AGAINST DOCTRINAL SILOING: HARMONIZING FISCAL FEDERALISM AND THE U.S. CONSTITUTION

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INTRODUCTION

The founders have been credited with "splitting the atom of sovereignty" in creating our federal system.[1] Yet this revolutionary achievement has fractured into a bewildering array of doctrinal silos, each with its own tests, exceptions, and internal contradictions.

Federal regulatory incursions into state fiscal authority trigger Commerce Clause analysis, while federal spending that pressures states invokes distinct Spending Clause jurisprudence. State revenue measures face scrutiny under the Dormant Commerce Clause, a doctrine that mysteriously transmutes its analytical framework depending on whether states regulate or tax. The Eleventh Amendment shields state treasuries through yet another doctrinal apparatus.[2] Meanwhile, limits on the federal taxing power proceed through their own isolated analyses, even when justified as protecting the very state fiscal interests at stake in these other doctrines.

This incoherent fragmentation creates more than theoretical confusion. The different tests lead to contradictory results in similar cases. Current sovereign immunity doctrine bars Congress from imposing any liability upon states using an Article I power, in part to protect state revenues.[3] Yet Congress *can* preempt state revenue powers outright using Article I's commerce power, and it remains unclear how Congress's power is limited in this sphere at all.[4] So a state is protected from minor tort judgments related to its own constitutional violations but not from sweeping dislocations of its revenue power? How can that be the right answer?

The problems run deeper still because the confused doctrine often does not point to answers at all. When the founders crafted our federal system, many of the biggest issues facing fiscal federalism had not yet manifested.

1. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty.").

2. *See generally* Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

3. *Alden*, 527 U.S. at 712 ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); *see also id.* at 750.

4. *See generally* JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & ANDREW D. APPLEBY, STATE TAXATION § 4.26–27 (3d ed. with updates through Mar. 2026); James R. Eads, *Federal Preemption of Revenue Autonomy*, *in* THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT FINANCE 198 (Robert D. Ebel & John E. Petersen eds., 2012) (listing numerous examples of federal preemption of state taxing authority).

There was little need to plumb the depths of what constituted "interstate commerce" because there was not much to consider. Thus, Hamilton could confidently claim (one might even say sing) in Federalist No. 32 that the federal government could not interfere with state taxing power because there was no such authority in the new Constitution. Yet Congress has done precisely that many times since 1959, plausibly grounding preemptive laws on its power over interstate commerce.[5] We don't know what the founders would have said about this, and even in 2025 the courts remain uncertain how to analyze federal preemption of state taxing powers.

In this Article, we argue that such questions of federal power versus state fiscal power can best be addressed through a form of proportionality review that we propose as a default rubric. We develop a unified constitutional framework to synthesize the currently fragmented doctrinal silos, which we call "Fiscal Federalism Proportionality Review" (FFPR). Our framework emerges from both the American constitutional tradition and the structural logic of federalism itself.[6] The Federal Constitution is short and written using broad principles. It was drafted against a backdrop of common law judging, where judges refined different areas of law in ways that advanced underlying values while aiming at analytically tractable solutions. As Chief Justice Marshall anticipated, issues of national versus state powers "will probably continue to arise, so long as our system shall exist."[7] Our project builds both on these foundations and on related transnational innovations in constitutional analysis.

Proportionality review asks the right questions when fundamental principles clash. When an individual right conflicts with a collective need, or when state autonomy confronts federal authority, neither principle should categorically "win." Instead, one must yield, but only to the extent necessary. Current fiscal federalism doctrine often fails this test.

Our proportionality framework offers a structured alternative. The test we propose evaluates: (1) the asserted federal interest, (2) the state interest at stake, (3) whether there is reasonable tailoring between means and ends, and (4) whether the federal benefit is proportional to the burden on state autonomy. This approach is not only analytically superior but also

5. *See, e.g.*, 15 U.S.C. §§ 381–384; Internet Tax Freedom Act, 47 U.S.C. § 151 note; 49 U.S.C. § 40116(b) (prohibiting state taxation of air travel); 49 U.S.C. § 14505 (restricting state taxation of motor carriers); 49 U.S.C. § 11501 (prohibiting discriminatory state taxation of railroads); 49 U.S.C. § 31705(a) (requiring states to conform to International Fuel Tax Agreement); 4 U.S.C. § 117(b) (federal sourcing rules for mobile phones); 29 U.S.C. § 1144(a) (ERISA preemption); 47 U.S.C. § 542(b) (capping cable franchise fees); 4 U.S.C. § 114 (prohibiting state taxation of nonresident retirement income); 7 U.S.C. § 2013(a) (prohibiting state taxation of SNAP purchases).

6. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (book review).

7. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

consistent with key strands of existing doctrine: from *Pike* balancing under the Dormant Commerce Clause to the "congruent and proportional" test for legislation justified by Section 5 of the Fourteenth Amendment.[8]

We propose FFPR as an organizing default to reduce doctrinal siloing and promote coherence across fiscal federalism doctrines. However, we in no way claim that every clause should be governed by the same test. Where constitutional text, history, structure, or purposes genuinely diverge, different tests may be warranted. Our claim is narrower: Departures from FFPR should be justified by those differences, not by happenstance or inertia. Our goal is principled harmonization and coherent reason-giving, not sameness for its own sake.

The Article proceeds in three parts. Part I develops our analytic framework, explaining proportionality review's theoretical foundations and its specific application to fiscal federalism. We show how this approach differs from both categorical rules and undifferentiated balancing tests.

We also emphasize the limits of our argument. A well-recognized benefit of proportionality review is the forced articulation of reasoning, to the benefit of the public, legislators, and other judges.[9] Typically, this argument focuses on the benefit of reasoning within the rubric, but it can also force articulation from those who would depart from it. Suppose, as we argue, that FFPR should be the default rubric because, among other things, there should be a presumption of symmetry as to similar questions. But also suppose that one believes, say on textual or historical grounds, that FFPR is not the right test, say for issues relating to sovereign immunity, and there should instead be a rule, as in current doctrine. Even so, the presumption that FFPR is the right test forces a defender of a different approach to explain their position and not just start their analysis assuming a different doctrinal approach for every similar constitutional silo.

Part II applies FFPR to federal limits on state revenue powers. We first examine Congress's powers both to pressure states under the Spending Clause and to preempt state taxes under the Commerce Clause, using the Internet Tax Freedom Act as a case study. We then turn to the Dormant Commerce Clause, demonstrating how FFPR can synthesize its many tests into a coherent principle. Throughout, we show how FFPR both explains existing doctrines and provides guidance for novel questions.

8. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (establishing balancing test for nondiscriminatory state regulations affecting interstate commerce); City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (requiring that Section 5 legislation be congruent and proportional to constitutional violations).

9. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3142 (2015).

Part III extends FFPR to constitutional limits on federal revenue powers. As a precursor to our argument for its broad use, this section starts with two areas in which FFPR already has an uneasy home: Eleventh and Fourteenth Amendment jurisprudence. Though proportionality review is not formally part of sovereign immunity jurisprudence, attending to background principles of federalism is already part of this jurisprudence and thus undergirds our approach. Further, in the case of the Fourteenth Amendment, the Court has been drawn to a form of proportionality review, but it has not done so following the analytic structure set forth in this Article. We argue that both areas of law would be improved through use of FFPR as a default.

Using this foundation, we next address whether and how FFPR could address the distinction between direct and indirect taxes, the apportionment requirement, and the uniformity requirement. To the extent that these limits on the federal taxing power exist to protect state fiscal autonomy—as recent jurisprudence and scholarship suggest—then they should be analyzed in a manner coherent with the framework governing other fiscal federalism questions.

Throughout, we argue that FFPR equips courts to navigate not only today's challenges but tomorrow's as well. As technology transforms commerce through digital taxation and artificial intelligence, as governments experiment with novel revenue measures, and as new struggles emerge over fiscal control between federal and state authorities, courts need a principled framework to guide their decisions. FFPR provides this framework while respecting both constitutional text and federalism's functional purposes. In an era demanding both innovation and constitutional fidelity, FFPR offers the principled flexibility our federal system requires.

I. The Analytic Framework of Fiscal Federalism Proportionality Review

A. Brief History and Evaluation

Our proportionality framework offers a structured alternative to the binary, categorical approach that too often at least seems to dominate fiscal federalism analysis. For example, one supposed simple binary is whether an activity is "commerce" or not. Yet law need not work through binaries when fundamental principles clash.[10] When principles collide—as when free speech confronts public safety, or state autonomy meets federal authority—

10. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22–28 (1977) (distinguishing between rules and principles).

one should yield, but only to the extent necessary.[11] A key strength of proportionality review is its ability to calibrate this balance with increasing precision.[12]

There is nothing in the Constitution or our tradition that requires formalistic rules, detached from the real underlying issues. For instance, when it comes to protecting states under the doctrine of sovereign immunity, the Court has relied heavily on background principles of federalism to craft rules that attempt to make decisions based on the principles at issue.[13] Or consider that the Constitution grants Congress power over "commerce . . . among the several states." This phrase is not self-executing, and the Court continues to believe that there is an implicit requirement that the interstate element be "substantial."[14] Thus, the Court, interpreting the Commerce Clause, has ample precedent not to consider the enumerated powers to be simple on-and-off switches.

The modern story of proportionality analysis begins with the German legal system. Interestingly, the story in Germany starts with an extensive modern law code (that of Prussia) in which a powerful government accepted some limitation on its power vis-à-vis individuals to be enforced by courts.[15] This mode of analysis, though not uniform or universal, has nevertheless come to dominate transnational and trans-substantive constitutional discourse.[16] Versions of it appear throughout U.S. jurisprudence in the form of various balancing tests, from *Pike* balancing to intermediate scrutiny to the undue burden standard.[17]

We think the explanation for this success lies with the fact that, at its core, this test asks the right questions. Proportionality review typically applies when an individual's right (say to privacy or due process) clashes

11. *See* Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

12. One might see this perpetual refining as a weakness, but we think the ability of the test to provide ever more specific—and principled—guidance is a strength. *See* Frederick Schauer, *Proportionality and the Question of Weight*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 173 (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014).

13. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 728 (1999) ("[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.").

14. United States v. Lopez, 514 U.S. 549, 558–59 (1995) ("Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . .").

15. Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT'L J. CONST. L. 263, 271 (2010) ("Article 10(2) of the Allgemeines Landrecht of 1794 authorized the government to exercise police powers in order to ensure public peace; however, at the same time, it also limited those powers to such measures that were essential for achieving that goal.").

16. *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 89–91 (2008).

17. *See generally* Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in* Heller*: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367 (2009).

with a collective right (say to freedom from harm).[18] The proportionality principle permits abridging the individual right, but only if the collective need is sufficiently important and only to the extent necessary to satisfy that need.

That the proportionality test is analytically correct is important to emphasize. Our argument elevates this framework based on its analytical merits and its deep roots within the American constitutional tradition. Further, this test is not analytically superior because it always gives the same answer or a determinate answer. We think that the test's strength lies in part in giving different answers based on the context. Yet the uncertainties in applying the test at least apply to the real issues and, as such, provide guidance.

B. Brief Literature Review

While proportionality review has gained widespread acceptance internationally, its application to fiscal federalism, particularly in the American context, remains underdeveloped. Most of the development of the proportionality principle has occurred in the context of individual rights. Yet the principle of proportionality is found in the Treaty on European Union as it relates to federalism.[19] There is thus a command in EU law for the Court of Justice of the European Union (CJEU) to apply the principle of proportionality to relations between the EU and member states. The CJEU's application of proportionality has been controversial, with a complaint being that the court has been too quick to find that EU legislation trumps national law.[20] Still, the fact remains that this framework is rightly seen as appropriate in a federalism context.

We should acknowledge that not only have other commentators argued for the benefits of proportionality review, but several have connected that

18. *See, e.g.*, Sweet & Mathews, *supra* note 16, at 89; Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 626 (1999).

19. Consolidated Version of the Treaty on European Union, art. 5, Oct. 26, 2012, 2012 O.J. (C 326) 18 [hereinafter TEU] ("Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.").

20. Armin Steinbach, *The Federalism Dimension of Proportionality*, 28 EUR. L.J. 36 (2022). The TEU also contains an explicit commitment to "subsidiarity," which requires that "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." TEU, *supra* note 19, art. 5. As another scholar observed, subsidiarity (at least as applied by a court) is reducible to the proportionality principle: "The principle of subsidiarity will thus ask whether the European legislator has unnecessarily restricted national autonomy. A subsidiarity analysis that will not question the federal proportionality of a European law is bound to remain an empty formalism. Subsidiarity properly understood is federal proportionality." Robert Schütze, Shorter Article, *Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?*, 68 CAMBRIDGE L.J. 525, 533 (2009) (original italics omitted).

review to federalism.[21] Nevertheless, these other treatments are distinguishable from our arguments in this Article. We are not aware of a prior discussion that is as specific in applying a proportionality test to fiscal federalism matters as we aim for here, nor are we aware of a prior account proposing a unified approach to proportionality analysis across multiple constitutional clauses dealing with fiscal federalism.[22]

In distinguishing our approach from that of others, we emphasize our granularity and subject matter. We aim here to provide a *specific* test that we will use repeatedly as to America's implicit *fiscal constitution*. We may be wrong in proposing this as the best test (even just as a default), but our goal is to be clearly wrong at the very least[23]—to provide a framework specific enough to be tested and refined. Here, roughly following the literature and judicial practice in other countries,[24] is the test we propose:

> (1) THE ASSERTED FEDERAL INTEREST MUST BE EVALUATED. Courts should not accept at face value the federal government's articulation of its objectives or their strength. At a minimum, the government must identify a valid, non-pretextual objective. Most importantly, the federal government must *articulate* some interest; a fit of pique or constituent service should not count for much.
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> (2) THE STATE INTEREST MUST ALSO BE EVALUATED. Even in areas of traditional state control, such as health and public safety, that strong general interest may be weaker in a particular case. Proportionality rejects strict categorization.
>
> (3) THERE MUST BE REASONABLE TAILORING BETWEEN THE FEDERAL GOVERNMENT'S MEANS AND ENDS. The federal government must use among "the least intrusive of all equally effective means."[25] That does not require the *least* intrusive means,

21. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

22. *See generally* Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, *in* FEDERALISM AND SUBSIDIARITY 123 (James E. Fleming & Jacob T. Levy eds., 2014). Calabresi and Bickford amass important historical evidence as to the significance of federalism to the founders including a form of subsidiarity, as well as an economic argument for this preference. As to these arguments, we broadly agree, but Calabresi and Bickford explicitly do not apply proportionality review, *id.* at 178 n.19, and also do not generally offer a unified attempt to analyze revenue powers under this rubric.

23. This is how H.L.A. Hart described Oliver Wendell Holmes. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593 (1958).

24. We derive the test from Sweet & Mathews, *supra* note 16, at 75–76; Mattias Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, 12 EUR. L.J. 503, 519 (2006); Richard Stacey, *The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication*, 67 AM. J. COMPAR. L. 435, 439–40 (2019).

25. Kumm, *supra* note 24, at 521.

as doing so sets the bar too high and grants courts excessive discretion.

(4) THERE SHOULD BE A FINAL BALANCING BETWEEN THE FEDERAL INTEREST AND THE STATE INTEREST. This is the proportionality analysis itself. The federal government's tailored intervention may still amount to a significant burden on state autonomy. If the benefit to the federal government is *significantly* out of proportion to the cost to state autonomy, then the federal intervention is disallowed.

This framework will guide our analysis throughout the remainder of this Article, as we apply it to various contexts in fiscal federalism.

C. Formalism Versus Functionalism; Rules Versus Standards; Statutes Versus the Constitution; Oh My!

This Article would never end if we were to attempt to address all relevant issues of interpretation, much less the special issues raised by interpreting our particular Constitution. Our goal in this subsection is to situate our arguments as just a small step beyond many current and widely accepted approaches and doctrines. Though, of course, small steps can be significant (and possibly mistaken).

We propose our FFPR framework as a default for organizing and improving analysis across fiscal federalism silos. The point is coherence in reasons, not uniformity in outcomes. Where text, history, or institutional function genuinely differ, calibrated divergence is appropriate, but differences should then be explained in those terms rather than by happenstance.

To begin with, there is a prominent school of thought that emphasizes that our Constitution should be understood according to its original public meaning.[26] Some supposed benefits of this approach are that it fixes the meaning of our Constitution and restricts the power of judges. At first glance, our approach here might seem to be in opposition, but we think this impression is mistaken.

For one thing, an underlying normative draw of our approach is that it protects a strong role for the states, a goal with much support in the text and historical understanding of the founders. Moreover, our approach is largely compatible with a preference that judges provide rules. Once a decision has been made as to the proper application of proportionality review, then that

26. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997); Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

decision can be applied as a rule going forward rather than as a standard. Proportionality review is not itself a rule, but it can produce rules.

Formalism and functionalism need not be adversaries here. Formal constraints can continue to do real work. FFPR can operate helpfully alongside those constraints; it can assist courts in classifying and encourage designs that respect the state fisc, all without displacing the constitutional text where that text speaks in categorical terms. Our claim is not that proportionality swallows categorical limits but that those limits and proportionality interact. Where the Constitution speaks specifically or where history supplies a settled understanding, FFPR's role may be just to inform classification and design rather than to override.

We acknowledge that certain results likely cannot be arrived at through proportionality review. But this pluralism is not a deep objection. Certain issues, such as the required age minimum of the President (thirty-five), don't lend themselves to proportionality review.[27] And there might be some issues upon which there are legitimate disagreements as to whether they should be analyzed using our test or some other test. Perhaps some believe that sovereign immunity is an on/off switch like the age rule. We are inclined to disagree, but we would argue that this disagreement ought not undermine the direct utility of our framework as to many other cases.

Further, it seems universal, and this certainly includes former Justice Scalia, that a more harmonious law is to be aspired to,[28] even if, of course, this is not the only value. Such harmonization advances the rule of law through predictability and, conversely, tamps down regulatory arbitrage. Thus, as a presumption, different tests for similar doctrines is a disfavored state of affairs.

Two other objections ought to be quickly considered. First, a particular camp of pure functionalists might not be convinced that our test is the right one because it assumes that federalism is a constitutional value with dignity that ought to be considered with other such values. Guilty as charged. We think that the Court is right that our particular Constitution is a federal one and that ignoring that would be a serious interpretive error. Happily, we also believe—as do many others—in the merits of federalism and so ground our test in two overlapping rationales: one more formally legal and one more pragmatic. This is not to say that this is the only core value, hence the need for proportionality review to adjudicate between different core values.

Second, some may feel discomfort with balancing tests of the kind we are proposing. Even if it be granted that what we are proposing is more apt

27. U.S. CONST. art. II, § 1, cl. 5.

28. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.").

than what it would replace, one might still object that what is needed are more uniform rules and not this more refined standard. To this we would say, as we have from the start, that in many areas of constitutional adjudication there are no such rules[29] and that the subject matter of federalism demands at least a structured standard given the multiplicity of issues it implicates.

Furthermore, consider a weakness in reasoning, such as poor judgment as to relative interests, which would undermine the use of proportionality review. Such a weakness is also likely to undermine legal reasoning throughout the law (consider tort compensation or criminal sentencing), including the law of federalism as it currently stands (consider *Pike* balancing or whether a federal law has a "substantial" effect on interstate commerce).[30] The task of theorists and judges and educators is not to develop perfect approaches but to develop better approaches, including approaches that institutions and individuals can learn to apply better. We contend that a coherent and grounded approach to federalism is ultimately an approach that all actors can learn to apply well (or at least better), as opposed to the current confusion. We think the continuity between our approach and what judges are asked to do in so many other areas of law is a strength.

D. The Symmetry Presumption

We propose FFPR as a presumptive rubric because it captures the key normative issues in this area and for this reason can be applied by judges

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29. And it is not clear there could be, as Wittgenstein warns not to be bewitched by the image of machine-like reasoning spitting out the right answer. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 77 ¶ 192 (G.E.M. Anscombe trans., 2d ed. 1958) ("You have no model of this superlative fact, but you are seduced into using a super-expression."). Even John Manning, who is skeptical of more free-floating federalism norms as a part of our Constitution, accepts that they have a place. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2008 (2009) ("To be sure, not all of the relevant provisions are precisely drawn (consider the Commerce Clause, the Necessary and Proper Clause, or the Guarantee Clause); many leave room for interpretation, a task for which the overall purpose of federalism may, if sufficiently definite, provide guidance."). Granted, Manning is skeptical of many of the Court's decisions that we would build on. This is not the space fully to adjudicate this dispute as to how far rules might go, but those decisions he criticizes are still the law and, should they remain so, the anomalies and uncertainties we catalog will remain.

30. *See* Timothy Endicott, *Proportionality and Incommensurability*, *in* PROPORTIONALITY AND THE RULE OF LAW, *supra* note 12, at 311, 325–26. Accordingly, even frontal assaults on balancing, such as *Pike* balancing, often end up relying on what we would characterize as proportionality reasoning. *See, e.g.*, Andrew Jordan, *What on Earth Is a Burden on Interstate Commerce?*, 120 NW. U. L. REV. 245 (2025). Despite his critique of *Pike*, Jordan concedes that something like *Pike* balancing may be appropriate for interstate functionalities, like transportation, and thinks the test should be: "[T]here is a shared interest in efficient transportation of goods, and that states must have some good reason to impede that interest." *Id.* at 297. It is very hard to see how this is not an inchoate version of our analysis. (What is a good reason? Why interstate functionalities if not because of their import? Etc.)

and understood by other parties. Further, as in all law, we think it appropriate that this approach be applied in all similar areas of the law. Using different tests with different biases in similar areas would lead to odd results that we think are hard to justify. Suppose the federal taxing rules are more restrictive than the Commerce Clause rules as to the powers of the federal government. That would mean the federal government could be barred from imposing a particular tax because it impermissibly interferes with state taxing capacity yet retain the power to completely preempt that very same state and local tax capacity. We thus argue for a presumption of symmetry.

But this symmetry goal is just a presumption for at least two reasons. At this late stage in our constitutional history, principles of stare decisis (and the rule of law generally) militate against overturning precedent inconsistent with FFPR. This is one reason why we will demonstrate that FFPR is consistent with much current law, but we do not contend it is consistent with all such law.

Second, we accept at least the theoretical argument that some of these doctrinal silos should remain governed by some other test. Perhaps, for example, textual and historical reasons imply that the categorical test governing sovereign immunity is the right one. Or consider the federal taxing powers in Article I. To the extent the federal taxing power is seen as implicating federalism concerns (as, for instance, Justices Thomas and Gorsuch argued in their dissent in *Moore v. United States*),[31] then we think the presumptive test should be FFPR because these doctrines address the same core phenomenon: enabling both state and federal revenue power, but neither too much. But one might believe otherwise, that this is an area that requires a rule-like analysis or a different analysis altogether.

Assessing all such arguments is beyond our scope, but we think our analysis at least establishes that if federalism concerns are implicated, then FFPR should be the default, and the burden should be on those who argue otherwise. That is, we argue that FFPR should be a rebuttable default, and that those who would depart from FFPR in any silo should then carry the justificatory burden: to be grounded in text, history, or other competing considerations, but not in mere happenstance.

II. FEDERAL LIMITS ON STATE REVENUE POWER

The fragmented doctrines governing fiscal federalism create their most visible contradictions when federal power confronts state revenue authority. Congress can seemingly preempt entire categories of state taxation under its

31. 602 U.S. 572, 625–26 (2024) (Thomas, J., dissenting) ("The Direct Tax Clause was a critical aspect of the balance between state and federal power in the original design of the Constitution.").

Commerce Clause power, yet the limits of this authority remain frustratingly unclear. Meanwhile, courts police state tax measures under the Dormant Commerce Clause, a protean doctrine that shapeshifts depending on whether states tax or regulate. FFPR offers a coherent framework for both contexts, demonstrating how a single analytical approach can bring clarity to these fractured doctrines.

A. The Spending Clause, the Positive Commerce Clause Power, and the Power to Preempt

Our first stop in framing our analysis and contribution is the Spending Clause, which is already governed by a form of the proportionality test, though an inchoate one. The Court has said, as to the Medicaid expansion in the ACA, that Congress cannot, in effect, use spending to coerce "too much."[32] But how much is that? As a preliminary matter, note that the Court is implying a proportionality test into a provision that does not have one, because the Spending Clause requires that Congress only spend for the "general welfare."[33] There could be a categorical test, but the Court has wisely not chosen that route. Furthermore, the Court has given some clues as to what would be too much, such as using large spending provided years ago as leverage to force more activity of a kind the federal government wants in the present.[34] Using our framework, we can say that the Medicaid expansion failed due to the Court's assessment of its tailoring (Step 3) and that the size of its blow to state finances was disproportionate to the federal interest (Step 4).

Our second stop is the positive Commerce Clause power and, in particular, its use to preempt state taxes. Current doctrine makes clear that Congress may displace at least some state tax rules, so long as it does not commandeer state officials and there is a "substantial relation" to interstate commerce.[35] What is missing, however, is any analogue to the Spending Clause's anti-coercion principle: The Court has never articulated a general "too far" limit tailored to preemption of state taxing power. Scholarship therefore treats this boundary question as open and undecided. Such scholarship includes a prior essay we wrote in 2016[36] and a recent article

32. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

33. U.S. CONST. art. I, § 8, cl. 1. Our analysis of the Clause follows that of Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861 (2013).

34. *See generally* Bagenstos, *supra* note 33.

35. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561–68 (1995); United States v. Morrison, 529 U.S. 598, 610–19 (2000).

36. David Gamage & Darien Shanske, *The Federal Government's Power to Restrict State Taxation*, 81 STATE TAX NOTES 547, 553 (2016).

written by Bradley Joondeph that does an excellent job of discussing the boundary question with much greater depth than we can here.[37]

Using our framework, as to prior Commerce Clause cases, we would say that the Court found certain interventions (say, relating to guns near schools) to involve too large a displacement of state power (there are a lot of schools) relative to the federal interest. Of course, this fact about the number of schools should also have weighed in favor of a substantial national interest.[38] Yet our argument here is ultimately not about old cases but about achieving greater rigor and predictability as to future cases: That is, because Congress's enumerated powers regulation is at least constrained by a fit inquiry, using the same clause to preempt entire categories of state taxation should be subject to an explicit, structured proportionality review rather than an unarticulated "too much" intuition.

Consider our discussion below of Justice Thomas's analysis of the role of the direct tax provision of the Federal Constitution. According to Justice Thomas, this rule is supposed to protect the fiscal capacity of states from federal encroachment that would occur through the too-free federal imposition of federal taxes. Again, it would be a strange result if the federal government could, following his view, not impose a tax itself because state revenue powers must be shielded from the federal government, but the federal government could still simply preempt state revenue power without restraint.

If one takes the view that, once Congress is acting within an enumerated power, there are only categorical limits and no functional constraints on preempting state taxes, then our approach may have limited application to this area. By contrast, if one accepts that there should be some limits on how far Congress may go in disabling state revenue authority, FFPR supplies a structured way to specify those limits. We cannot fully repeat here all of the arguments from our earlier essay and from Joondeph's article (and from other related scholarship) about why such limits should exist,[39] but instead we now build on that work by showing that, once the existence of some constraint is accepted, proportionality review provides a coherent way to implement it.

To that end, in the next subsection we will apply our framework to a current example relating to preemption. Again, we should want our constitutional tests to be responsive to context, but we do not want fundamental powers to change in haphazard ways. There can be changes

37. Bradley W. Joondeph, *Congress's Authority to Regulate State and Local Taxation*, 79 TAX LAW. 193 (2026).

38. And thus we do not need to agree with the Court's conclusion to believe that our framework helps create a larger and more coherent structure for its analysis.

39. *See* Gamage & Shanske, *supra* note 36; Joondeph, *supra* note 37.

and differences, but their reasons should be forced into the light. As we will explain below, FFPR provides a structured analysis to guide judges and policymakers as to determining how much is too much with respect to many similar issues.

1. A Case Study of Applying FFPR to the Internet Tax Freedom Act

Consider how FFPR applies to the Internet Tax Freedom Act (ITFA),[40] a preemption statute that bars discrimination against "electronic commerce." This bill does—or might do—many different things. We will assess one strong claim as an example here, that "any taxation of property, goods, services, or information that is inherently unique to the Internet would be discriminatory, because there is no non-Internet property, goods, services, or information that is similar and that the State generally taxes."[41] To be clear, as we will elaborate below, we disagree with this claim as to the best interpretation of the ITFA, but we nonetheless view it instructive to assess this claim via FFPR as if the claim were interpretatively correct. Accordingly, assuming for the moment that this claim is accurate as to what the ITFA actually does, can it do so as a matter of federal constitutional law? That is, if there are such unique products, say a social media network, could Congress bar states from imposing a tax on such activities?

Following our four-part test:

> (1) The asserted federal interest must be evaluated. The ITFA allegedly aims to prevent discrimination against electronic commerce. At least in principle, this represents a potentially legitimate federal concern about protecting a form of interstate commerce from possibly protectionist state taxation. Courts should not simply take Congress's word that this interest is sufficiently important, but protecting channels of interstate commerce from discriminatory treatment is a traditional federal concern that seems at least plausibly to justify a weighty federal interest.
>
> (2) The state interest must also be evaluated. Even in 1998, and certainly by 2025, states have a significant interest in taxing electronic commerce. This represents not just revenue interests but also the states' ability to maintain tax neutrality between different forms of commerce. If states cannot tax electronic commerce while

40. 47 U.S.C. § 151 note. And we acknowledge this is just an outline of how courts should approach this issue. For a similar analysis of the ITFA, see Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41.

41. Brief of Appellees Responding to Amici Curiae Brief of Tax Law Professors at 40–41, Comptroller of Md. v. Comcast of Cal./Md./Pa./Va./W. Va., LLC, 297 A.3d 1211 (Md. 2023) (No. 32).

physical commerce remains taxable, this creates its own economic distortion and tax-burden unfairness.

(3) There must be reasonable tailoring between means and ends. Here the analysis becomes more complex. The ITFA bars discrimination against electronic commerce. The interpretation of "discrimination" that we are addressing in this example argues that *any* taxation of products that exist only in electronic form would violate the ITFA. If this interpretation is correct, then the statute in this aspect would seem to fail the tailoring requirement. Protecting electronic commerce from discrimination does not require exempting all electronic commerce from taxation in a manner that would amount to an effective subsidy. There is a substantial difference between preventing discriminatory treatment (the federal interest) and granting categorical immunity.

(4) The proportionality analysis reveals another fundamental problem. Even assuming that Congress has a valid interest in protecting electronic commerce from all taxation, completely exempting major and growing sectors of the economy from state taxation is disproportionate to that interest. In a world where electronic commerce represents an ever-larger share of economic activity, denying states this tax base altogether cannot be justified by anti-discrimination concerns alone. The temporal dimension matters: what might have been proportional in 1998 becomes increasingly disproportionate as electronic commerce shifts from exception to norm.

This analysis demonstrates how FFPR provides more guidance than current doctrine's vague inquiry into whether Congress has interfered "too much." Rather than asking an ungrounded question about the degree of interference, FFPR focuses on the relationship between federal objectives and the means chosen to achieve them.

2. *Reconciliation with Current Doctrine*

Note that our analysis so far is largely consistent with current doctrine, so that adopting FFPR would preserve stability while providing clearer guidance. The clear statement rule[42] and the presumption against broad preemption[43] would both lead to results similar to those reached here

42. Gregory v. Ashcroft, 501 U.S. 452, 464 (1991).
43. N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995).

through FFPR: that the ITFA should not be read to preempt all taxation of electronic commerce.

Yet those interpretive doctrines are controversial and inconsistently applied.[44] We think one reason for this ad hoc application is that existing doctrines are not strongly tethered to fundamental constitutional norms. By contrast to FFPR, these doctrines do not provide as grounded and reasoned of an approach to answering fundamental questions about the federal-state balance.

For instance, suppose Congress were to clearly preempt all state taxation even incidentally related to electronic commerce. The clear statement rule would not help because the statute would be clear, and thus we would be left considering whether Congress has interfered "too much" by drawing on vague notions from Spending Clause cases. FFPR, by contrast, would provide a structured answer: Courts would assess the interests involved, the fit between means and ends, and whether the burden on state autonomy is proportional to the federal benefit. Knowing this would be the test, lawmakers would be deterred from simply shooting from the hip and would be incentivized to instead aim for transparent, reasoned, and tailored interventions.

B. Dormant Commerce Clause Analysis

The Dormant Commerce Clause represents a negative implication of the Commerce Clause, protecting congressional prerogative by limiting state interference with interstate commerce even absent specific federal legislation. Ideally, the DCC test should have ground rules coherent with those governing the positive power granted to Congress under the Commerce Clause. It would certainly be anomalous for the DCC to limit states more in the absence of specific federal legislation as compared to the potential limits that Congress would have the power to impose through specific legislation.[45]

Yet the actual DCC tests are many and do not obviously map onto proportionality review. The problem here is not doctrinal silence but rather cacophony and chaos. For instance, there is a two-part test for regulations but a four-part test for taxes.[46] This would be bad enough given that taxes

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44. *See* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253.

45. It would also be inconsistent with the Court's sensible claim that "commerce" is supposed to have the same definition in both its negative and positive aspects. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574 (1997).

46. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (example of two tests for regulations); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (establishing four-prong test for taxes).

and regulations are generally policy substitutes, but one of the two tests for regulations (*Pike* balancing) is uncertain in its application.[47] As to the four-part test for taxation, one prong has been eviscerated and another prong arguably added.[48] In short, this whole doctrinal area is a mess, a crazy quilt of inconsistent tests that confounds practitioners and theorists alike.

1. Applying FFPR to Contemporary DCC Issues

Consider a live question in the world of the DCC that demonstrates how FFPR brings clarity to this confused doctrine. Suppose a state imposes a tax on large corporations where, as it happens, no corporations of that size are located in the state. Size would therefore seem to be a proxy for a firm being out of state. Consider, as an example, a simplified version of a tax Maryland has imposed on gross receipts of digital advertisers.[49] The tax kicks in at 10 percent for any advertiser with at least $100 million in gross receipts in the state. There are no such firms currently in Maryland, but there is also nothing in the law that would exempt such local firms from taxation.

Evaluated through FFPR, the analysis proceeds in four steps. First, the federal interests policed by the DCC would seem to be preventing economic protectionism and preserving the integrity of the national market. Preventing facial or proxy discrimination is an important interest. Second, the state also possesses substantial interests in raising revenue from the value created by access to its consumer base.

Third, the tailoring analysis here would evaluate the fit. The federal interest in preventing facial discrimination should not be offended by the Maryland statute. The federal interest in avoiding clever use of proxies is, we believe, ill-fitting with this fact pattern without more evidence. Can California not tax tobacco because it is all grown out of state? The answer seems clear and we can say why: The state is not taxing tobacco as a proxy for out-of-stateness but because of its other characteristics that are reasonable to tax. There *is* a fit between the state tax's rationale and out-of-state taxpayers, and this also protects the legitimate federal interest in nondiscrimination. So too with Maryland and these platforms. Maryland may be seeking to tax consumption or supernormal profits or a problematic business model. There are no indications that Maryland is seeking to tax out-of-state businesses as such, even by proxy.

47. Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023).

48. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983) (adding so-called internal consistency); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (eviscerating fair relation prong).

49. This is an argument made by the plaintiffs objecting to the Maryland tax. *See, e.g.*, Amended Complaint for Injunctive and Declaratory Relief ¶ 84, Chamber of Com. v. Franchot, 595 F. Supp. 3d 423 (D. Md. 2022) (No. 21-cv-410).

Fourth, the proportionality balance weighs the federal and state interests against each other. Here, no evidence suggests the threshold was designed to protect local champions or that there are or could be such champions, and thus the federal interest in invalidation remains abstract and speculative, while the state's interest in taxing actual economic rents (or consumption, etc.) from current and vast market access is concrete and substantial. Under these circumstances, FFPR should sustain the tax.

However, if a state coupled its size threshold with carve-outs that systematically exempted local competitors, that poor tailoring and protectionist effect might well tip the proportionality balance toward invalidation.

This structured analysis demonstrates how FFPR organizes and clarifies existing DCC doctrine, including placing current tests into a larger context. Rather than navigating today's doctrinal "crazy quilt," courts applying FFPR would follow a single analytical framework that demands transparent reasoning at each step.

2. *Reconciling and Synthesizing Current DCC Doctrine*

There are strands of current doctrine that would reach these sensible results. For example, there is a strong argument that the internal consistency test is not a standalone DCC test unmoored from its constitutional grounding and is, in effect, a proxy for fair apportionment.[50] And we believe that the fair apportionment requirement should be understood as part of our test and part of narrow tailoring in particular. However, we concede, there are also strands and dicta pointing in other directions.[51]

To transform current doctrine into a coherent application of FFPR would require only a few clarifying steps.

First, as to the bifurcated test for regulations (discrimination and then *Pike* balancing), we need only follow suggestions from the Justices that *Pike* balancing is just a special case of presumptive discrimination.[52] Why would a state overburden interstate businesses for little gain if not to advantage

50. Michael T. Fatale, *State Tax Discrimination and Internal Consistency*, 29 FLA. TAX REV. 271 (2025). The internal consistency test asks if out-of-state taxpayers would be burdened if every state were to adopt the same formula. This is a reasonable heuristic for whether or not a formula is reasonable (and if it is not, then it fails Step 3 of FFPR).

51. One reading of Comptroller of the Treasury v. Wynne, 575 U.S. 542 (2015), is that the Court is very invested in the internal consistency test above all and not as a heuristic. *But see* Fatale, *supra* note 50. A different strong reading of this case indicates that, at the very least, the Court was also looking to simplify and rationalize its DCC jurisprudence. Brannon P. Denning, *The Dormant Commerce Clause ~~Wynnes Won~~ Wins One: Five Takes on* Wynne *and* Direct Marketing Association, 100 MINN. L. REV. HEADNOTES 103 (2016) (noting that the Court itself is moving in this direction).

52. *Nat'l Pork Producers*, 598 U.S. 356.

local businesses? We thus have one master norm governing taxes and regulations.

Second, as to taxes, we should recognize that all the different tests and subtests derive from the same anti-discrimination norm.[53] The concern with fair apportionment, for instance, reduces to a concern with discrimination: If a tax is misapportioned, then interstate businesses risk paying more than in-state businesses. As we saw, Maryland's tax was not misapportioned and so did not fail the tailoring step.

Third, now that we see how both taxes and regulations are governed by the anti-discrimination norm, we should recognize this is the same norm and the same test.[54]

Fourth, we should appreciate that the universal "don't discriminate" standard would benefit from articulation through proportionality review just like the command that Congress not coerce "too much." Certain applications of current doctrine, such as the mechanical application of the "internal consistency" test, would be shown to be lacking from this perspective. The internal consistency test is based on hypothetical taxes; as a general matter, hypothetical burdens on the national marketplace should be given less weight than actual state revenue collection.

Many pieces of current doctrine should then survive as parts of presumptive proportionality analyses, but the proportionality test should be understood as the master test, there to fill gaps and ground—and possibly limit—these heuristic subtests. Facial discrimination is unlikely to survive proportionality review given the harm it causes, but it is not impossible, which is why some quarantine laws can survive DCC review, for example.[55]

III. CONSTITUTIONAL LIMITS ON THE FEDERAL GOVERNMENT'S FISCAL POWERS

A. Collateral Constitutional Limits: The Eleventh and Fourteenth Amendments

Before examining the express clause-based limits on the federal taxing power (apportionment and uniformity), we consider two doctrines that illuminate how proportionality review already operates—albeit imperfectly—in fiscal federalism contexts: sovereign immunity under the Eleventh Amendment and Congress's enforcement power under Section 5 of the Fourteenth Amendment.

53. Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193.

54. Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331 (2020).

55. Maine v. Taylor, 477 U.S. 131 (1986).

1. The Eleventh Amendment and Sovereign Immunity

The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[56]

On its face, this provision provides states only limited protection, solely from suits in federal courts by citizens of other states. Nevertheless, the Court has interpreted it to protect states even in their own courts and even from their own citizens. Indeed, states are protected from any liability that might be imposed upon them by Congress using an Article I power, such as the Commerce Clause.[57] At the same time, the Court has recognized "plan of the Convention" exceptions under several Article I powers (notably bankruptcy, eminent domain, and war powers), underscoring the doctrine's policy-inflected and selectively formalist character.[58]

The Eleventh Amendment jurisprudence is directly supportive of our approach in one sense: Though the lead cases will often discuss murky concepts like the dignity of states,[59] these vague concerns are explicitly anchored in the protection of state revenue powers as an essential aspect of state sovereignty.[60] Further, by arguing that the Eleventh Amendment is itself only a partial codification of sovereign immunity, the Court has shown itself willing to go beyond the text of the Constitution to its implied background principles.[61] By contrast, we do not think that any of our

56. U.S. CONST. amend. XI.

57. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996).

58. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 377–80 (2006) (holding that in the plan of the Convention the states agreed not to assert sovereign immunity in "Laws on the subject of Bankruptcies"); PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 499–506 (2021) (concluding states surrendered any immunity from the federal eminent domain power, including when delegated to private condemners); Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 589–99 (2022) (recognizing that states agreed their sovereignty would yield where Congress exercises its war powers).

59. *But see, e.g.*, Suzanna Sherry, Essay, *States Are People Too*, 75 NOTRE DAME L. REV. 1121 (2000).

60. Alden v. Maine, 527 U.S. 706, 750 (1999) ("Underlying constitutional form are considerations of great substance. Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States.").

61. *Id.* at 728 ("[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."). We should add here the Court has also shown itself willing to undertake significant doctrinal gymnastics in order to come up with a rough balancing of rights and interests in this area. For example, sovereign immunity has been interpreted broadly to protect states, but the Court has developed the *Ex parte Young* exception in order to protect citizens from ongoing violations that the Court's expansive interpretation of sovereign immunity would otherwise seem to allow. *See, e.g.*, *id.* at 747 ("In particular, the exception to our sovereign immunity doctrine recognized in *Ex parte Young*, 209 U. S. 123 (1908), is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land.").

proposed reforms would come close to the Court's willingness in this context to prioritize background principles over plain text.

Yet this area of jurisprudence also demonstrates why our approach is only a presumption. We think that FFPR should apply in this area and could lead to different results. Yet analyzing this is beyond the scope of our Article, and so we will instead concede that if one has a really strong commitment to a particular combination of formalism and textualism, then one might eschew FFPR altogether in this context. However, if one is so committed, then one would also have to accept the asymmetric results, namely that Congress's power to preempt state revenue power seems far broader than its ability to grant individuals a remedy when wronged by their states.

This discussion yields at least two important insights for our broader project. First, the stark asymmetry between the Court's approaches reveals a troubling incoherence. Congress seemingly cannot authorize even modest damage awards against states for constitutional violations under its Article I powers, yet it seemingly can ban entire categories of state taxation through preemption or coerce state compliance through conditional spending. This disparity makes little functional sense to the extent that the underlying concern is protecting state fiscal autonomy.

The asymmetry itself strengthens our argument for applying FFPR in the contexts where Congress retains power. To the extent that sovereign immunity bars monetary remedies in private suits, courts should apply heightened scrutiny when Congress uses its preemption or spending powers to displace state revenue. FFPR should require Congress to articulate sufficiently important federal interests, demonstrate that its intervention is narrowly tailored to those interests, and include safeguards that preserve state fiscal authority where possible. That is, categorical protection in one domain at least justifies more rigorous proportionality review in others.

Second, should the Court ever reconsider the scope of sovereign immunity—whether through revisiting abrogation doctrine or reconsidering available remedies—FFPR offers a principled alternative to the current all-or-nothing approach. Rather than categorically barring all monetary remedies or permitting unlimited liability, courts could better calibrate remedies to both the federal interest in enforcement and the genuine fiscal risks to state treasuries. The Court has already chosen not to interpret Congress's power to spend, regulate, or preempt in categorical terms. Is the case for sovereign immunity really so strong?

2. *The Fourteenth Amendment Section 5 Power*

The Court—or at least some Justices, some of the time—seemingly agrees that proportionality review has a place in federalism analysis. The Fourteenth Amendment explicitly gives Congress the power to enforce its provisions. This could be a very great federal power given the sweep of the Fourteenth Amendment. Yet the Court has held that Congress's remedial actions under Section 5 must be congruent and proportional.[62]

In so doing, we believe the Court has accepted the aptness of proportionality review. However, we would argue, along with many others (such as Justice Breyer),[63] that the Court has not applied this test correctly. Fully analyzing this failure is beyond our scope.[64] Nevertheless, we think that this doctrine demonstrates that a form of proportionality review (beyond just balancing) does have a home in U.S. constitutional jurisprudence but that what is required is more careful application.

To be more specific about some of the problems with the current application of the doctrine, the Court often considers costs yet does so through an undertheorized methodology that produces divergent outcomes that are hard to rationalize. In *Garrett*, the Court treated accommodation expenses as providing an argument for narrowing the constitutional violation Congress could remedy (because of the additional fiscal burden on the states) and thus did not uphold the statute.[65] By contrast, in *Hibbs*, the statute's modest fiscal footprint—unpaid leave, strict eligibility thresholds, and categorical exclusions—counted as evidence for the federal remedy's proportionality and thus the statute's constitutionality.[66] These cases reveal a tacit principle—that fiscal design features bear on the congruence and proportionality analysis—yet the Court has not articulated consistently when such features matter, how much weight they carry, or what distinguishes permissible fiscal considerations from impermissible ones.

FFPR supplies this missing analytical structure. When Section 5 legislation imposes compliance costs on states, courts should explicitly acknowledge these burdens and evaluate them within the proportionality framework—not at the underlying rights stage[67] but as factors bearing on remedial scope and design (Steps 3 and 4 in particular). This evaluation

62. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

63. Bd. of Trs. v. Garrett, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting).

64. For a powerful critique see, for example, William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001).

65. *Garrett*, 531 U.S. at 372–74 (noting it is "entirely rational [and thus not a violation of the Equal Protection Clause] . . . to conserve scarce financial resources").

66. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 738 (2003) ("We also find significant the many other limitations that Congress placed on the scope of this measure.").

67. We also note that one may object to the Court's handling of the analysis of the rights, and, in fact, we do because we would use a proportionality analysis as to the underlying right.

should examine whether Congress has incorporated mechanisms to mitigate fiscal impacts while still achieving its remedial objectives. Courts should look for specific design features: targeted coverage formulas and triggering mechanisms; statutory defenses that prevent open-ended liability; graduated implementation schedules allowing fiscal adjustment; calibrated remedial schemes with damages or prospective relief proportioned to documented constitutional harm; and, where enforcement legislation intersects with federal spending programs, cost-sharing arrangements rather than unfunded mandates. The presence of such structural safeguards demonstrates congressional respect for state fiscal autonomy and weighs in favor of proportionality; their absence, particularly when coupled with sweeping substantive requirements, suggests disproportion to the constitutional injury documented. This approach extends the transparent, structured reasoning we advocate throughout fiscal federalism doctrine to the specific context of Fourteenth Amendment enforcement.

B. *Express Clause-Based Limits on the Federal Taxing Power*

We now turn to assessing the Constitution's express clause-based limits on federal taxation—principally the Apportionment Clauses (for direct taxes) and the Uniformity Clause (for duties, imposts, and excises)—along with also assessing how FFPR clarifies the classification line between these categories. The jurisprudence governing that classification question, plus that governing the questions of how to apply the limitations imposed by each of the uniformity requirement and the apportionment requirement, has been developed and justified, at least in part, as protecting state fiscal autonomy. Prima facie, we think these doctrines do indeed relate to questions of federal versus state power. Thus, to the extent that this functionalist protective principle animates these doctrines, we now argue that courts should aim to apply it coherently through FFPR rather than through disconnected categorical rules.

We first consider the classification question, then turn to the uniformity and apportionment tests, and finish with a synthesis discussion of how FFPR can be applied to harmonize these doctrines to combat incoherent siloing.

1. *The Classification Question*

The Constitution distinguishes between: (1) direct taxes, which must be apportioned among the states by population; and (2) duties, imposts, and excises (sometimes called "indirect taxes," although that term is not in the Constitution), which must instead be geographically uniform. While the

Sixteenth Amendment exempted "taxes on incomes" from apportionment,[68] the classification question retains vital importance, especially for proposed wealth taxes and mark-to-market reforms, and also possibly for other current or proposed tax provisions for which the classification is uncertain.[69]

This section examines how FFPR illuminates the classification question when—and to the extent that—these clauses are understood as protecting state fiscal interests. We first map the interpretive landscape to show the diversity of views about these clauses' purpose, then focus on the specific strand of jurisprudence that treats classification as a tool for protecting state fiscal autonomy. For that strand, we demonstrate how FFPR provides a structured methodology that can help resolve current doctrine's internal contradictions while respecting the legitimate federalism concerns at stake.

a. Competing Functional Accounts of the Classification Question

The contemporary debate over the Apportionment and Uniformity Clauses reflects fundamental disagreements about their continuing purpose in our constitutional structure. Many scholars view the apportionment requirement as a constitutional anachronism, what Hemel calls nonfunctionalism.[70] For instance, Bruce Ackerman and Calvin Johnson both argue that the clauses are "foul-ups" tied to the odious compromise over slavery and the pre-constitutional requisition system, deserving minimal enforcement in modern jurisprudence.[71] From this perspective, courts should defer broadly to Congress's choice of tax instruments, treating the classification question as essentially irrelevant, or just allow all or most forms of taxation to survive as uniform duties, imposts, or excises (without requiring apportionment).

A more nuanced position—so we think—comes from one of us (Gamage) in prior writings with John R. Brooks.[72] Brooks and Gamage argue that apportionment should be reconceptualized, not as a barrier, but

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68. Note that, due to space constraints, this Article mostly does not address the special interpretive questions raised by the Sixteenth Amendment. For discussion of the Sixteenth Amendment's original meaning and its implications for modern tax debates, we direct readers to John R. Brooks & David Gamage, *The Original Meaning of the Sixteenth Amendment*, 102 WASH. U. L. REV. 1 (2024).

69. For discussions of these issues, *see, e.g.*, David Gamage, John R. Brooks & Edward J. McCaffery, Moore *Questions, Some Answers: Fixing the Personal Tax System Despite Constitutional Constraints*, 28 FLA. TAX REV. 381, 403–10 (2025) (surveying mark-to-market, wealth-tax, and other reforms and their constitutional constraints).

70. Daniel Hemel, *Formalism, Functionalism, and Nonfunctionalism in the Constitutional Law of Tax*, 2024 SUP. CT. REV. 327.

71. Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 6–10 (1999); Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998).

72. John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. 75 (2022).

as simply an alternative path for federal taxation. Under their "two paths" thesis, Congress can choose between apportionment and uniformity as alternative meta-rules for ensuring interstate equity, with the two rules relatively more suitable for different forms of taxation. As we will discuss further below, Brooks and Gamage argue that modern fiscal federalism's extensive transfer programs can address any geographic disparities created by apportionment, while a broad interpretive principle they term the "excise canon" should permit Congress to structure most (but not necessarily all) taxes as uniform excises on privileges or activities rather than direct impositions on property. Under this view, classification thus becomes primarily a question of legislative design with relatively low stakes, rather than a high-stakes question of constitutional restriction.

An older strand of scholarship, exemplified by Erik Jensen, emphasizes individual liberty concerns, arguing that direct taxes are uniquely "dangerous" because individuals cannot avoid them through behavioral changes.[73] This liberty-protective account, while methodologically somewhat formalist, argues that the classification question serves a functionalist purpose of protecting individual freedom from oppressive federal impositions. Yet this individual-liberty focus has found little traction in recent jurisprudence or scholarship, which has instead gravitated toward structural federalism concerns when it has given the classification question substantive bite.

By contrast, contemporary functionalist arguments for treating the classification question as constitutionally momentous primarily come from those who frame the Apportionment and Uniformity Clauses as safeguards for state fiscal autonomy. Justice Thomas, dissenting in *Moore v. United States*, argued that the apportionment requirement was designed to be deliberately cumbersome to discourage Congress from encroaching upon the states' traditional property tax bases.[74] This functionalist argument claims that protection of critical state revenue sources was intended to preserve the federal-state fiscal balance.

Relatedly, David Schizer and Steven Calabresi argue that the apportionment requirement was designed to prevent "fiscal raids" whereby coalitions of states might use federal taxing power to target assets concentrated in other regions, effectively forcing wealth transfers from particular states to the federal treasury.[75] While this concern famously

73. Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1076–77 (2001).
74. Moore v. United States, 602 U.S. 572, 644 (2024) (Thomas, J., dissenting).
75. David M. Schizer & Steven Gow Calabresi, *Wealth Taxes Under the Constitution: An Originalist Analysis*, 77 FLA. L. REV. 1401 (2025).

applied to slavery, they demonstrate it was a general principle meant to protect any region-specific economic interest.

Note that this view is inherently similar to the Brooks and Gamage view that the classification question was designed to impose one of two meta-rules for ensuring interstate equity. Preventing fiscal raids and ensuring interstate equity are highly related and overlapping (if not essentially the same) purposes, at least conceptually. The key difference in these views is that Schizer and Calabresi, like Justice Thomas, view the apportionment requirement as deliberately intended to be more cumbersome than the uniformity requirement, and so they view the classification question as designed to impose the (in their view, more restrictive) apportionment requirement in scenarios in which concerns about fiscal raids are relatively greater.

It is this state-fiscal-autonomy strand of interpretation—that both Justice Thomas and Schizer and Calabresi argue for—that makes the classification question particularly amenable to analysis through FFPR. Unlike individual liberty concerns, which involve different constitutional values, or nonfunctionalist accounts, the functionalist state-fiscal-protection theories explicitly invoke the same federalism interests that FFPR was designed to balance. To the extent that the classification question matters because it protects state revenue systems and prevents sectional exploitation, then FFPR provides a principled framework for weighing those concerns against legitimate federal interests.

b. *Applying FFPR to the Classification Question*

The value of applying FFPR to the classification question becomes apparent when we examine current doctrine's internal contradictions. Congress has repeatedly exercised its Commerce Clause power to completely preempt certain forms of state taxation when such taxes burden interstate commerce. Federal law currently bars states from taxing railroad property more heavily than other commercial property, for example.[76] Yet according to the state-protective interpretation of the Apportionment and Uniformity Clauses, Congress would be constitutionally forbidden from imposing its own uniform tax on such property if the tax were deemed "direct."[77] This asymmetry produces an incoherence: the doctrine permits complete federal displacement of state taxing authority while potentially forbidding the lesser intrusion of concurrent federal taxation that would

76. 49 U.S.C. § 11501(b).

77. Moreover, as we will discuss further below, to the extent that the apportionment requirement is viewed as an in-effect insurmountable barrier, Congress would then be effectively prohibited from levying a tax on such property regardless of whether or not it was uniform.

preserve state revenue powers. To the extent that the justification for interpreting the classification question restrictively is the functionalist purpose of protecting state fiscal autonomy, this result seems backwards.[78]

Rather than just asking whether a tax is "direct" in some categorical sense, FFPR directs attention to whether applying apportionment or uniformity would better serve the competing constitutional interests at stake. The framework's four-step analysis—evaluating federal interests, assessing countervailing state concerns, examining the tailoring of means to ends, and weighing proportionality—transforms classification from a purely formalistic labeling exercise into a contextually richer evaluation of fiscal federalism values.

Consider how this analysis could apply to a broad-based federal wealth tax on net worth exceeding (say) $50 million.[79] The federal government's primary interest would presumably be revenue generation, potentially reinforced by concerns about repairing gaps in the income tax system created by wealthy taxpayers' ability to indefinitely defer realization of gains through borrowing against appreciated assets—the so-called "buy, borrow, die" strategy that has increasingly undermined the income tax's progressivity.[80] These represent substantial federal interests in maintaining an effective and equitable revenue system.

The countervailing state interests appear less weighty in this context. While states might assert interference with their traditional property tax bases, no state currently imposes a comprehensive wealth tax, and most have abandoned the taxation of intangible property almost entirely.[81] The anti-raid concern animating Schizer and Calabresi's analysis also seems minimal where the tax base consists primarily of financial assets distributed across national and global markets rather than immobile tangible property that may be located entirely or primarily within only specific states. A

78. We of course acknowledge that there are differences between the taxing power and regulatory powers, and so there may be valid reasons for a lack of complete symmetry. For instance, the Origination Clause (requiring that taxes originate in the House of Representatives, not the Senate) applies only to taxes, and not regulations; but this limitation is justified on political economy grounds related to separation of powers and the allocation of authority within Congress between the House and Senate, and not on the fiscal federalism concern of protecting state fiscal interests.

79. Brooks & Gamage, *supra* note 72, at 150–52 (discussing the Warren and Sanders wealth-tax proposals and associated constitutional issues).

80. *See* Gamage et al., *supra* note 69, at 404–09 (discussing "buy, borrow, die" and design options to address realization-based avoidance).

81. And even were states to return to levying such taxes, the overlap here would be no worse than for other existing taxes levied at both the federal and state levels. *See* David Gamage & Darien Shanske, *Tax Cannibalization and Fiscal Federalism in the United States*, 111 NW. U. L. REV. 295, 304–09 (2017) (explaining cannibalization across federal and state tax bases and ways to address this). As discussed further below, this differs from real and personal property taxes because such property must exist in specific geographic locations, by contrast to intangible property which lacks similar physical locational ties.

wealth tax on securities portfolios and other financial assets simply does not present the same sectional dynamics as would a targeted tax on specified forms of immobile tangible property that may be geographically concentrated.

So then, in light of this analysis, would uniformity or apportionment better serve as the mechanism for protecting state fiscal interests with respect to a broad-based federal wealth tax? We would argue that apportionment's cumbersome machinery makes little sense for a mobile, national tax base of this sort. Instead, Congress could satisfy federalism concerns through targeted safeguards within a uniform framework: credits for any overlapping state wealth taxes, exemptions for real property and other traditional state and local revenue sources, or other similar protective provisions. We will discuss further (below) how the uniformity requirement can be applied to require appropriate safeguards of this sort.

The key point for now is that FFPR helps illuminate why apportionment is poorly suited for protecting whatever legitimate state fiscal interests might be in conflict with the federal government levying a broad-based wealth tax.

The proportionality balance in this scenario thus favors allowing uniformity with appropriate safeguards.

By contrast, the analysis shifts when considering a federal tax specifically targeting immovable forms of tangible property that may exist wholly within specific states. Imagine, for instance, a federal levy on commercial oil and gas reserves. While the federal government might assert revenue needs or environmental objectives, the potential for fiscal raids on specific states invites scrutiny. Such a tax could functionally transfer wealth from a handful of resource-rich states to the federal treasury for redistribution elsewhere, precisely the fiscal raid that Schizer and Calabresi argue apportionment was designed to prevent.

In this context, apportionment arguably serves its historic purpose. By requiring equal per-capita tax burdens regardless of resource distribution, apportionment makes sectional targeting potentially more difficult politically. The tailoring between means and ends becomes much tighter when the threat is regionally targeted extraction rather than broad-based revenue collection. Without sufficiently important national interests and robust safeguards ensuring proportional benefit to affected states, such a targeted levy could well fail FFPR's proportionality analysis. The classification as "direct," requiring apportionment, would be justified not just by formal categories but also by functional protection of federalism values.

Translated into more formalist language, this analysis bolsters the Brooks and Gamage argument (based on constitutional history, text, and precedent) that a broad-based wealth tax should be categorized as an excise on an activity or privilege (for which the uniformity requirement is applicable); whereas, by contrast, a tax directly assessed on real property that is based primarily on the characteristics of that property—as opposed to the nature of the property's ownership or activities engaged in with respect to the property or by its owners—should be characterized as a direct tax (for which the apportionment requirement is applicable).[82] As we explained in Part I, formalism and functionalism need not be enemies here but instead can work together, with FFPR-based functionalism assisting in clarifying gaps and ambiguities in formalist categories.[83]

This contextual approach acknowledges the limits of proportionality review in resolving all aspects of the classification debate. For those who view the Apportionment and Uniformity Clauses through lenses other than state fiscal protection—whether formalist adherence to fixed meanings, individual liberty concerns,[84] or nonfunctionalist dismissal—FFPR offers less analytical purchase. Yet for the important strand of jurisprudence and scholarship exemplified by Justice Thomas's dissent and the Schizer-Calabresi analysis, which understands these clauses as serving state fiscal interests, FFPR provides a principled methodology that improves upon current doctrine's categorical confusion.

2. *The Uniformity Test*

The Uniformity Clause requires that "all Duties, Imposts and Excises shall be uniform throughout the United States."[85] Like the classification question discussed above, the uniformity requirement has been understood—at least partially—as protecting state fiscal autonomy from federal encroachment. Yet current doctrine, epitomized by *United States v. Ptasynski*,[86] has rendered this protection rather weak through an easily manipulated two-part test that scholars have criticized as reducing the Clause to "virtually an empty shell."[87]

The geographic uniformity principle established in the *Head Money Cases*[88] and *Knowlton v. Moore*[89] held that a tax satisfies the Uniformity Clause when it "operates with the same force and effect in every place where

82. Brooks & Gamage, *supra* note 72.
83. *See supra* Section I.C.
84. We think that analysis too should be based on proportionality review, though not FFPR because of the different interests.
85. U.S. CONST. art. I, § 8, cl. 1.
86. 462 U.S. 74 (1983).
87. Nelson Lund, Comment, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193, 1193 (1984).
88. 112 U.S. 580, 594 (1884).
89. 178 U.S. 41, 106 (1900).

the subject of it is found."[90] This formulation distinguished constitutional geographic uniformity from the unworkable standard of intrinsic uniformity: A tax need not burden all regions equally in effect, only apply the same rule wherever its subject exists.[91] Yet as Nelson Lund observed, this principle left unresolved the critical question of how Congress defines the tax's "subject," creating a loophole through which "good draftsmanship" could defeat the Clause's protective purpose.[92]

Ptasynski purported to address this gap but instead created doctrine that invites circumvention. The Court established that where Congress defines a tax's subject in nongeographic terms, the Uniformity Clause is presumptively satisfied: what critics call a "per se rule of validity."[93] Only when Congress explicitly uses geographic language does the Court "examine the classification closely to see if there is actual geographic discrimination."[94] Even then, the Court upheld Alaska's exemption from the windfall profit tax based on "neutral factors" like climate and drilling costs, despite the exemption's explicit geographic boundaries.[95]

This framework fails on multiple levels. Most fundamentally, it enables precisely the evil the Uniformity Clause was designed to prevent: sectional raids disguised through careful drafting.

a. *The Failure of Facial Formalism*

Consider a hypothetical that exposes the current doctrine's inadequacy. Congress, seeking to punish states that have challenged federal immigration policy, imposes a 50 percent excise tax on "hydraulic fracturing operations using horizontal drilling techniques at depths exceeding 8,000 feet where average well productivity exceeds 500 barrels per day." Congressional staffers have carefully researched these parameters to ensure they capture fracking operations in Texas and Oklahoma—states whose congressional delegations opposed recent immigration legislation—while excluding operations in allied states where different geological conditions prevail.

Under *Ptasynski*'s first prong, this facially neutral tax would receive virtually no scrutiny. The statute nowhere mentions Texas or Oklahoma; it speaks only of drilling techniques and productivity metrics. Yet this represents a clear "fiscal raid": precisely what the framers sought to prevent when they insisted that federal excises not become tools for building up

90. *Id.*
91. *See id.* at 83–84 (rejecting argument that progressive rates violated uniformity).
92. Lund, *supra* note 87, at 1194, 1217–18.
93. *Id.* at 1222.
94. United States v. Ptasynski, 462 U.S. 74, 85 (1983).
95. *Id.* at 78, 85–86 (discussing "neutral factors" and "unique climatic and geographic conditions").

"[t]he agriculture, commerce, or manufactures of one State . . . on the ruins of those of another."[96] As Lund argued, this approach reduces the Uniformity Clause to a mere drafting exercise.[97]

b. Applying FFPR to Uniformity Analysis

FFPR transforms this hollow formalism into principled analysis. As articulated in Part I, FFPR evaluates: (1) the asserted federal interest; (2) the countervailing state interest; (3) whether the means are reasonably tailored to the ends, using among the least intrusive of all equally effective means; and (4) whether the federal benefit is proportional to the burden on state autonomy.[98]

Applied to our hypothetical fracking tax, FFPR quickly exposes what *Ptasynski*'s formalism obscures. At step one, Congress would need to articulate a valid federal interest beyond punishing political opposition. Generic revenue-raising might suffice, but the narrow targeting suggests pretextual justification. At step two, the affected states have powerful interests in avoiding discriminatory federal taxation that could cripple major economic sectors. The tailoring analysis at step three reveals the classification's true nature: If the federal interest is environmental protection or revenue generation, why do geologically similar operations in other states escape taxation? The parameters appear reverse-engineered for geographic targeting rather than reasonably tailored to valid ends. Finally, the proportionality analysis would likely condemn a tax that devastates particular states' economies while contributing marginally to federal revenues or environmental goals.

Now consider how FFPR might analyze *Ptasynski* itself. The federal interest was clear: encouraging oil exploration in extreme conditions to enhance energy independence.[99] The state interest in uniform treatment remains significant—other oil-producing states faced a competitive disadvantage. But the tailoring analysis becomes more complex. Congress confronted unique Arctic conditions—permafrost, extreme cold, lack of infrastructure—that made drilling costs fifteen times higher than elsewhere.[100] Could Congress have used non-geographic proxies? Perhaps exempting wells with documented costs exceeding a threshold, regardless of location. Yet such alternatives posed serious administrative challenges

96. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 683 § 957 (Thomas M. Cooley ed., 4th ed. 1873).

97. Lund, *supra* note 87, at 1217–19.

98. *See supra* Section I.B.

99. *See* H.R. REP. NO. 96-817, at 103 (1980) (Conf. Rep.).

100. *Ptasynski*, 462 U.S. at 78–79, 78 n.7.

and potential fraud, while geographic boundaries provided clear, enforceable limits for conditions that were genuinely geography-specific.[101] The proportionality balance might reasonably favor the exemption: the burden on uniformity affected less than 20 percent of Alaska's production, while the federal interest in Arctic energy development was substantial given 1970s energy crises.[102]

Crucially, FFPR reaches this conclusion through transparent reasoning about federal and state interests, not through mechanical application of the geographic/non-geographic distinction. The framework would equally reject a broader Alaskan preference unsupported by unique conditions or a facially neutral classification that merely disguised sectional targeting.

c. *A Doctrinal Proposal*

Courts applying FFPR to uniformity challenges should ask: When Congress deviates from geographic uniformity—whether through explicit boundaries or facially neutral proxies—can it demonstrate that (1) the classification serves a legitimate federal objective beyond sectional preference; (2) the burden on disfavored states' fiscal interests has been considered and minimized; (3) there is reasonable tailoring between the means and ends, meaning that among equally effective means, Congress chose an approach that is among those least disruptive to competitive neutrality among states; and (4) the federal gains justify the departure from uniform treatment?

This approach neither categorically condemns geographic classifications nor blindly accepts facially neutral ones. Instead, it recognizes that uniformity, like the other structural principles discussed in this Article, protects state fiscal autonomy while permitting necessary federal flexibility. Some geographic tailoring may be essential; for example, the Arctic presents challenges that no cost metric fully captures. Some facially neutral classifications may be intolerable; reverse-engineered parameters that target disfavored states while maintaining technical neutrality should at the very least be subject to heightened scrutiny.

The uniformity requirement need not remain an empty shell vulnerable to drafting gamesmanship. Through FFPR, it can resume its intended role:

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101. Our analysis of *Ptasynski* in this Section is partly inspired by Hemel's treatment, although our conclusions differ. See Hemel, supra note 70, at 329, 341 (describing *Ptasynski* as "the opposite of hypertextualist formalism" because the Court "excused Congress's facial violation of the Uniformity Clause's plain text," and observing that "[s]ince lawmakers almost always will be able to cite some economic rationale for geographic differentiation, *Ptasynski* effectively renders the Uniformity Clause nugatory").

102. *Ptasynski*, 462 U.S. at 77 n.5 (noting less than 20 percent of Alaska's oil production was exempt).

protecting states from sectional exploitation while preserving federal flexibility to address genuine regional variations.[103] Structured proportionality review offers a principled middle path between formalistic rigidity and standardless deference.

3. The Apportionment Test

Once a tax is classified as direct, Article I requires apportionment "among the several States . . . according to their respective Numbers." This requirement was famously applied to strike down a national income tax in *Pollock v. Farmers' Loan & Trust Co.* (prior to the Sixteenth Amendment).[104] Although Congress levied a series of apportioned direct taxes during the Civil War and prior, many commentators have since come to believe that the apportionment requirement is so cumbersome that it has essentially become an insurmountable barrier to any federal taxes deemed to be direct and thus subject to apportionment.[105]

There is no jurisprudence on the application of the apportionment requirement beyond *Pollock*'s striking down a national income tax that was unmistakably designed to be uniform and not apportioned.[106] Though, in an analogous area of jurisprudence, the Court in *Adams Express Co. v. Ohio State Auditor*—decided just two years after *Pollock*—upheld flexible state apportionment of multistate business taxes, recognizing that state revenue power would be unduly restricted by a strict apportionment test.[107]

So why have commentators come to assume that the apportionment requirement has become an in-effect near-insurmountable hurdle, especially considering that jurisprudence has made the uniformity requirement an in-effect near-empty shell (as explained above)?

a. Reassessing Historical "Impossibility"

Clarke and Glogower marshal impressive evidence that historical apportioned taxes repeatedly failed to collect their mandated quotas.[108] For

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103. Our analysis here parallels that of whether states can tax out-of-state firms under the DCC. The parallelism is deliberate and we think a major strength of our approach.

104. 157 U.S. 429 (1895), *vacated on reargument,* 158 U.S. 601 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI, *as recognized in* Moore v. United States, 602 U.S. 572 (2024).

105. Brooks & Gamage, *supra* note 72, at 98–104.

106. *Eisner v. Macomber* continued this jurisprudential approach with respect to the specific income tax provision being challenged. 252 U.S. 189 (1920).

107. 165 U.S. 194 (1897).

108. Conor Clarke & Ari Glogower, *Apportioned Direct Taxes*, 79 TAX L. REV. (forthcoming 2026) (manuscript at 3–16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5314120 [https://perma.cc/4J26-TR5E] (surveying the 1798, 1813, 1815/16, and 1861 Direct Tax Acts and applications to land/real estate and enslaved persons).

instance, the 1798 Direct Tax collected only 77 percent of its target after five years; some states paid nothing due to protracted valuation disputes.[109] Yet we think these historical struggles reflect administrative incapacity, not constitutional defects.

For sure, Clarke and Glogower are correct that if the apportionment test is interpreted as requiring strict and precise apportionment as to the ultimate effects and incidence, then no historical apportioned direct tax could have satisfied this test, and indeed it would be near impossible for any real-world tax to satisfy such a test. Revenue collection is just not that precise in practice. But why should the apportionment requirement be interpreted so impossibly strictly, especially considering that the uniformity requirement has been interpreted to require only at-most facial uniformity in a manner making it essentially toothless? The historical record clearly supports that the founders intended for the national government to be able to levy apportioned taxes in practice, especially during times of war. There is no historical support for thinking that the apportionment test was intended as an in-effect impassable barrier.

Reflecting on this in 1861, Treasury Secretary Salmon P. Chase concluded that the apportionment test should be understood as requiring only facial compliance, that "the constitutional requirement will be satisfied if Congress, in the act levying the tax, shall apportion it among the several States in the required manner."[110] Collection shortfalls, he argued, cannot retroactively void a facially apportioned levy—just as the Union's inability to collect uniform taxes in Confederate states did not violate the Uniformity Clause. As we discussed earlier, this facial compliance principle aligns with the Court's later uniformity jurisprudence, which demands geographic neutrality in statutory design, not equality of economic impact or perfect collection.

We think Chase's view on this is both plausible and shows greater fidelity to the text and history of the Constitution than does interpreting the Apportionment Clauses as imposing a near-insurmountable hurdle to direct taxes. Yet we think FFPR offers a superior middle ground. We argued above that FFPR provides guidance for calibrating uniformity to achieve constitutional fidelity with a test that is neither essentially toothless nor impossible to comply with. We now argue that FFPR can similarly guide in calibrating and interpreting the Apportionment Clauses.

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109. *Id.*

110. SALMON P. CHASE, REPORT OF THE SECRETARY OF THE TREASURY ON THE FINANCES, S. EXEC. DOC. NO. 37-2, at 10 (1st Sess. 1861).

b. Modern Administrative Viability

Brooks and Gamage identify two developments that resurrect apportionment's practical viability.[111] First, the federal government now operates vast intergovernmental transfer systems capable of offsetting any regressive interstate effects. If apportionment forces poorer states to impose higher effective rates, Congress can alleviate or even counteract those disparities through spending programs or direct transfers—converting what was once an intractable equity problem into a manageable design challenge.

Second, contemporary administrative tools make the mechanics of apportionment workable, if admittedly somewhat more complex than uniformity. Consider what Clarke and Glogower label as the "sum certain" mechanism: Congress predetermining each state's dollar contribution rather than setting rates and letting revenues float. Clarke and Glogower argue that this is a critical flaw making apportionment unworkable.[112] Yet many local property tax systems in America currently operate in essentially this same manner: Legislatures determine revenue needs, assessors calculate the base, and administrators derive rates to meet those needs.[113] From this we conclude that the key difference between eighteenth-century supposed failures and modern feasibility lies not in anything inherently constitutional but rather in administrative capacity.

A workable framework for apportioning a tax today could thus include: statutory apportionment of the national levy to state quotas based on census data, mechanical rate-setting where each state's rate equals its quota divided by its assessed base, and targeted transfers to protect vulnerable populations and preserve essential state services. Techniques like this already operate successfully in local property tax administration.[114]

c. Applying FFPR to Apportionment Analysis

FFPR offers a way to read the apportionment requirement as a real safeguard rather than either as a mere ceremonial recital or as an impenetrable blockade. The inquiry should seek to ascertain whether Congress has designed an administrable regime reasonably calculated to raise a formally, facially apportioned sum while appropriately respecting state fiscal autonomy and federalism values.

111. Brooks & Gamage, *supra* note 72.

112. Clarke & Glogower, *supra* note 108 (manuscript at 15, 57–65) (introducing the "Sum Certain" and analyzing why this design feature creates fundamental implementation difficulties).

113. David Gamage, *Preventing State Budget Crises: Managing the Fiscal Volatility Problem,* 98 CALIF. L. REV. 749 (2010).

114. *Id.*

A hypothetical federal levy on high-value commercial real property illustrates the point. A federal interest in revenue (or perhaps, say, infrastructure finance) could easily be legitimate. But the state interests are potentially valid as well: The property tax remains a backbone of subnational finance and falls on immobile, place-specific assets. Those features raise both the displacement concern emphasized by Justice Thomas and the fiscal raid worry about regionally concentrated bases emphasized by Schizer and Calabresi. With regard to the classification question, routing a national property tax of this sort to the apportionment test therefore at least arguably fits with the Constitutional text, history, and purpose. This then raises the question of applying the apportionment test.

FFPR directs courts to look beyond just abstract categories by examining how Congress actually structures an apportioned tax. The 1798 Direct Tax Act demonstrates a workable template that remains instructive today.[115] Congress established state quotas, then deployed a tripartite mechanism: nationally uniform charges on dwelling houses and enslaved persons, combined with a residual land levy calibrated to close each state's remaining gap. As Brooks and Gamage observe, this design reveals a crucial principle—"only the combination of the three—*the total revenue collected*—was proportional to population."[116] The administrative logic extends beyond this historical example: When direct-tax bases distribute unevenly across states, Congress can satisfy apportionment by pairing uniform base components with state-specific residual rates that achieve the required quotas. Rather than representing a constitutional defect or clever evasion, this hybrid structure embodies the pragmatic flexibility necessary to operationalize apportionment's requirements while respecting its protective purposes.

The historical record does not justify transforming apportionment into a rigorous outcomes test. Treasury records reveal persistent gaps between ambition and achievement—the five direct-tax statutes collectively raised roughly $28 million against $34 million apportioned—with collections trailing for years.[117] The 1798 levy exemplifies this pattern: a decade after enactment, only $1.7 million of the $2 million target had materialized, with

115. As an aside, it is worth noting here that historically, apportionment may have originated as a budgeting device: a sum certain fixed ex ante to discipline the work of assessors and collectors. Clarke and Wiedenbeck describe the mechanism as having a "reasonable purpose and function," akin to a quota that constrains local discretion—"not a foolish one." Conor Clarke & Peter Wiedenbeck, *The Original Function of Tax Apportionment*, 188 TAX NOTES FED. 1215, 1222 (2025) ("[T]he original mechanism was not a foolish one."); *id.* (explaining apportionment's budget-like role to discipline local assessment).

116. Brooks & Gamage, *supra* note 72, at 103.

117. Clarke & Glogower, *supra* note 108 (manuscript at 47–52) (reporting approximately $28 million collected of $34 million apportioned across the five statutes, with long collection tails).

several states chronically delinquent in their quotas.[118] Yet these shortfalls illuminate administrative capacity, not constitutional noncompliance. Eighteenth-century tax administration lacked the standardized assessment protocols, electronic recordkeeping, and enforcement mechanisms that modern systems deploy routinely. What should matter for the constitutional analysis is that Congress legislated apportionment quotas and constructed a collection architecture to pursue them in good faith. FFPR therefore counsels deference to a statute that builds a reasonable apparatus to meet the quotas, while permitting courts to reject designs that would predictably frustrate apportionment or disguise sectional extraction.

FFPR also clarifies the role of potential interstate fiscal-equalization provisions. Because apportionment can impose higher effective rates on poorer states, Congress may employ appropriate fiscal tools—such as equalization transfer grants to state governments—to smooth interstate effects. Brooks and Gamage argue that the modern federal toolkit permits such adjustments while leaving apportionment meaningful.[119] The key point to understand here is that federal spending has never been subject to either the apportionment or uniformity requirements, nor could it comply with either. Moreover, there is no support in either the constitutional text or history for extending either requirement to spending (as both requirements explicitly apply only to federal taxes). Indeed, existing federal spending programs provide grants to state governments using formulas purposefully designed to achieve different targeting for different states and geographies—consider Medicaid, for just one notable example. Thus, as Brooks and Gamage explain in much greater detail in their prior scholarship, the interstate inequities caused by apportionment viewed myopically can be ameliorated through targeted federal spending such as grants to state governments or increased financing to states inequitably affected by apportionment through adjusted formulas for Medicaid or other similar spending programs. Adding to this prior work by Brooks and Gamage, we now argue here that the use of such tools should be evaluated through FFPR and in consideration of the presumption of symmetry: If Congress could accomplish the same interstate redistribution through an independent spending statute that would survive FFPR-informed review under the Spending Clause, then using a fiscal equalization formula to recycle a portion of revenues raised by an apportioned direct tax should likewise be permissible (at least presumptively).

Two examples help illustrate the boundary. First, Congress might enact an apportioned surtax on high-value commercial property that would rely

118. *Id.*
119. Brooks & Gamage, *supra* note 72, at 102–03, 120–25.

on standardized valuation protocols and a residual land-value rate to reconcile each state's quota. Along with this, Congress might enact a companion spending program of fiscal equalization grants to state governments—perhaps keyed to population and median income and available to all states—to soften interstate regressivity. Under FFPR, that combined package should be ruled consistent with apportionment's purpose. Absent other facts suggesting otherwise, this package seems like a reasonable attempt to raise national revenues from a direct tax base with appropriate tailoring that respects state fiscal interests and fiscal federalism values and with the companion spending grants designed to achieve the valid federal goal of alleviating interstate regressive effects.

For a brief counterexample, suppose Congress imposed an apportioned tax limited to oil and gas reserves and then earmarked the proceeds for a "transition fund" that completely *excluded* fossil-fuel-producing states. That combination would seemingly amount to an invalid fiscal raid. An FFPR-informed apportionment test should thus examine this with great scrutiny and skepticism.

d. A Doctrinal Proposal

Courts should operationalize the middle ground through a structured design inquiry. Formally satisfying the Apportionment Clauses demands that Congress establish population-based quotas and construct collection machinery reasonably calculated to achieve them. Yet this should permissibly allow for incorporating pragmatic mechanisms such as: mechanical rate-setting where quotas drive rate determination (a residual land rate, for instance, derived by dividing each state's remaining obligation by its assessed base); dynamic adjustment protocols with reconciliation mechanisms; and de minimis variance bands that acknowledge operational friction without inviting strategic gamesmanship.[120] Where federal levies may threaten traditional state tax bases, courts should potentially reward design features that appropriately seek to preserve subnational fiscal capacity—credits against state and local property taxes, for example—preventing federal collections from needlessly cannibalizing core state revenue instruments.

Accompanying equalization spending devices should presumptively be permissible when they operate through generally applicable formulas that would themselves satisfy constitutional scrutiny if enacted as stand-alone spending legislation. Courts should ask whether such devices further valid federal interests—maintaining interstate equity, stabilizing national

120. Brooks & Gamage, *supra* note 72, at 138–41.

investment, or mitigating temporary rate disparities—or instead seem designed to overly trample on state interests without appropriate tailoring. For instance, where the overall design or legislative history reveals a pretext to accomplish a regional fiscal raid, an FFPR-informed apportionment test should potentially bar even a statute that would facially achieve apportionment quotas.

This approach gives apportionment real teeth without demanding the impossible. In short, FFPR reads apportionment as a workable, state-protective rule rather than a relic or a trap.

4. *Synthesis: Harmonizing the Constitution's Express Clause-Based Limits on the Federal Taxing Power*

FFPR can help reconcile the Apportionment and Uniformity Clauses with modern fiscal realities by providing courts with a structured methodology for both classification and application. Rather than treating these clauses as binary switches or empty shells, FFPR directs attention to their federalism risk profiles. Taxes on immobile, tangible, place-bound bases that may threaten core state revenue sources are relatively better suited to apportionment's machinery, consistent with the historical association of "direct taxes" with land, real property, and capitation.[121] Conversely, taxes on diffuse, mobile, more abstract, and transaction-determined bases present lower federalism risks and are relatively better-suited for uniformity. This approach harmonizes formal categories with functional purposes in fidelity with the constitutional text and history.

Once classification determines the governing clause, FFPR calibrates each test to be meaningful yet workable. For uniformity, this means geographic neutrality with teeth—screening for state-mapping proxies that disguise sectional targeting through facially neutral parameters. For apportionment, FFPR similarly charts a middle course: requiring population-based quotas with administrable collection mechanisms reasonably calculated to achieve them, while permitting modern tools like equalization spending grants to state governments for addressing interstate regressive effects without defeating the clause's protective purposes. The 1798 Direct Tax Act is a historical example demonstrating this pragmatic flexibility—pairing uniform levies on dwellings with a variable residual land rate to meet state quotas, showing how hybrid designs can appropriately operationalize apportionment.[122] Through this structured approach, FFPR transforms the Uniformity and Apportionment Clauses

121. *Id.* at 93–94, 100, 106–08.
122. *Id.* at 102–03.

from fragmented doctrinal silos into a coherent framework that appropriately respects federalism values.

CONCLUSION

We have argued that the current fissured state of fiscal federalism doctrines reflects the absence of a unifying analytical framework. By tracing our proposed FFPR framework across the varied contexts examined in this Article, we have sought to demonstrate how a structured methodology can bring principled order to this doctrinal chaos. Our framework does not aim to impose uniformity for its own sake; rather, it demands that courts articulate precisely when and why different contexts may warrant different treatments, replacing incoherent siloing with transparent reasoning about the federal and state interests actually at stake.

The Internet Tax Freedom Act illustrates the problem; what began as temporary protection for a fledgling e-commerce industry has calcified into claims for indefinite exemption by some of the world's most dominant economic sectors. Current jurisprudence offers no coherent method for reassessing whether yesterday's justified interventions have become today's unjustified intrusions. FFPR provides the necessary tools for this reevaluation—not through rigid temporal limits but through dynamic recalibration as economic and technological circumstances evolve. The same analytical structure capable of evaluating 1998's dial-up protections can assess tomorrow's quantum computing regulations, asking not just what legal category a technology inhabits but also what federal-state tensions it creates and how their resolution serves overarching constitutional values.

Or consider state or federal legislators considering a new tax that might be novel, at least in twenty-first-century context. Legislators (and judges) need guidance based on principles as to new cases.

Traditional doctrines stumble when confronting new developments because no founder contemplated novelties like social media or digital currencies. FFPR's structured approach may not eliminate disagreements, but it can at least structure new ideas and channel disputes toward the questions that ultimately matter. By forcing fundamental inquiries into the open, FFPR can transform fiscal federalism from an exercise in doctrinal archaeology into a proper constitutional jurisprudence, equipping the judiciary to manage not just today's conflicts but also the federal-state frictions our economic and technological future will inevitably generate.