excerpt from the forthcoming book *The Supreme Court, Federal Taxation and the Constitution*.

⁵ Taxes need not necessarily raise revenue -- a regulatory tax can aim to eliminate the taxed item or transaction -- but fees must raise revenue because they must be evaluated in comparison with the government cost to be funded.

⁶ See Jasper L. Cummings, Jr., "'Individual Mandate' Stricken," *Tax Notes*, Sept. 5, 2011, p. 1065, *Doc 2011-17976*, or *2011 TNT 172-7*, discussing *Florida v. U.S. Department of Health and Human Services*, Nos. 11-11021, 11-11067 (11th Cir. 2011), *Doc 2011-17561*, or *2011 TNT 158-14*.

⁷ Voluntariness need not be complete. For example, in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the Court acknowledged that the plaintiff might have preferred not to use the adjudication process it was required to use and pay for; nevertheless, the payment was a valid user fee.

⁸ See, e.g., *Cooley v. Board of Wardens*, 53 U.S. 299 (1852). (A state harbor half pilot fee that applied if a ship did not take on a pilot and pay a full fee was not a tax, and so did not violate the constitutional prohibition of state imposts and duties on imports and exports. The fees collected were paid into a society for relief of distressed and decayed pilots. "It cannot be denied that a

tonnage-duty, or an impost on imports or exports, may be levied under the name of pilot-dues or penalties; and certainly it is the thing, and not the name, which is to be considered." The decision was based on the typicality of such a penalty in encouraging use of harbor pilots for purposes of safety and as part of such regulations.)

⁹ See, e.g., *Packet Co. v. Keokuk*, 95 U.S. 80 (1877) (wharfage fee not a regulation of commerce); *Cannon v. New Orleans*, 87 U.S. 577 (1874) (docking fee); *Evansville-Vanderburgh v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) (per passenger fee); *Case of State Freight Tax*, 82 U.S. 232 (1873).

¹⁰ See, e.g., *Packet Co. v. Keokuk*, 95 U.S. 80 (1877) (wharfage fee not a tonnage duty); *Packet Co. v. St. Louis*, 100 U.S. 423 (1879).

¹¹ See, e.g., *Sands v. Manistee River Improvement Co.*, 123 U.S. 288 (1887) (tolls); *Carson v. Brockton Sewerage Com.*, 182 U.S. 398 (1901) (sewer charge based on usage); *Charlotte, C & A R Co. v. Gibbes*, 142 U.S. 386 (1892) (a fee/tax charged to a regulated industry).

¹² *Mass. v. United States*, 435 U.S. 444 (1978). This opinion is cited for multiple points within this analysis, yet it is not a typical fee case because it involved the additional issue of intergovernmental immunity. However, there is no evidence in the opinion that the Court thought different concepts applied; indeed, the Court analogized the question to that arising in a commerce clause attack on local fees. *Id.* at 466 (three-prong test: no discrimination, fair approximation of cost of benefit, and fee not designed to collect more than cost). However, the focus on discrimination and benefits should not apply to test fees purely on their amounts.

¹³ *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) (statute authorized administrator to set a fee that could not be a tax).

¹⁴ Even Justice Stephen J. Field agreed that taxes are not subject to the just compensation requirement. See dissent in *Munn v. Illinois*, 94 U.S. 113 (1877) ("The power of the State over the property of the citizen under the constitutional guaranty is well defined. The State may take his property for public uses, on just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government.").

¹⁵ *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (harbor maintenance tax).

¹⁶ *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (The issue was whether a student activity fee of \$14 violated the establishment clause because the proceeds could be used, nondiscriminatorily, by religious organizations. The Court seemed to draw some comfort from the fact that the fee was not a general tax, but it hardly could have been, since levied by a university); *Mayo v. United States*, 319 U.S. 441 (1943) (inspection fee that state tried to exact directly from the United States; unconstitutional whether they be fees or taxes, unless the United States consents).

¹⁷ *United States v. Sperry Corp.*, 493 U.S. 52 (1989).

¹⁸ 493 U.S. 52 at n.7.

¹⁹ *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 289-290 (1987).

²⁰ *Mass. v. United States*, 435 U.S. 444, 454, 466 (1978).

²¹ *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). The export clause is in Article I, section 9, clause 5 of the Constitution.

²² See *Northwest Airlines v. County of Kent*, 510 U.S. 355 (1994), citing *Evansville-Vanderburgh v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) (which did not really state a test based on benefits, but cited *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940), which did).

²³ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

²⁴ *E. Enters. v. Apfel*, 524 U.S. 498 (1998). Also the Court directly applied the takings clause to the interest on lawyers' trust accounts. *Brown v. Legal Found.*, 538 U.S. 216 (2003). See also *Webb's Fabulous Pharms. v. Beckwith*, 449 U.S. 155 (1980) (The clerk of the court could not keep interest earned on deposited funds; however, the claimant did not contest a 0.5 percent "fee" charged on the principal deposited that had no discernable relationship to cost).

²⁵ *United States v. Sperry Corp.*, 493 U.S. 52 (1989).

²⁶ *Mass. v. United States*, 435 U.S. 444, 454 (1978).

²⁷ See *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 552 (1959) (dissent of Justice Frankfurter: "the only constitutional permission in terms so drastically limited").

²⁸ See, e.g. *Patapsco Guano Co. v. North Carolina Bd. of Agriculture*, 171 U.S. 345, 353-354 (1898). ("Entertaining these views of the legislative intention, it does not appear to us that evidence tending to show that money collected from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of the act. If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge. But treating the question whether the charge of twenty-five cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question we are satisfied that comparing the receipts from this charge with the necessary expenses, such as the cost of analyses, the salaries of inspectors, the cost of tags, express charges, miscellaneous expenses of the department in this connection, and so on, we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected, as to justify the imputation of bad faith and change the character of the act.")

²⁹ See *Pace v. Burgess*, 92 U.S. 372 (1875) (fee may be arbitrary and need not exactly reflect costs); *Carson v. Brockton Sewerage Com.*, 182 U.S. 398 (1901) (the legislature can set the rate, and so long as it is not grossly excessive or out of all proportion to the benefit received, it is allowed); *Ouachita Packet Co. v. Aiken*, 121 U.S. 444 (1887) (fee can produce excess funds over costs, which excess is paid into state treasury); *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (government need not prove its costs with bills and records).

³⁰ See, e.g., *Great N. R. Co. v. Washington*, 300 U.S. 154 (1937) (holding that the burden was not on the taxpayer to prove a fee was disproportionate); *Postal Telegraph-Cable Co. v. Taylor*, 192 U.S. 64 (1904) (calling the fee a tax but finding it far excessive in amount to be a payment for police regulation and so was a fee used for revenue raising that the state did not attempt to justify

as a tax); *Mass. v. United States*, 435 U.S. 444 (1978) (the amount of a fee may approximate the benefit even if unrelated to the cost); *Evansville-Vanderburgh v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) (per-passenger fee; a fee is valid if it is based on some fair approximation of the benefit or use, is not discriminatory, and is not excessive in comparison with the benefit conferred); *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (only fair approximation required); *Northwest Airlines v. County of Kent*, 510 U.S. 355 (1994) (states that *Evansville's* test has been adopted in a variety of setting).

³¹ See, e.g., *Mass. v. United States*, 435 U.S. 444, 455 (1978) (which refers to a tax that functions as a user fee and is for benefits and raises revenue).

³² See, e.g., *Mass. v. United States*, 435 U.S. 444, 454 (1978); *Commonwealth Ed. Co. v. Montana*, 453 U.S. 609, 622-623 (1981).

³³ 435 U.S. at 463-464 (rough approximation is sufficient).

³⁴ 435 U.S. at 464 n.19.

³⁵ 435 U.S. at 461.

³⁶ 435 U.S. at 453-454 (that federal aircraft tax was in title 26 did not prevent the Court from treating it as a user fee).

³⁷ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

³⁸ The opinion stated that the writers of the Constitution fully understood that a duty or impost could be motivated by intent to regulate, and it was for that reason that the Constitution prohibits them. That would seem to contradict the initial statement that the prohibition was on the taxing power, but Chief Justice Marshall reasserted that it was on the taxing power because of the fresh example of taxation by a foreign sovereign that had started the Revolutionary War. "The right to regulate commerce, even by the imposition of duties, was not controverted." 22 U.S. at 202.

³⁹ See also *The State Tax Tonnage Cases*, 79 U.S. 12 (1870) (confirming that *Gibbons* determined the duties at issue in the Constitution are taxes, with the consequence that the states had the power to lay them under the Confederation, except as limited by the Constitution, unlike interstate commerce, which the states did not have the power to regulate). The police power broadly refers to the general powers of government, which frequently can regulate private property, and so recognition of states' police power can be undesirable to property rights.

⁴⁰ 22 U.S. at 204.

⁴¹ *Brown v. Maryland*, 25 U.S. 419 (1827).

⁴² This appears to be at odds with the reasoning in *Gibbons* that the inspection laws were allowed under the states' police power.

⁴³ *Thurlow v. Mass.*, 46 U.S. 504 (1847).

⁴⁴ *Smith v. Turner*, 48 U.S. 283, 403 (1849); *Norris v. Boston*, 48 U.S. 283 (1849). These cases

reflect an exclusivity view of Congress's interstate commerce regulatory powers, which has been repudiated. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 766-767 (1945). *Smith v. Turner* stated in dictum that even the United States could be made to pay a toll for use of state roads because the toll was not a tax but a compensation for the advantage of using the improvement.

⁴⁵ See Louis B. Boudin, *Government by Judiciary*, 415-418 (1932, 1968 reprint). *Smith v. Turner* attempted to distinguish an earlier opinion allowing a state fee on immigrants as an early application of the states' police power. *New York v. Miln*, 36 U.S. 102 (1837).

⁴⁶ *Cooley v. Board of Wardens*, 53 U.S. 299, 314 (1852). But see *Smith v. Turner*, 48 U.S. 283, 401-402 (1849) (explaining that the states' pilot laws were incorporated by Congress into federal regulation of commerce). *Cooley* is viewed as establishing the doctrine that Congress's power over interstate commerce is selectively exclusive.

⁴⁷ *License Tax Cases*, 72 U.S. 462 (1867). The opinion does not indicate that the tax would not be a tax if the United States had the power to grant a license.

⁴⁸ See, e.g., N.C. Admin. Rules 17 NCAC 04B.0604 (imposing a privilege license tax on CPAs and specifically stating that it is not a regulatory measure and CPAs must obtain separate approval to practice).

⁴⁹ *S.S. Co. v. Portwardens*, 73 U.S. 31 (1867) (treated as an unconstitutional tonnage duty even though not based on tonnage); implicitly overruled by *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935) (which found a similar charge for general port supervision to be a fee).

⁵⁰ This case took eight years to be appealed. 14 La. App. 595 (1859).

⁵¹ *State Tonnage Tax Cases*, 79 U.S. 204 (1870).

⁵² *Case of State Freight Tax*, 82 U.S. 232 (1873).

⁵³ The jurisprudence of state taxation of interstate commerce underwent several transformations, and cases such as this are not representative of current law, at least regarding whether the state can tax. See *Oklahoma Tax Com. v. Jefferson Lines*, 514 U.S. 175 (1995).

⁵⁴ *Cannon v. New Orleans*, 87 U.S. 577 (1874). See also *Packet Co. v. Keokuk*, 95 U.S. 80 (1877).

⁵⁵ Cf. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935) (allowing port charge where port policing accrued to benefit of all, even though no specific service was used, as stated in *Mass. v. United States*, 435 U.S. 444 n.23 (1978), which analogized the federal fee for airspace use to *Mallory*).

⁵⁶ *Peete v. Morgan*, 86 U.S. 581 (1874).

⁵⁷ *Pace v. Burgess*, 92 U.S. 372 (1875). See also *Carson v. Brockton Sewerage Commission*, 182 U.S. 398 (1901) (the legislature can set the rate and so long as it is not grossly excessive or out of all proportion to the benefit received, it is allowed).

⁵⁸ *Inman S.S. Co. v. Tinker*, 94 U.S. 238 (1877).

⁵⁹ *Packet Co. v. St. Louis*, 100 U.S. 423 (1880). See also *Vicksburg v. Tobin*, 100 U.S. 430 (1880) (upholding a wharfage fee against an assertion that the city was charging for docking at the unimproved river bank; it found the city had improved the wharf and was charging for docking there).

⁶⁰ *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881). The plaintiff did not actually claim the fee was excessive in terms of the value provided. The opinion also implied that an excessive wharfage fee is not a tax but is an unconstitutionally excessive fee.

⁶¹ *Turner v. Md.*, 107 U.S. 38 (1883) (containing an extensive recitation of the colonies' inspection laws at the time of the Constitutional Convention).

⁶² *People v. Compagnie Generale Transatlantique*, 107 U.S. 59 (1883).

⁶³ *Transp. Co. v. Parkersburg*, 107 U.S. 691 (1883). It is not clear that the Court actually believed this. See, e.g., *Minnesota Rate Cases*, 230 U.S. 352 (1913) (citing *Parkersburg* for that principle); *Hopkins v. United States*, 171 U.S. 578, 596 (1898) (stating that a remedy "would probably be forthcoming" if the rate was excessive).

⁶⁴ *Morgan's S.S. Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886) (and any excess could be used for general revenue purposes).

⁶⁵ *Sands v. Manistee River Improvement Co.*, 123 U.S. 288 (1887).

⁶⁶ *Ouachita Packet Co. v. Aiken*, 121 U.S. 444 (1887). ("Clearly it must be by the local municipal law, at least until some superior or paramount law has been prescribed. . . . The courts of the United States do not enforce the common law in municipal matters in the States because it is Federal law, but because it is the law of the State.") See also *Huse v. Glover*, 119 U.S. 553 (1886) (same statement about using surplus funds for general purposes).

⁶⁷ *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888).

⁶⁸ *Charlotte, C & A R. Co. v. Gibbes*, 142 U.S. 386 (1892).

⁶⁹ *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893).

⁷⁰ *Patapsco Guano Co. v. North Carolina Bd. of Agriculture*, 171 U.S. 345 (1898) (quoted Chief Justice Marshall's opinions stating that the import-export clause inspection fees could apply to imports).

⁷¹ *New Mexico ex rel. E. J. McLean & Co. v. Denver & R. G. R. Co.*, 203 U.S. 38 (1906).

⁷² *Hendrick v. Maryland*, 235 U.S. 610 (1915).

⁷³ *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245 (1928).

⁷⁴ *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 608 n.4 (1951), *overruled on other grounds*, *Complete Auto Transit, Inc. v. Brady*, 340 U.S. 274 (1977).

⁷⁵ *Sprout v. South Bend*, 277 U.S. 163 (1928).

⁷⁶ *New York v. Latrobe*, 279 U.S. 421 (1929).

⁷⁷ *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935).

⁷⁸ *Ingels v. Morf*, 300 U.S. 290 (1937).

⁷⁹ *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306 (1937).

⁸⁰ *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). *See also Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (parade fee unconstitutional).

⁸¹ He stated that exercise of a constitutional right (such as publishing) could be conditioned on payment of a license tax. Presumably only for purposes of the freedom of religion analysis, Frankfurter said it made no difference whether the levy was a license tax or a regulatory fee designed to cover the cost of regulation; he said governments can choose to earmark revenue and that did not change their character. He turned the usual distinction between tax and fee on its head by stating that the ultimate question about a tax was whether the state has given something for which it may charge; his point was that religious groups benefit from an ordered society and should pay for it.

⁸² *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

⁸³ 319 U.S. at 181.

⁸⁴ *Toomer v. Witsell*, 334 U.S. 385 (1948). *See also Mullaney v. Anderson*, 342 U.S. 415 (1952); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978).

⁸⁵ *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951).

⁸⁶ *Evansville-Vanderburgh v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

⁸⁷ *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974). *See also FPC v. New England Power Co.*, 415 U.S. 345 (1974) (companion case).

⁸⁸ *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989).

⁸⁹ *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976).

⁹⁰ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977).

⁹¹ *See also American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987).

⁹² *Massachusetts v. United States*, 435 U.S. 444 (1978).

⁹³ *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987).

⁹⁴ *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989). See also *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (Congress can delegate to administration power to vary taxes based on a standard).

⁹⁵ *United States v. Sperry Corp.*, 493 U.S. 52 (1989).

⁹⁶ *United States v. IBM*, 517 U.S. 843 (1996).

⁹⁷ *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998).

⁹⁸ *Jefferson County v. Acker*, 527 U.S. 423 (1999).

⁹⁹ *License Tax Cases*, 72 U.S. 462 (1867).

¹⁰⁰ *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009). The dissent explained an often overlooked distinction between property taxes based on value and levied only when the ship had taxing situs in the jurisdiction and impermissible tonnage duties when the ship could not be subject to a property tax based on situs and the charge bore no relation to the services. But the majority said situs was too easy to establish to make that principle controlling; it asked instead whether the alleged property tax was uniformly imposed on others.

¹⁰¹ The distinction between a state acting in its sovereign capacity and its proprietary capacity is stated here as a conceptual distinction and is not analogous to the rejected similar distinction in the intergovernmental immunity area. See *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 542 n.7 (1985).

¹⁰² See Staff of the Joint Committee on Taxation, "Background and Present Law Relating to Funding Mechanisms of the 'E-Rate' Telecommunications Program," n.13, JCX-59-98 (July 31, 1998), available at JCT website (indicating that Congress could choose to charge a fee as an excise tax).

¹⁰³ *Cooley v. Board of Wardens*, 53 U.S. 299, 314 (1852). See also *Packet Co. v. Keokuk*, 95 U.S. 80 (1877) (wharfage fee); *Mass. v. United States*, 435 U.S. 444, 453-454 (1978) (even though called a tax and located in the IRC, determined to be a fee); *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (a harbor maintenance tax was a tax and hence an impermissible export duty and was not a user fee simply because it was said to be levied for the benefit of using the harbor); *Pace v. Burgess*, 92 U.S. 372, 375-376 (1875) (a fee was not a tax if it bore no proportion whatever to the quantity or value of the package on which [the stamp] was affixed; and the fee was not excessive, taking into account the cost of arrangements needed both "to give to the exporter the benefit of exemption from taxation, and . . . to secure . . . against the perpetration of fraud"). Cf. *United States v. IBM*, 517 U.S. 843 (1996) (tax on insurance policies on exports; government did not even assert that the excise tax in the IRC was a fee).

¹⁰⁴ *Cooley v. Board of Wardens*, 53 U.S. 299, 314 (1852).

¹⁰⁵ *Id.* (pilot fees necessarily vary with local conditions).

- ¹⁰⁶ *Packet Co. v. Keokuk*, 95 U.S. 80 (1877) (wharfage fee).
- ¹⁰⁷ *Cannon v. New Orleans*, 87 U.S. 577 (1874) (docking fee where the ships had to dock on the river bank); *Packet Co. v. St. Louis*, 100 U.S. 423 (1879) (improved wharf).
- ¹⁰⁸ See, e.g., *Packet Co. v. St. Louis*, 100 U.S. 423 (1880).
- ¹⁰⁹ See *Charlotte, C & A R. Co. v. Gibbes*, 142 U.S. 386 (1892) (the opinion consistently called the levy a tax). Cf. *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) (in which the words of the statute authorizing the fee were interpreted to preclude their paying for public benefit).
- ¹¹⁰ *Packet Co. v. Keokuk*, 95 U.S. 80 (1877) (wharfage fee).
- ¹¹¹ *Sands v. Manistee River Improvement Co.*, 123 U.S. 288 (1887) (did not involve interstate commerce).
- ¹¹² *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974).
- ¹¹³ *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974) ("The lawmaker may, in light of the 'public policy or interest served,' make the assessment heavy if the lawmaker wants to discourage the activity; or it may make the levy slight if a bounty is to be bestowed; or the lawmaker may make a substantial levy to keep entrepreneurs from exploiting a semipublic cause for their own personal aggrandizement. Such assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress"); *Sands v. Manistee River Improvement Co.*, 123 U.S. 288 (1887). But see the contrary view in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989), and *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), (Congress also can delegate to administration power to vary taxes based on a standard, so fees and taxes are not distinguishable on that basis).
- ¹¹⁴ *Mass. v. United States*, 435 U.S. 444 (1978).
- ¹¹⁵ *Mass. v. United States*, 435 U.S. 444 (1978) (flat annual fee).
- ¹¹⁶ *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (an export clause case in which the definition of tax may be more strict than in other cases).
- ¹¹⁷ *Case of State Freight Tax*, 82 U.S. 232 (1873), (A state freight tax was not a toll and so was an unconstitutional tax).
- ¹¹⁸ *Commonwealth Ed. Co. v. Montana*, 453 U.S. 609, 622 n.11 (1981).
- ¹¹⁹ *Ouachita Packet Co. v. Aiken*, 121 U.S. 444 (1887). See also *Huse v. Glover*, 119 U.S. 553 (1886) (same statement about using surplus funds for general purposes).
- ¹²⁰ *Standard Stock Food Co. v. Wright*, 225 U.S. 540 (1912) (although plaintiff was a large dealer paying the flat fee, the opinion stated it did not have the right to complain).
- ¹²¹ *D.E. Foote & Co. v. Stanley*, 232 U.S. 494 (1914).

END OF FOOTNOTES

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