NATURAL RESOURCES JOURNAL

Volume 61
Issue 1 *Winter*

Winter 2021

Taxing Power Delegation for Better Environmental Regulation: A Proposal on Federal Carbon Tax Policymaking

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TAXING POWER DELEGATION FOR BETTER ENVIRONMENTAL REGULATION: A PROPOSAL ON FEDERAL CARBON TAX POLICYMAKING

ABSTRACT

In view of the stalled situation in climate change lawmaking, transferring the focus from direct congressional lawmaking to delegated lawmaking by agencies may provide a new perspective to break the gridlock of federal carbon tax legislation. However, taxes are generally less delegable than environmental and other regulations. Specifically, the Internal Revenue Service and Treasury are not permitted to determine tax rates. This is also the case for environmental taxes in the Internal Revenue Code. Though some environmental statutes seem to provide some implied and untested delegation of power to regulate by taxation, the Environmental Protection Agency ("EPA") has not yet imposed any environmental taxes under such delegation.

This Article argues for expanding the delegation of environmental taxes to realize their regulatory purposes and proposes to delegate the EPA the power to determine and adjust carbon tax rates. A comparative study of Chinese legislation and U.S. delegating power illustrates the need for delegating environmental taxing power. The National People's Congress of China has considered the regulatory purpose in expanding the delegation of tax rates and tax base in the new Environmental Protection Tax Law. This new law provides a valuable reference to the U.S. EPA's regulatory mission. Delegating the power to determine carbon tax rates advances the EPA's regulatory mission due to its comparative advantages of expertise in environmental policymaking, flexibility to the uncertainty, volatility of the climate change issue, and coordination of environmental policy instruments. The regulatory nature of environmental taxes weakens the distributional and transfer-of-property concern, ultimately justifying the legitimacy of environmental tax delegation. Moreover, the EPA is likely to be more responsive than Congress in producing urgently needed, but politically unpopular, carbon tax. Finally, this article concludes that the proposal to delegate carbon tax rates is constitutional based on the Origination Clause, the non-delegation doctrine, and potential non-tax-delegation doctrines.

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1. Post-Doctoral Fellow, Peking University Law School; S.J.D. Candidate, University of Michigan Law School. I am extremely grateful to Reuven S. Avi-Yonah, Nina A. Mendelson and Janet E. Milne for their invaluable support, guidance, and comments. I thank Alex Wang, Xiaonan(Nancy) Yang, Tom Temprosa, Farshad Rahimi Dizgovin, Johanna Lorenzo, Shay Moyal, Chun-Han Chen, Ajitesh Kir, and participants in the S.J.D. Colloquium at University of Michigan Law School, for their helpful insights. All errors are of course my own. The author could be contacted at kaijiewu@umich.edu.

I. INTRODUCTION

Nearly a century has passed since the idea of imposing taxes on environmental burdens was first proposed by Arthur Cecil Pigou in 1920, which is deemed as the theoretical origin of environmental taxes.[2] Most economists argue that a tax equal to the harm caused by the entities is the optimal form of regulation of entities that produce negative externalities.[3] Compared to command-and-control regulations, environmental taxes can save costs,[4] promote innovation,[5] and bring more transparency in regulation.[6] Compared to the carbon trading system, a carbon tax can better ensure price stability and predictability,[7] and send a clearer, stronger signal.[8] When properly designed, environmental taxes such as a carbon tax can also

2. *See* Janet E. Milne & Mikael S. Andersen, *Introduction to Environmental Taxation Concepts and Research*, HANDBOOK OF RESEARCH ON ENVIRONMENTAL TAXATION 15, 15–18 (Janet E. Milne and Mikael S. Andersen ed., Edward Elgar Publishing, 2012) (discussing in depth the development of the Pigouvian tax theory and its impacts on environmental taxes).

3. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], *Managing the Environment: The Role of Economic Instruments*, at 32 (China Environmental Science Press, 1994)] (stating that taxing polluters at the level of marginal social cost will lead to optimal production and pollution reduction); Agnar Sandmo, *Direct Versus Indirect Pigouvian Taxation*, 7 EUR. ECON. REV . . . 337 (1978) (exploring how the Pigouvian tax solution stands up to the theory of optimal taxation in the presence of externalities).

4. *See* Jonathan S. Masur & Eric Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. EV. 93, 95 (2015-2016) (noting that determining optimal command-and-control measures demands knowledge of both costs and benefits of production while setting Pigouvian taxes only demands knowledge of the costs); OECD, *supra* note 3, at 11 (stating that polluters can choose between reducing pollution and paying taxes to minimize their costs).

5. *See* Masur & Posner, *supra* note 4, at 101–102 ("Regulators can only perform a cost-benefit analysis with respect to extant technology, materials, and processes-a regulator cannot estimate the cost of a technology that has not yet been invented"); OECD, *supra* note 3, at 11 (arguing that polluters have incentives to develop new pollution-reduction technologies in order to avoid tax payment).

6. *See* OECD, *supra* note 3, at 12 (noting that the close relationship between regulators and regulated parties under command-and-control measures will lead to regulatory capture); Jonathan Baert Wiener, *Global environmental regulation: Instrument choice in legal context*, 108 YALE L.J. 677, 714–726 (1999) (command-and-control measures also demand monitoring of pollution and the administrative costs of selecting "best technology" or other conduct rules may be at least as high as the administrative costs of setting incentive levels).

7. *See* Lawrence H. Goulder & Andrew R. Schein, *Carbon Taxes Versus Cap and Trade: a Critical Review,* CLIMATE CHANGE ECON., Vol. 4, No. 3, 2013, at 3 (stating that carbon tax can ensure price stability because price cannot go beyond tax rate and presumably the time-profile of tax rates imposed by policy makers involves relatively smooth changes); Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax is a Better Response to Global Warming Than and Trade*, 28 STAN. ENVTL. L.J. 3, 43–44 (2009) (finding that adding banking or borrowing mechanisms to a carbon trading system will add complexity and provides no assurance to be effective); W. D. Nordhaus, *To tax or not to tax: Alternative approaches to slowing global warming,* 1 REV. OF ECON. POL'Y, no.1, 26–44, 2007 (observing that sulfur dioxide allowance prices between 1995 and 2006 in the US were about as volatile as oil prices and more volatile than prices of stocks).

8. *See* Michael J. Waggoner, *The House Erred: A Carbon Tax is Better than Cap and Trade* , U. of Colo. Law Sch., Working Paper No. 09-18, 1261 (2009) (observing that the public is unlikely to read and fully understand the lengthy and complicated legal texts that institutionalize the carbon trading system) http://ssrn.com/abstract=1489592; Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 81 NOTRE DAME L. REV. 313, 326 (2006) (noting that calling the cost a tax sends a different signal than

be more politically acceptable,[9] administratively feasible,[10] and economically efficient.[11] Because of these advantages, environmental tax instruments and carbon taxes are increasingly incorporated by many governments, especially in European countries, into their environmental governance portfolios.[12]

Despite the theoretical advantage of environmental taxes,[13] they are far from becoming a major environmental policy in the United States ("U.S.").[14] Organization for Economic Co-operation and Development ("OECD") statistics show that in 2014, only 2.86 percent of the total tax revenue in the U.S. came from environmentally related taxes.[15] Such a gap between theory and practice is more significant in the context of climate change issues. Although more than ten carbon tax proposals have been put forward in Congress, none of them have become law.[16] In light of the stalled situation, transferring focus from direct congressional lawmaking to delegated lawmaking by federal regulatory agencies may provide a

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calling it the purchase price for a right to pollute); David G. Duff, *Tax Policy and Global Warming*, 51 CAN. TAX. J. 2063, 2069 (2003) (concluding that a carbon tax can send an unambiguous message about this discouragement).

9. *See* Stewart Elgie & Jessica McClay, *BC's Carbon Tax Shift is Working Well After Four Years* (Attention Ottawa), 39 CAN. PUB. POL'Y S1 (2013) (British Columbia's revenue-neutral carbon tax imposes less tax burden on taxpayers and thus are supported by the public), http://www.sustainableprosperity.ca/dl1026&display; Mingde Cao, *Carbon Trading or Carbon Tax: Which is the More Feasible Solution to Climate Change from the Perspective of China?*, MARKET INSTRUMENTS AND THE PROTECTION OF NATURAL RESOURCES 164 (Natalie P. Stoianoff et al. eds., 2016) (the interactions between carbon pricing programs and other climate policies may weaken their collective function in reducing carbon emissions).

10. *See* J.E. Aldy & R.N. Stavins, *The Promise and Problems of Pricing Carbon: Theory and Experience*, 21(2) J. ENV'T & DEV. 152, 155 (2012) (noting that collection of carbon tax can rely on existing systems but carbon trading system cannot); Kenneth R. Richards & Stephanie Richards, *The Evolution and Anatomy of Recent Climate Change Bills in the U.S. Senate: Critique and Recommendations*, Soc. Sci. Res. Network, Working Paper 6 (2009) (observing that a successful carbon trading program requires intense monitoring, verifying and reporting mechanisms) http://ssrn.com/sol3/papers.cfm?abstract_id=1368903;

11. *See* Kevin Lo & Mark Y. Wang, *Energy Conservation in China's Twelfth Five-Year Plan Period: Continuation or Paradigm Shift?*, 18 RENEWABLE AND SUSTAINABLE ENERGY REVIEWS 499, 499–507, February 2013 (observing that biggest emitters in China have already been targeted by "the 1000 enterprises initiative" and multiple fiscal subsidy policies).

12. *See* OECD, *Green growth challenge: Shifting the tax burden in favour of environmentally related taxation*, http://www.oecd.org/environment/environmentaltaxation.htm (Summarizing environmental tax revenue compared to GDP and the share of total tax revenue).

13. *See* Janet E. Milne, *Environmental Taxation: Why Theory Matters*, CRITICAL ISSUES IN ENVIRONMENTAL TAXATION, 3–26 (Janet E. Milne et al., eds., vol. 1, Richmond Law & Tax Ltd., Richmond, UK, 2003).

14. *See* Masur & Posner, *supra* note 4, at 96 (noting that very few references to Arthur Pigou or Pigouvian taxes could be found in the entire history of the Congressional Record).

15. *See generally* Environmentally Related Tax Revenue Statistic, Office for Economic Co-Operation and Development, https://stats.oecd.org/Index.aspx?DataSetCode=ERTR# (Select "Customize" drop down and then select "Country"; then in the "search" tool bar type in "United States" and select "view data"; Then change the displayed data using a drop down to "Tax Revenue, % of total tax revenue" to display the data.)

16. *See Bills*, https://www.carbontax.org/bills/ (last visited 10/2/2020 at 8:06 AM) (summarizing proposed carbon tax bills).

new political and economic perspective for the current discussion of federal carbon tax legislation.

To address the gap between theory and practice, scholars have carried out considerable research from the perspectives of economics[17] and political economy[18] in different jurisdictions. An OECD report summarized sectoral competitiveness, distributional impacts, political acceptance, administrative costs, and existing environmental policies as the major concerns affecting implementation of environmental taxes.[19] While these studies have explained the gap between theory and practice to some extent, they have largely focused on the power of legislatures to enact environmental taxes but have not paid enough attention to the delegation of taxing power from legislatures to agencies. If agencies have the power to decide main elements of environmental taxes or even impose new environmental taxes, the current state of environmental tax may change significantly.[20] The comparative advantages of agency rulemaking in terms of expertise, flexibility, and time may fill the gaps left by legislatures and promote more effective and responsive policymaking.[21]

In practice, the authority to tax is generally less delegable than other legal authorities in the U.S.[22] Congress has delegated broad regulatory authority to the EPA, which allows for the promulgation of substantive rules that impact incentives

17. *See* Victor Fleischer, *Curb Your Enthusiasm for Pigouvian Taxes*, San Diego Legal Studies Paper, No. 14–151 (2014) (pointing out that when marginal social cost varies significantly, a Pigouvian tax will not lead to an optimal allocation of economic resources due to limited information and enforcement capacity of tax institutions); Robert P. Murphy et al, *The Case Against a U.S. Carbon Tax*, No. 801 Policy Analysis of Cato Institute, 2–9 (2016) (arguing that when moving from academic theory to historical experience, carbon taxes have not lived up to the promises of their supporters.)

18. *See generally* OECD, THE POLITICAL ECONOMY OF ENVIRONMENTALLY RELATED TAXES (2006) (A book detailing political economy research on OECD's member country environmental taxes.); *see also*, Kathryn Harrison, Environment Working Papers No. 63 - The Political Economy of British Columbia's Carbon Tax, In OECD's Environment Working Papers (2013) (writing on political economy research of environmental taxes in British Columbia); Frank J. Convery, Louise Dunne & Deirdre Joyce, Environment Working Papers No. 59 - Ireland's Carbon Tax and The Fiscal Crisis: Issues in Fiscal Adjustment, Environmental Effectiveness, Competitiveness, Leakage and Equity Implications, in OECD's Environment Working Papers (2013)(assessing a carbon tax and political implications in Ireland).

19. *See generally* The Political Economy of Environmentally Related Taxes (2006) (A book detailing political economy research on OECD's member country environmental taxes.)

20. *See* Masur & Posner, *supra* note 4, at 93 (" . . . contrary to the conventional wisdom, regulators typically have legal authority to create Pigouvian taxes-they just do not use it. While regulators may hesitate to impose Pigouvian taxes for a range of political and symbolic reasons, these reasons do not justify this massive failure of regulatory efficiency. It is time for the regulatory state to take a Pigouvian turn.").

21. *See, e.g.*, Jerry L. Mashaw, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 J.L. ECON. & ORG. 81 (1985) [hereinafter Mashaw, *Prodelegation*]; Peter H. Schuck*, Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

22. *See* James R. Hines Jr. & Kyle D. Logue, Delegating Tax, 114 MICH. L. REV. 235, 248 (2015) (observing that typical congressional tax delegation amounts to fleshing out the details-filling in the missing definitions of provisions whose basic policy design was already put into place by statute).

and distribution of economic burdens.[23] However, Congress rarely enacts tax statutes that provide for broad tax policy principles and authorize an agency to fill in the details.[24] In light of this difference, some scholars argue that agencies should have more taxing powers.[25] However, expanding tax delegation may raise constitutional concerns. The most plausible constitutional challenge against tax delegations is the so-called non-delegation doctrine. Although the non-delegation doctrine is widely deemed dead,[26] whether it has special force to tax delegations is unsettled.[27]

This general tax/regulation distinction for delegation purposes is facing new challenges in the case of environmental taxes. Scholars have recognized the distinction of regulatory taxes from fiscal taxes.[28] Environmental taxes are regulatory taxes by nature because the primary objective of an environmental tax, unlike a fiscal tax, is not to raise revenues, but to regulate environmentally harmful behaviors.[29] Due to this distinguishing feature, the emergence of environmental taxes, or "regulatory taxes," has blurred the boundary between taxes and regulations.[30] The regulatory nature of environmental taxes has impacted the consideration of the associated delegation issue. For instance, some scholars argue that agencies have power to impose environmental taxes under the existing environmental statutes.[31]

This Article argues to expand the delegation of environmental taxes and proposes that the EPA is delegated the power to create carbon tax rates. Section I

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23. *Id.* at 236.

24. Hines & Logue, *supra* note 22.

25. *See* Masur & Posner, *supra* note 4, at 96 (2015–2016); Hines & Logue, *supra* note 22 at 238 (arguing that the Congress should consider delegate more authority on tax subsidy provisions, income tax rates, and tax reform).

26. *See, e.g.*, Fed. Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring in the result) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes."); John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132–33 (1980); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) ("In our view there just is no constitutional nondelegation rule, nor has there ever been."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315-16 (2000) (arguing that the nondelegation doctrine is not dead, but is instead relocated to other doctrines).

27. *See* Hines & Logue, *supra* note 22, at 268 (The Court has occasionally suggested that tax is different, as evidenced by Justice Douglas's line in the *National Cable Television Association* case. Nevertheless, the conventional wisdom seems to be that Congress has just as much freedom to delegate tax lawmaking power as it has to delegate any sort of lawmaking power).

28. , *See* Reuven S. Avi-Yonah, *Taxation as Regulation: Carbon Tax, Health Care Tax, Bank Tax and Other Regulatory Taxes*, ACCT. ECON. & L., no. 1, Article 6, at 2 (2011) (For discussions on regulatory taxes and its distinction from fiscal taxes); Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1 (2007) (identifying that taxation with regulatory goals is called regulatory tax, or taxation as regulation).

29. *See* Kalle Määttä, ENVIRONMENTAL TAXES: AN INTRODUCTORY ANALYSIS 37 (2006) (noting that environmental taxes "are created in order to guide the behavior of polluters, whereas their revenues are of secondary importance, if they have any importance at all").

30. *See* Kalle Määttä, ENVIRONMENTAL TAXES: FROM AN ECONOMIC IDEA TO A LEGAL INSTITUTION 38 (1997); *Id*. 35 (underlining the need to distinguish incentive or regulatory environmental taxes from fiscal environmental taxes).

31. *See* Masur & Posner, *supra* note 4, at 108–134 (arguing that agencies have authority to impose Pigouvian taxes under the Clean Air Act, the Clean Water Act, financial regulation, and the Occupational Safety and Health Act).

defines the nature of environmental taxes as regulatory taxes and the implication of the delegation issue. Section II examines the practices of environmental tax delegation in the U.S. and finds that the power to enact environmental taxes is narrowly delegated in the Internal Revenue Code ("IRC"), the same as in the case of tax delegation in general. In comparison, the EPA has broad but dormant authority to enact environmental taxes under environmental statutes. Section III then provides a comparative study of environmental tax delegation in China. While the general trend of tax delegation is toward narrow delegation, environmental tax delegation is distinguishably broader. By reference to the Chinese case, Section IV argues for expanding environmental tax delegation and proposes to delegate power to determine carbon tax rates in the U.S. Section V addresses the constitutionality of carbon tax delegation. Finally, Section VI provides a brief conclusion.

II. LEGAL NATURE OF ENVIRONMENTAL TAXES

A fundamental issue demands consideration before discussing delegation of environmental taxes – what is the legal nature of environmental taxes? The legal nature is important for the following discussion of the delegation issue.[32] In brief, environmental taxes are tax policy instruments with the purpose of regulating environment-related behaviors instead of raising revenue.[33] With their legal nature as regulatory taxes, environmental taxes demand a reconsideration of the long-existing "tax vs. regulation" distinction for the delegation issue.

A. Environmental Taxes as Regulatory Taxes

1. Goal of Environmental Regulation

Environmental taxes have been explored to replace and supplement inefficient command-and-control measures for better environmental regulation. Command-and-control measures, which require regulated parties to use specific technologies ("technology-based standards") or fulfill specific emission reduction goals ("performance-based standards"), have been widely criticized as wasting the cheapest abatement options and discouraging innovation in abatement technology.[34] In comparison, scholars have argued that environmental taxes could motivate the firms and sectors with most cost-effective abatement options to fully utilize their potential and also encourage further innovation by awarding extra emissions

32. *See* Michael Rodi & Hope Ashiabor, *Legal authorities to enact environmental taxes*, HANDBOOK OF RESEARCH ON ENVIRONMENTAL TAXATION 59, 59 (Janet E. Milne and Mikael S. Andersen ed., Edward Elgar Publishing, 2012).

33. *See* Määttä, *supra* note 29, at 37.

34. *See* Erin Adele Scharff, *Green Fees: The Challenge of Pricing Externalities Under State Law*, 97 NEBRASKA L. REV. 168, 198 (2018) (Command-and-control measures waste cheapest pollution abatement options because they "force firms to shoulder similar shares of the pollution-control burden, regardless of the relative costs to them." Command-and-control measures also discourage innovation in abatement technologies as regulated parties have no motivation to emissions reductions beyond the required amount, therefore "command . . . and . . . control regulations tend to freeze the development of technologies that might otherwise result in greater levels of control."); Robert N. Stavins, *Market-Based Environmental Policies*, PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 32 (Paul R. Portney & Robert N. Stavins eds., 2d ed. 2000).

reductions.[35] In addressing the climate change issue, environmental taxes are especially promising due to the widespread greenhouse gas ("GHG") emissions and considerable abatement costs.

The regulatory function of environmental taxes is rooted in economic theories.[36] The primary theory underlying environmental taxes is the Pigouvian tax theory, arguing that environmental taxes should be imposed on polluters to internalize environmental costs and thus maximize social welfare.[37] In line with this rationale, the tax rate should be set at the marginal external environmental cost of the environmentally damaging activity or product.[38] To improve the feasibility of the Pigouvian theory,[39] economists William J. Baumol and Wallace E. Oates hold the view of setting tax rates at a level enough to achieve a given degree of environmental improvement.[40] As long as the tax rate is higher than the abatement cost, taxpayers have incentive to reduce their emissions. Another economic theory, which is called the least-cost abatement theory, is that taxes may provide the least-cost approach to achieving regulatory goals; compared to command-and-control regulations, which require all entities to follow the same standards regardless of their different cost-effectiveness, environmental taxes can yield the desired degree of environmental protection at lower compliance costs.[41]

In practice, the U.S. has a long history of exploring the use of taxation for environmental regulation at the federal level.[42] Since the late 1960s and the early 1970s, Congress has enacted the following environmental taxes: a tax on the extraction of coal from domestic mines in 1977 (hereinafter "the coal extraction tax");[43] a tax on gas-guzzling cars in 1978 (hereinafter "the gas-guzzling tax");[44] taxes on chemicals, oil products, and corporate income to finance the Superfund in 1980 (hereinafter "the Superfund taxes");[45] a tax on ozone-depleting chemicals in

35. *See* OECD, TAXATION, INNOVATION AND THE ENVIRONMENT 12 (2010).

36. *See* Milne, *supra* note 13, at 3–26.

37. *See Id*. at 15.

38. *See Id.* at 15 (stating that "Pigou formulated his theory in terms of the difference between the marginal social net product and the marginal private net product")

39. *See* Murphy et al, *supra note 17*, 2–9 ("parameters are needed to calculate the social cost of carbon that by their essence are subjective, such as the analyst's view on the proper weight to be given to the welfare of future generation"); OECD, *supra* note 3, at 32 (noting that due to lack of damage information, environmental agencies are unable to impose pollution tax on a correct level).

40. *See* OECD, *supra* note 3, at 32; William J. Baumol & Wallace E. Oates, *The Use of Standards and Prices for Protection of the Environment*, 23 SWEDISH J. ECON. 42, 44–45 (1971).

41. *See* Milne, *supra* note 13, at 10.

42. *See* Janet E. Milne, *Environmental Taxation in the United States: The Long View*, 15 LEWIS & CLARK L. REV. 417, 419 (2011).

43. Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95–87, 91 Stat. 445 (codified as amended at 18 U.S.C. § 1114 and in scattered sections of 30 U.S.C.). See Dana Clark & David Downes, *What Price Biodiversity? Economic Incentives and Biodiversity Conservation in the United States*, 11 J. ENVTL. L. & LITIG. 9, 36 (1996).

44. Energy Tax Act of 1978, Pub. L. No. 95-618, § 201, 92 Stat. 3174, 3180 (codified at I.R.C. § 4064 (2006)).

45. Hazardous Substance Response Revenue Act of 1980, Pub. L. No. 96-510, § 201, 94 Stat. 2767, 2796 (codified at I.R.C. §§ 4661-4662 (2006)).

1989 (hereinafter "the ODC tax");[46] and a tax on petroleum to finance the Oil Spill Liability Trust Fund (hereinafter "the petroleum tax").[47]

Among these environmental taxes, the coal extraction tax, the gas-guzzling tax, and the ODC tax have clear regulatory goals of environmental protection by curbing environmentally harmful behaviors. For instance, the ODC tax was designed to reduce the production and consumption of ozone-depleting chemicals, and thereby address the problem of the stratospheric ozone layer erosion that endangers the Earth to ultraviolet radiation.[48] It has been widely endorsed as a successful environmental policy and a useful model for the design of environmental taxes in the future.[49] Unlike the ODC tax, the regulatory features of the Superfund taxes and the petroleum tax arise from both their tax bases and the use of their revenue.[50] The Superfund taxes, for example, have tax bases associated with the environmental problems, but absent dedication of the revenue to the cleanup of hazardous waste sites, the relatively low level of tax rates would be inadequate to significantly deter environmentally harmful behaviors.[51] It should be noted, however, that earmarking revenue for environmental purposes is not a necessary feature of environmental taxes. On the contrary, taxes with dedication of revenue for environmental purposes with no regulatory impacts on the tax base side are not environmental taxes, but functionally equal to environmental tax expenditures.[52]

Notably, the regulatory function of taxes is not limited to environmental issues but also extend to other economic and social issues. As Professor Avi-Yonah observed, taxation has a third goal of regulation, besides the two well-known goals of raising revenue and redistribution.[53] Other scholars have also identified the "efforts of contemporary tax administrations focusing on programs, purposes, and functions other than raising revenue."[54] Besides the environmental taxes mentioned

46. Revenue Reconciliation Act of 1989, Pub. L. No. 101-239, § 7506(a), 103 Stat. 2106, 2364 (codified at I.R.C. §§ 4681-4682 (2006)). See Thomas A. Barthold, *Issues in the Design of Environmental Excise Taxes*, 8 J. ECON. PERSPECTIVES 133, 136–38 (1994) (discussing design features of ozone-depleting chemicals taxes).

47. *See generally* George M. Chalos, *A Practical Guide to the Oil Spill Liability Trust Fund Claim Submission Procedures*, 3 U. DENV. WATER L. REV. 80 (1999) (In the wake of the Exxon Valdez oil spill in 1989, Congress created an oil pollution fund, called the Oil Spill Liability Trust Fund, to provide compensation to those who have suffered losses or damages from an oil spill. The Fund is primarily funded by a tax of five cents per barrel of oil produced and imported to the United States.); John M. Woods, *Going on Twenty Years - The Oil Pollution Act of 1990 and Claims Against the Oil Spill Liability Trust Fund*, 83 TUL. L. REV. 1323 (2009).

48. *See* Bruce Pasfield & Elise Paeffgen, *How to Enforce a Carbon Tax: Lessons from the Montreal Protocol and the U.S. Experience with the Ozone Depleting Chemicals Tax*, 14 VT. J. ENVTL. L. 389, 395 (2013).

49. *See* Milne, *supra* note 13, at 429; Masur & Posner, *supra* note 4, at 104 (2015-2016) ("the best example of a Pigouvian tax we have found is the Ozone Depleting Chemicals Tax"); *Id*. at 393 & 395.

50. *See* Milne, *supra* note 13, at 434.

51. *Id*. 434–36.

52. *See infra* notes 52–54.

53. *See* Avi-Yonah, *supra* note 28, at 1.

54. *See* Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L. J. 1717, 1723 (2014).

above, taxes have also been used to discourage the use of liquor and cigarettes,[55] deter banks from taking excessive risks,[56] and encourage individuals to purchase health insurance.[57]

2. Tax as Policy Instrument

Despite the goal of environmental regulation, environmental taxes are distinctive from other environmental regulatory instruments. The OECD has offered a well-accepted definition of "environmentally related tax": "any compulsory, unrequited payment to general government levied on tax bases deemed to be of particular environmental relevance. Taxes are unrequited in the sense that benefits provided by government to taxpayers are not normally in proportion to their payments."[58] This definition catches key features of environmental taxes that distinguish them from two similar regulatory instruments – environmental tax expenditures and environmental user fees.

First, environmental taxes, which are "levied on tax bases deemed to be of particular environmental relevance,"[59] do not include environmental tax expenditures.[60] The concept of "environmental tax" is less broad than the concept of "environmental taxation," which encompasses both environmental taxes and environmental tax expenditures.[61] Environmental tax expenditures, or tax incentives for environmental regulation, refer to tax benefits provided for encouraging environmentally positive activities. The U.S. corporate income tax has contained a large amount of tax credits and tax exemptions to achieve regulatory aims of environmental protection,[62] including tax credits for energy efficient new homes, improvements to existing homes, and the manufacture of energy efficient appliances, as well as a tax deduction for energy efficient commercial buildings.[63] Unlike environmental tax expenditures, environmental taxes are directly imposed on tax bases associated with negative environmental impacts, thereby deterring certain

55. *See, e.g.,* I.R.C. § 5001 (imposing taxes on distilled spirits and wines produced in or imported into the United States). Excise Tax Changes Act of 1958, Pub. L. No. 85-859, § 201, 72 Stat. 1275, 1313–14 (1958) (codified as amended at I.R.C. §§5001-5693 (2012)); *see also* I.R.C. § 5701 (imposing taxes on cigars, cigarettes, and other tobacco products manufactured in or imported into the United States); Internal Revenue Code of 1954, ch. 52, § 5701, 68A Stat. 1, 705 (1954) (codified as amended at I.R.C. §5701 (2012)).

56. *See e.g.* Wolfgang Schön, *Taxation and Democracy*, Max Planck, *Institute for Tax Law and Public Finance Working Paper* 2018-13, 2–4 (2018); Douglas A. Shackelford, Daniel N. Shaviro & Joel Slemrod, *Taxation and the Financial Sector*, 63 NATIONAL TAX JOURNAL 781, 806 (2010); Carlo Garbarino & Giulio Allevato, *The Global Architecture of Financial Regulatory Taxes*, 36 MICHIGAN JOURNAL OF INTERNATIONAL LAW 603-648 (2015).

57. *See* NFIB v. Sebelius, No. 11-393, slip op. at 32 (June 28, 2012) (This controversial Supreme Court decision held that the Patient Protection and Affordable Care Act imposed a tax on individuals who did not purchase health insurance. The health care tax stems primarily from the desire to ensure the constitutionality of the individual health insurance mandate.).

58. *See* OECD, ENVIORNMENTALLY RELATED TAXES IN OECD COUNTRIES: ISSUES AND STRATEGIES, 15 (2001).

59. *Id*. at 15.

60. *See* Milne, *supra* note 13, at 421.

61. See *id*.

62. *See id.* at 440-41; *see also* Avi-Yonah, *supra* note 27 at 3.

63. I.R.C. §§ 25C, 25D, 45M, 179D.

environmentally detrimental activities by forcing private actors to internalize their social costs.[64]

Second, environmental taxes are also different from environmental user fees. The concept of "environmental tax" is closely related to the concept of "environmental fee" or "environmental charge." A critical, traditional distinction between taxes and user fees (or other charges) is that user fees provide a direct benefit back to the payers while taxes do not.[65] The "benefits" that the payers of environmental taxes receive, if any, are not typical benefits attached to user fees but could be characterized as the ability to harm the public good of environmental protection.[66] In addition, the relationship between the tax amount and the cost of providing the "benefits" is more indirect and complicated than in the case of a user fee.[67] In a typical user fee context, the amount charged reflects dollars that a government spends directly in providing the corresponding services, such as the waste management service for the garbage fee paid by households.[68] In the environmental tax context, however, the rate level should be equal to the costs of the targeted pollution or the expenses to meet the emission reduction goals, rather than the compensation that the government receives for its services.

This article, for the purpose of discussing the legislative delegation issue, generally follows the OECD definition of "environmental related taxes" but also considers such taxes' regulatory purpose of discouraging environmentally detrimental behaviors. In consistence with this addition, this paper uses the term of "environmental tax" rather than "environmentally-related tax," which refers to "any compulsory, unrequited payment to general government levied on tax-bases deemed to be of particular environmental relevance for the purpose of discouraging environmentally detrimental behaviors."[69] Environmental taxes, in order to achieve their regulatory goals, rely on an indirect means of creating economic incentives by imposing taxes, instead of directly constraining freedom of choice as in the case of command-and-control regulation.[70]

B. Why the Nature as a Regulatory Tax Matters for the Delegation Discussion?

1. Tax v. Regulation Distinction

Congress has treated regulations and taxes as different authorities for the purpose of delegation. Congress has been used to delegating the EPA and other regulatory agencies broad regulatory authority to promulgate substantive rules that

64. *See* Milne, *supra* note 2, at 421.

65. *See* Janet E. Milne, *Environmental Taxes and Fees: Wrestling with Theory*, ENVIRONMENTAL TAXATION AND GREEN FISCAL REFORM THEORY AND IMPACT 5, 8 (Larry Kreiser et al. eds., 2014).

66. *See* Scharff, *supra* note 33, at 171–72.

67. *Id*. at 172.

68. U.S. ENVIRONMENTAL PROTECTION AGENCY, PAY-AS-YOU-THROW: LESSONS LEARNED ABOUT UNIT PRICING 2 (1992).

69. *See* OECD, *supra* note 58, at 15.

70. *See* Milne, *supra* note 13, at 10.

can have enormous effects on incentives and distribution of economic burdens.[71] For instance, the Clean Air Act ("CAA") has delegated considerable power to the EPA in formulating environmental policies. Section 109(b)(1) of the CAA delegates the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [published air quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health."[72] In *Whitman v. American Trucking Association*, the Court held that this delegation was constitutional because Congress had provided an "intelligible principle" limiting the EPA's discretion.[73] The word "requisite," which "mean[s] sufficient, but not more than necessary," had delineated the required "ceiling" and "floor" to constitute an "intelligible principle."[74] For another example, the CAA empowers (and requires) the EPA administrator to set emissions standards for "any air pollutant . . . which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."[75]

The power to formulate tax policies, in comparison, is generally less delegable than the administrative authority in environmental regulation and other regulatory areas.[76] Congress rarely enacts tax statutes that provide for broad tax policy principles and authorize the Treasury or IRS to fill in the details.[77] Typical congressional tax delegation amounts to fleshing out the details—filling in the missing definitions of provisions in which basic policy design was already put into place by statute.[78] Whether such limited delegation is required by the Constitution has not been settled in the courts. In *Mayo Foundation for Medical Education & Research v. United States*, the Supreme Court rejected to "carve out an approach to administrative review good for tax law only,"[79] but did not speak to the specific issue of legislative delegation. Contrary to the Supreme Court's attitude, many tax administrative practices still do not comply precisely with general administrative law requirements but are often subject to special requirements for tax rules.[80]

Scholars have tried to come up with some explanations for the different treatment of taxes and regulations. First, the Constitution requires special treatment for taxing power through the Origination Clause.[81] Second, tax is special due to its substance of property deprivation, which is deemed as the most prominent and

71. *See* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993) (providing a survey of the ways in which environmental regulation can have distributional consequences).

72. 42 U.S.C. § 7409(b)(1).

73. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).

74. *Id*. at 473.

75. 42 U.S.C. § 7521(a)(1) (2012).

76. *See* Hines & Logue, *supra* note 22, at 248.

77. *See* DAVID EPSTEIN & SC SHARYN O'HALLORAN, DELEGATING POWERS 196–203 (1999) (finding that tax legislation granted less policy and implementation discretion to executive agencies than did laws passed by Congress in any of fifty-three other substantive federal policy areas).

78. *See* Hines & Logue, *supra* note 22, at 249.

79. Mayo Foundation for Medical Education & Research v. United States, 131 S. Ct. 704, 713 (2011).

80. *See* Hickman, *supra* note 54, at 1718.

81. *See* Ronald J. Jr. Krotoszynski, *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L. J. 239, 243 (2005).

extensive intrusion of the state's power into the sphere of individual[82] and distributional consequences.[83] Third, while regulations redistribute wealth and income between private parties, the use of tax instruments is associated with the transfer of private funds to the public coffers;[84] therefore, tax delegation is subject to strict scrutiny under the due process doctrine and the separation of powers doctrine.[85] Fourth, scholars have also identified some external factors, including specialization, cloistering, path dependence, and litigation strategy, as origins of tax exceptionalism.[86]

2. Regulatory Tax: Tax or Regulation?

This article has no intent to address the issue of whether the divergent treatment for taxes and regulations could be justified in a general sense. Instead, this article attempts to argue that the tax regulation distinction for delegation purpose is inapplicable in the case of environmental taxes, and thus entails reconsideration. Even if this divergent treatment is justified, whether environmental taxes fall into the category of a tax or regulation is not clear.

The regulatory purpose of environmental taxes has blurred the distinction between tax and regulation. The primary feature of regulatory taxes is the purpose of steering behaviors while their revenues are of secondary importance.[87] To realize their regulatory function, the design of environmental taxes should follow principles different from the design of fiscal taxes mainly aimed at generating revenue, such as income taxes.[88] Essentially, the tax base and tax rate of environmental taxes should follow social costs of pollution or certain pollution-reduction goals, while income taxes should be designed to generate adequate fiscal revenue for the operation of government. In this sense, environmental taxes are functionally similar to environmental regulation rather than taxes.

The revenue-raising function of taxes has played a role in the formulation of distinguishing taxes from regulations. In explaining or defending exceptional treatment of taxes, courts and scholars often invoke the importance of revenue-raising.[89] In *Bull v. United States*, the Supreme Court justified special limitations on a taxpayer's ability to challenge tax assessments and collections on the ground that

82. *See* Schön, *supra* note 56, at 4–7.

83. *See* Hines & Logue, *supra* note 22, at 257.

84. *See* Wolfgang Schön, *Regulation and Taxation of the Financial Markets*, Max Planck Institute For Tax Law and Public Finance Working Paper 2016-08, at 6, May 2016.

85. *See generally* Krotoszynski, *supra* note 81, at 245.

86. *See generally* Hines & Logue, *supra* note 22, at 268 (stating the combination of historical accident and path dependence could lead to no tax delegation); Robert Glicksman & Richard Levy, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011) (describing how specialization, cloistering, and path dependence lead to judicial divergence from administrative law norms, with tax as one example); Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?*, 89 TEX. L. REV. 89, 92 (2011) (identifying litigation strategy as a partial explanation for tax departures from general administrative-law norms).

87. *See* Määttä, *supra* note 29, at 37.

88. *See* Kalle Määttä, ENVIRONMENTAL TAXES: FROM AN ECONOMIC IDEA TO A LEGAL INSTITUTION 38 (1997); Kalle Määttä, ENVIRONMENTAL TAXES: AN INTRODUCTORY ANALYSIS 35–43 (2006).

89. *See* Hickman, *supra* note 54, at 1720.

"taxes are the life-blood of government, and their prompt and certain availability an imperious need."[90] Professor Steve Johnson has identified the "revenue imperative" as the claimed justification for "several features of tax administration that uniquely advantage" the IRS.[91]

This revenue-raising justification is invalid in the case of environmental taxes due to its regulatory purpose. The main reason is that the effectiveness of regulatory taxes should be judged according to their regulatory function of promoting intended behaviors rather than revenue-generating function.[92] Therefore, the exceptional treatment of taxes based on the importance of revenue-raising function is unwarranted. Although regulatory taxes inevitably have revenue-raising effects, revenue collection is an ancillary function and taxes should not be designed to pursue this goal. In theory, we can start from the admittedly extreme case of an environmental tax that has no fiscal function at all, aiming only to reduce environmentally detrimental actions. To make the case even more extreme, the tax may be designed not just to reduce, but to stop, this behavior altogether. These are good reasons to treat an environmental "tax" purely as a regulatory instrument because it is comparable to a command-and-control regulation.[93]

As the "tax v. regulation" distinction is problematic in applying to environmental taxes due to their regulatory purpose, the delegation issue of environmental taxes is worth further consideration. Are environmental taxes truly different from fiscal taxes for the purpose of delegation? Do their nature as regulatory taxes justify more delegation to agencies as the case of environmental regulation? Before addressing this issue, it is helpful to review what powers Congress already delegates in the policymaking of environmental taxes and how they differ from the sort of broad delegation it might adopt.

III. CURRENT ENVIRONMENTAL TAX DELEGATION

Environmental taxes could exist in both tax statutes and environmental statutes, because of their tax form and regulatory purpose. This section will examine the U.S. Internal Revenue Code ("IRC") and major environmental statutes to find the status quo of environmental tax delegation. Delegation of environmental taxes in the IRC is as narrow as the case of tax delegation in general, but delegating clauses in some environmental statutes seem not to foreclose regulation by taxation.[94] Delegated agencies, however, have not yet imposed any environmental taxes under such delegation.[95]

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90. Bull v. United States, 295 U.S. 247, 259–60 (1935).

91. Steve Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269, 279–80 (2012).

92. *See* Määttä, *supra* note 29, at 39–40.

93. *See* Rodi & Ashiabor, *supra* note 32, at 61.

94. *See* Masur & Posner, *supra* note 4, at 108–123 (reviewing the EPA's authority to impose environmental taxes under the Clean Air Act and the Clean Water Act).

95. *Id*. at 96.

A. Environmental Tax Delegation in the Internal Revenue Code

Most existing environmental taxes were first enacted within larger legislative programs and then codified in the IRC.[96] For instance, the ozone-depleting chemicals tax ("ODC tax") was originally established by the Revenue Reconciliation Act of 1989 and was later codified into the IRC.[97] To understand the delegation of existing environmental taxes in the IRC, the rest of this section will discuss the delegation of the ODC tax and the gas-guzzling tax as two examples.

The ODC tax was a regulatory tax implemented by Congress in 1989 to comply with the Montreal Protocol, under which countries agreed to phase out the use of key ozone-depleting chemicals.[98] The tax base and the tax rate are linked directly with the chemicals' potential to damage the environment.[99] The tax base consists of twenty chemicals with ozone-depleting characteristics.[100] The tax rate on each listed chemical, which unlikely reflects the social costs, varies according to the ozone-depleting potential of each chemical. In determining the tax rate, a uniform base tax amount is multiplied by the varying ozone-depleting factor of each chemical.[101] Therefore, the tax rate for a chemical with a higher ozone-depleting factor is higher than another chemical with a lower ozone-depleting factor. For example, "CFC-11 has an ozone-depleting factor of 1.0 whereas Halon-1301 has a factor of 10.0, causing the tax on the more potent Halon-1301 to be ten times greater."[102]

The gas-guzzler tax, which is a federal regulatory tax on gas-guzzling vehicles, similarly employs an environmentally logical tax base and tax rate. The tax, enacted in 1978, is an excise tax on automobiles whose fuel economy values are less than 22.5 miles per gallon.[103] Although the tax was enacted in 1978 in response to concerns about reliance on imported oil following the oil embargo, its existence today is directly relevant to the environmental problems caused by carbon dioxide and other emissions from motor vehicles' combustion of gasoline.[104] The tax ranges from $1000 to $7500 per car depending on the fuel economy, which significantly correlates to the level of emissions, and the tax rate appropriately increases as fuel economy decreases.[105] This increased cost also creates an incentive for consumers to buy more efficient automobiles, while promoting the conservation of fossil fuels.

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96. *See* Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 18 U.S.C. § 1114 and in scattered sections of 30 U.S.C.).

97. Revenue Reconciliation Act of 1989, Pub. L. No. 101-239, § 7506(a), 103 Stat. 2106, 2364 (codified at I.R.C. §§ 4681–4682 (2006)).

98. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10. See Pasfield & Paeffgen, *supra* note 48, at 393, 395.

99. *Id*. at 395–96; *see also* Clark & Downes, *supra* note 43, at 35.

100. I.R.C. §4682(a)(2).

101. *See* Gregory A. Orlando, *Understanding the Excise Tax on Ozone-Depleting Chemicals*, 42 TAX EXECUTIVE 359, 359 (1990).

102. *See* Milne, *supra* note 42, at 429.

103. I.R.C. §4064.

104. *See* Milne, *supra* note 42, at 431.

105. *See* Clark & Downes, *supra* note 43, at 37.

1. Typical Detail-filling Delegation

Detail-filling delegation is typical in the cases of environmental taxes. Congress reserves to itself the fundamental policymaking authority on determining tax rates and tax base. Tax agencies are only allowed to fill in the details to clarify the ambiguous provisions in the statute, which lay out the essential policy design.[106] IRC provisions on both the ODC tax and the gas-guzzling tax, as well as their corresponding Treasury regulations, offer the examples of typical details-filling delegations.

The delegation of the ODC tax is consistent with the typical detail-filling tax delegation as described above. First, the tax base of the ODC tax is not delegated. The tax base consists of two categories: the first is any ozone-depleting chemical sold or used by the manufacturer, producer or importer; and the second is any imported taxable product sold or used by the importer.[107] With regard to the first category, the tax code has already listed twenty chemicals and their ozone-depleting factors and thereby excluded other chemicals from the tax base.[108] The second category of tax base is determined by the first-category ozone-depleting chemicals used as materials in the manufacture or production of imported taxable products[109] and is thus also specified by the tax code.

Second, the tax rate of the ODC tax is not delegated. Recognizing the need to gradually increase the tax rates, Congress provided for an annually increasing, but uniform, base tax amount, leaving the Treasury with no discretion to adjust the base tax amount.[110] The base tax amount was adjusted by statute from the original amount of $1.37 per pound of ozone-depleting chemical in 1990 to $5.35 per pound in 1995.[111] Since 1995, the base tax amount has automatically increased 45 cents per year.[112] The Treasury also has no power in determining the ozone-depleting factors of covered chemicals, which are specified by statute.[113]

However, the Treasury has been delegated the authority to more precisely define the tax base in consideration of technical details of some specific chemicals, as well as to formulate certain discretionary enforcement policies. For instance, qualifying sales of chemicals used in manufacture of rigid foam insulation were not taxable in 1990 and were taxed at reduced rates for 1991, 1992, and 1993.[114] A qualifying sale is one where registration certificate requirements are met. Temp. Reg. §§ 52.4682- 2T(a) and (d) set forth the certificate requirements for tax-free and tax-reduced sales,[115] and the recommended IRS Registration Certificates are reproduced in Temp. Reg. § 52.4682-2T(d)(2).[116] The term "rigid foam insulation" is defined in

106. *See* Hines & Logue, *supra* note 22, at 249.

107. I.R.C. § 4681(a).

108. I.R.C. § 4682(a)(2).

109. I.R.C. § 4681(b)(2).

110. *See* Milne, *supra* note 13, at 429.

111. *See* I.R.C. § 4681(b) (1) (B) (showing 1995 base amount); I.R.C. § 4681(b) (1) (B) (Supp. II 1990) (showing original 1990 base amount).

112. *Id*.

113. I.R.C. § 4682(b).

114. *See* Orlando, *supra* note 101, at 360.

115. Temp. Reg. §§ 52.4682- 2T(a) and (d).

116. Temp. Reg. § 52.4682-2T(d)(2).

Temp. Reg. § 52.4682-1T(d)(3) as any rigid foam designed for use as thermal insulation.[117] To support a claim that rigid foam is designed as thermal insulation, taxpayers may cite test reports and advertising material reflecting R-values.

Similarly, the gas-guzzler tax shows detail-filling delegation as in the case of the ODC tax. The scope of the delegation for the gas guzzler tax is as narrow as in the case of the ODC tax. First, the power to determine tax rates and tax base is not delegated. IRC § 4064 sets several fuel economy thresholds and corresponding tax rates, leaving the Treasury with no power to adjust them.[118] Second, only the power to clarify the tax base definitions and enforcement rules are delegated. For example, the Treasury issued the regulation 48.4064-1 to define the key terms relevant to the tax base, such as sale, manufacturer, automobile, model year, model type, fuel economy, and fuel.[119]

2. Few Policymaking Delegation

While detail-filling delegations are typical in the cases of environmental taxes, the IRC rarely sets a general policy goal and expressly delegates the agencies to decide on the instruments to achieve the policy goal.[120]

The primary source for the delegation of general regulatory authority to the Treasury, for both the ODC tax and the gas-guzzler tax, is IRC § 7805. IRC § 7805 provides that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of [the IRC]."[121] With this delegated authority, the Treasury has issued regulations to enforce the statutory provisions on the ODC tax and the gas-guzzler tax. Treasury regulations on imported taxable products offer an example. IRC § 4681(b)(2) provides that the ODCs used as materials in the manufacture or production of imported taxable product should be taxed.[122] The purpose of IRC § 4681(b)(2) is to level the playing field for domestic ODCs-involved products and their imported counterparts by border tax adjustment.[123] This section leaves the question of how to identify imported taxable products and determine the weight of taxable ODCs unanswered. It is such tax lawmaking authority, over fine-tuning the tax base and determining enforcement approaches, that Congress is willing to delegate to the Treasury.[124]

In 1991, the Treasury used its regulatory authority and issued regulation 52.4682-3, which set forth the methods to be used for determining the ODC weight of an imported taxable product.[125] The first is the "exact method," which allows an importer to use the exact weight of each ODC used as material in the manufacture of

117. Temp. Reg. § 52.4682-1T(d)(3).

118. I.R.C. § 4064 (The tax rate starts at $1,000 for vehicles with fuel economy less than 22.5 but more than 21.5 miles per gallon, and it rises with each one-mile decrease in fuel economy until it reaches $7,700 for vehicles with fuel economy less than 12.5 miles per gallon).

119. Temp. Reg. § 48.4064-1.

120. *See* Hines & Logue, *supra* note 22, at 248.

121. I.R.C. § 7805.

122. I.R.C. § 4681(b)(2).

123. *See* Milne, *supra* note 13, at 430.

124. *See* Hines & Logue, *supra* note 22, at 250.

125. Treas. Reg. § 52.4682-3 (1991) (amended 1993); *see also* Orlando, *supra* note 113, at 360.

an imported taxable product in calculating the amount of tax.[126] If the importer cannot identify the exact weight, a second "table method" permits the importer to determine the ODC weight according to a table contained in the regulations, which specifies the approximate ODC weight relating to certain products.[127] The importer may apply the exact method or table method for different ODCs, depending on whether reliable information concerning the weight of relevant ODCs is available or not.[128] In the event that both the exact method and table method are not applicable, the amount of tax could be computed as one percent of the value of the taxable products on the date of entry into the U.S., called the "value method."[129]

In addition to the general delegation under IRC § 7805, the statutory provisions on the ODC tax and the gas-guzzler tax also provide some specific delegations. With regard to the ODC tax, IRC § 4682(c)(2) delegates the Treasury Secretary the authority to determine the imported products using a *de minimis* amount of ODCs as materials in the manufacture or production, and such imported products are excluded from "imported taxable products" under the "*de minimis* exception."[130] Under this delegation, the Treasury specified the "*de minimis* exception" by stipulating that "the adjusted tax with respect to a product is *de minimis* if such tax is less than one/tenth of one percent of the importer's cost of acquiring such product."[131]

3. Benefits of More Delegation

Current environmental tax delegation, though limited, shows that Congress has already realized the limits of congressional lawmaking in cases of environmental taxes. The Treasury's exercise of the delegated power to clarify tax base definitions and enforcement mechanisms has shown the benefits of delegation. For instance, the treasury regulations on the computation of tax on imported taxable products show the complexity of the subject to be regulated and the changing conditions affecting the implementation of the policy as envisioned by the statute.[132] In response to the complexity and changing conditions, the tables specifying the approximate ODC weight relating to certain products were established through a combined effort of the IRS and the industry and have been revised to reflect changes in ODC usage.[133] A manufacturer or importer of a product may request the IRS to add or remove a product from the table, or change or specify the table-based ODC weight of a product.[134] Given the limited expertise and time frame of Congressional sessions, but for considerable demand for regulations, it is unrealistic for Congress to legislate and adjust the same regulations in each and every piece of national policy.[135]

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126. Treas. Reg. § 52.4682-3(e)(2).
127. Treas. Reg. § 52.4682-3(e)(3).
128. Treas. Reg. § 52.4682-3(e)(3)(ii)(B).
129. Treas. Reg. § 52.4682-3(e)(4).
130. I.R.C. § 4681(c)(2).
131. Treas. Reg. § 52.4682-3(b)(2)(ii).
132. *See supra* note 119–129.
133. *See* Orlando, *supra* note 113, at 361.
134. Treas. Reg. § 52.4682-3(g)(1).
135. *See* Hines & Logue, *supra* note 22, at 242.

More policymaking delegation could be beneficial, in addition to tax base definitions and enforcement mechanisms. As circumstances changed, the environmental effectiveness of the gas-guzzler tax eroded significantly; the problem might have been cured if the tax had been delegated. First, the gas-guzzler tax does not apply to sport utility vehicles ("SUVs"), minivans, and pickup trucks,[136] which represent a major portion of the new vehicle sales in recent years.[137] As Professor Milne pointed out, "though this exemption was created in 1978 long before SUVs were contemplated as a common choice for everyday travel, the failure to amend the law has significantly undercut its force as an environmental instrument."[138] Second, the tax rates of the gas-guzzler tax have not been increased since 1990, nor have the fuel economy thresholds been changed since 1978.[139] Obviously, the stagnancy does not respond to the increasingly serious issue of climate change.[140] In order to serve a long-term environmental purpose, the tax rates and tax base should be adjusted periodically to preserve their incentive effects.[141]

B. Environmental Tax Delegation in the Environmental Statutes

In addition to the tax code, agencies' authority to implement environmental taxes could also come from environmental statutes. Compared to the Treasury's limited authority delegated by the IRC, the EPA has broader delegation to regulate under environmental statutes and has issued hundreds of regulations, such as requirements to meet emission standards, adoption of certain types of technology, or operations under permits.[142] None of these regulations, however, have adopted a tax approach to mitigate externalities.[143] Scholars have long accepted this division between tax and other regulations without serious consideration until a recent paper raised doubt.[144] In this Section, the argument that a plausible reading of the environmental statutes would not explicitly delegate the power to tax and show that an explicit delegation of environmental tax is preferable will be made.

1. Implied Tax Delegation

The EPA has potential delegations to enact environmental taxes in multiple provisions of environmental statutes.[145] The CAA is the primary statute under which the EPA regulates and provides the basic regulatory structure that has been imitated by other major environmental statutes. In their article, Professor Masur and Professor

136. *See* I.R.C. § 4064(b) (1) (B); Milne, *supra* note 36, at 431 (citing Richard A. Westin, *The SUV Advantage*, 94 TAX NOTES 1360, 1361 (explaining that SUVs are not subject to the tax)). *See also* Gilbert E. Metcalf, *Federal Tax Policy towards Energy*, 21 TAX POL'Y & ECON. 145, 151 (2007).

137. *See* Metcalf, *supra.* note 136, at 151.

138. *See* Milne, *supra* note 13, at 431.

139. *Id*.

140. *Id*.

141. *Id*.

142. *See* Masur & Posner, *supra* note 4, at 108.

143. *Id*.

144. *Id*.

145. *See* Masur & Posner, *supra* note 4, at 143–44.

Posner identified potential tax delegations under sections 110, 111 and 112 of the CAA.[146]

The first potential tax delegation comes from the National Ambient Air Quality Standards ("NAAQS") provision under § 110 of the CAA. The EPA has the authority to set the NAAQS, which limit the quantity of certain pollutants in the ambient air.[147] Following the determination of a NAAQS, the states are required to submit "state implementation plans" ("SIPs") to implement the NAAQS, and the EPA may conduct "federal implementation plans" ("FIPs") if the states fail to do so.[148] The Act stipulates that each plan shall "include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights) . . . "[149] Interpreting this provision, Masur and Posner held the view that "the phrase 'other control measures, means, or techniques' clearly encompasses a tax system that had the effect of limiting emissions; the word 'fee' in the parentheses reinforces this interpretation, as a tax is a kind of fee."[150]

Though the NAAQS provision does not exclude the option of tax, it fails to "clearly encompasses a tax system" as Masur and Posner argued above.[151] Tax is not a kind of fee but a different authority altogether. As introduced above, the key difference between a tax and a fee is that fees provide a direct benefit back to the payers while taxes do not.[152] In *National Cable Television Association v. United States*, the Court confirmed this distinction and held that a tax may be based solely on the ability to pay without regard to any benefit conferred on the taxpayer, while a fee constitutes a charge that an agency exacts in return for a benefit voluntarily sought by the payer.[153] If Congress had intended the implementation plans to consider the option of tax, it could have easily incorporated the term of "taxes" in the list of economic incentives. Furthermore, if the NAAQS provision delegated taxing power, it would mainly be an argument that state governments already possess this power because FIPs are much less common than SIPs.

The second potential delegation is that the EPA might have a separate authority to regulate "stationary sources," mostly factories and power plants, by taxation under section 111 of the CAA. The CAA delegates the EPA to establish New Source Performance Standards ("NSPSs"), which are "emission limitations" in substance, governing both new and existing stationary sources.[154] "Once EPA has established such a limitation on pollution," Masur and Posner said, "there are no strictures on the type of regulatory mechanism the EPA or the states may use to meet the pollution standard."[155] Therefore, the EPA could employ taxes to reduce pollution below emission limitations.

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146. *Id*. at 109–119.

147. 42 U.S.C. § 7409(a)–(b)(2012).

148. 42 U.S.C. § 7409(a)(1), (c).

149. 42 U.S.C. § 7410(a)(2)(A).

150. Masur & Posner, *supra* note 4, at 111.

151. *Id*. at 111.

152. *See supra* section I(A)(1–2) for discussion of the purpose of taxes.

153. National Cable Television Ass'n v. United States, 415 U.S. 336, 340–41 (1974).

154. 42 U.S.C. § 7411 (2012).

155. Masur & Posner, *supra* note 4, at 112.

This argument is problematic because the NSPSs designate a specific approach of regulation by emission limitations. The phrase of "enforceable emission limitations and other control measures, means, or techniques" in section 110 indicates that emission limitation is a type of regulatory approach to achieve emission reduction.[156] Emission limitations and environmental taxes are two different regulatory approaches. Emission limitations impose quantified, administrative restrictions on how much of a pollutant a given stationary source may release into the air.[157] On the contrast, an environmental tax does not impose a limit, but a price, on any pollutant discharged by a given stationary source. Stationary sources are not required to reduce their emissions so long as they pay the tax. Although the tax rate might be set at a level to achieve an overall objective of emission reduction, it is incapable of guaranteeing the realization of individual limits.

The third potential tax delegation exists in the EPA's authority to regulate "hazardous air pollutants" directly under section 112 of the CAA.[158] Similar to section 111 of the CAA as described above, the EPA is delegated to set "emission standards" governing the emissions of "hazardous air pollutants" into the air.[159] These "emission standards" are also essentially "emission limitations" but with different stringency compared to the NSPSs.[160] In determining the standards, the EPA may consider "measures which . . . reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications . . . "[161] Masur and Posner argued that tax, as a "measure," could lead to reductions through "process changes, substitution of materials or other modifications," and therefore, the EPA has the authority to tax.[162]

This argument made the same mistake of treating the emission standards as regulatory objectives instead of regulatory approaches. The "measures" which reduce pollutants through "process changes, substitution of materials or other modification" are factors to be considered in determining the stringency of the emission standards, not optional regulatory approaches other than emission standards.

To be consistent with the emission limitations system under sections 111 and 112, Masur and Posner suggested that an environmental tax be implemented in three steps: "[F]irst, set an emissions limitation at or near zero emissions; second, set the fine that scales with the amount of pollution in excess of the limitation, so that it is equal to the desired level of Pigouvian tax; and third, initiate an administrative proceeding against every polluter in order to collect the appropriate taxes (fines)."[163] They argued that "an emission limitation at or near zero emissions" in the first step would be "achievable" as required under sections 111 and 112 in that the EPA "does

156. 42 U.S.C. § 7410(a)(2)(A) (2012).

157. 42 U.S.C. § 7409(a)(1) (2012).

158. 42 U.S.C. § 7412 (2012).

159. 42 U.S.C. § 7412(d) (2012).

160. 42 U.S.C. § 7412(d)(2)–(3) (2012) (Major sources of hazardous air pollutants are subject to Maximum Achievable Control Technology (MACT)); 42 U.S.C. § 7411(a)(1) (2012).

161. 42 U.S.C. § 7412(d)(2) (2012).

162. Masur & Posner, *supra* note 4, at 113.

163. *Id*. at 115.

not intend that regulated firms will actually comply with the zero emissions limitation," but "anticipates that many firms will violate the limitation and pay manageable 'fines' (taxes, really) in the appropriate amount."[164]

Such a "zero emission limitation plus low noncompliance penalty" regulation is unlikely to be a permissible interpretation of the CAA. First, the text of the CAA is clear that Congress intends for the emission limitations to be achievable, instead of the combination of "emission limitation plus penalty for incompliance." If this had not been the case, Congress would have required the consideration of penalty in determining the emission limitations. Otherwise, the varying requirements of stringency for standard determination would be meaningless. Second, penalty should be high enough to discourage violations of emission limitations under the CAA. Penalty is designed to ensure the compliance with emission limitations, not an option of noncompliance. In *NFIB v. Sebelius,* the Supreme Court recognized the coercive nature of regulations supported by penalties.[165] First, the magnitude of the burden is higher than the gain from the regulated conduct; second, the burden usually falls only on knowingly breaching the standards; and third, there is social stigma or considered unlawfulness for choosing to pay the penalty.[166]

2. Need for Explicit Delegation

The analysis above shows that the CAA, especially the NAAQS provision under section 110, does not foreclose the EPA's authority to tax air pollutants but also fails to delegate taxing power in an explicit manner. To effectively delegate the EPA to regulate by taxation, such delegation should be explicit for two primary reasons.

The first reason is that without an explicit delegation, the notion that "taxes" and "regulations" are different authorities may prevent the EPA from taking advantage of an implied delegation. Regulators, including the EPA, believe that they do not impose taxes but issue regulations and punish regulated parties that violate them; taxes are imposed by Congress and implemented by the Treasury Department.[167] Taxes are subject to a special and complex set of norms and procedures not applicable to regulations.[168] Although an implied tax delegation existed, the EPA may lack the incentive to explore its potential, not to mention other administrative and political hurdles.[169]

In addition, explicit delegation is preferable because the clear statement rule may invalidate environmental taxes implemented under an implied delegation. The clear statement rule means that an agency may not interpret an ambiguous statute to confer the power to tax.[170] Whether section 110 of the CAA could be interpreted as granting the states or the EPA the authority to implement NAAQS by taxation, such

164. *Id*. at 116.

165. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

166. *See* Kyle D. Logue, *NFIB v. Sebelius and the Individual Mandate: Thoughts on the Tax/Regulation Distinction*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 173, 180-187 (2016).

167. *See* Masur & Posner, *supra* note 4, at 143.

168. *Id*. at 143.

169. *Id*. at 139–145 (analyzing potential objections or obstacles for agencies in implementing Pigouvian taxes).

170. *See infra* notes 341–44 and the accompanying text.

delegation would be an implied delegation under ambiguous statutory provisions.[171] As analyzed above, the CAA does not explicitly incorporate "taxes," but only lists "fees," which has been held by the Supreme Court to be distinguishable from "taxes."[172] Though taxes arguably fall into the scope of "economic incentives" under section 110, this provision is at best ambiguous. Therefore, environmental taxes enacted under section 110 of the CAA are likely to be invalidated by the courts.

In summary, environmental tax delegation under the current statutory scheme is as limited as tax delegation in general. The Tax Code explicitly only allows detail-filling delegations with few policymaking delegations for elaboration of tax base and design of enforcement mechanisms. On the other hand, the environmental statutes, in delegating broad lawmaking on choice and design of regulatory instruments, have not explicitly foreclosed the option of environmental taxes. However, the EPA and other administrative agencies have never exercised power under such implicit delegation due to unwarranted perception of tax exceptionalism.

IV. ENVIRONMENTAL TAX DELEGATION IN CHINA: A COMPARATIVE STUDY

To prove the necessity and feasibility of broader environmental tax delegation for regulatory purpose, this section provides a comparative study of environmental tax delegation in China. The Chinese experience is worth reference from a functional perspective.

First, China has been faced with serious and complicated environmental issues due to rapid economic growth.[173] To address environmental issues effectively with lower costs, China has actively explored more efficient market-based regulatory instruments, including environmental taxes.[174]

Second, China has used tax instruments for environmental regulation for more than 30 years.[175] By the end of 2016, the enactment of the Environmental Protection Tax Law created China's first tax law specifically for environmental regulation.[176] This environmental protection tax (hereafter "EPT") was not

171. See *supra* notes 144–150 and the accompanying text.

172. See *supra* notes 149–150 and the accompanying text.

173. *See generally* Guowuyuan Guanyu Niandu Guanjìng Zhuangkuang He Huanjing Baohu Mubiao Wancheng Qingkuang Yu Yanjiu Chuli Shui Wuran Fangzhi Fa Zhifa Jiancha Baogao Ji Shenyi Yijian Qingkuang De Baogao (国务院关于年度环境状况和环境保护 目标完成情况与研究处理水污染防治法 执法检查报告及审议意见情况的报告) [The State Council's Report on the Completion of Environmental Conditions and Environmental Protection Objectives for 2019 and the Study of Law Enforcement Inspection Reports and Deliberations on the Law on the Prevention and Control of Water Pollution] (May 12, 2020), http://www.npc.gov.cn/npc/c30834/202005/96a10e30f77a45948a04179edb64eb61.shtml (summarizing China's environmental issues).

174. *See* Yan Xu, *Environmental Taxation in China: the Greening of An Emerging Economy*, in HANDBOOK OF RESEARCH ON ENVIRONMENTAL TAXATION 303, 305-309 (Janet E. Milne and Mikael S. Andersen ed., Edward Elgar Publishing, 2012).

175. Ying She et al. *Can China's Government-Oriented Environmental Regulation Reduce Water Pollution? Evidence from Water Pollution Intensive Firms*, MDPI J. OF SUSTAINABILITY (2020).

176. Huánjìng bǎohù shuìfǎ [yǐ bèi xiūdìng] (中华人民共和国环境保护税法 [已被修订]) [Environmental Protection Tax Law] (promulgated by Standing Comm. of the Nat'l People's Cong., Dec.

established from the ground up, rather it was from an updated version of the 30-years-old pollution fee system.[177] The pollution fee, despite the term of "fee," was a regulatory tax in substance.[178] Thanks to the reform from the pollution fee to the EPT, China has accumulated valuable experiences on proper legislative delegation of environmental taxes.

Third, China has comparable institutional arrangements on legislative delegation with the U.S. The central government of China has three branches: the legislative branch (the National People's Congress ("NPC") and its standing committee), the executive branch (the State Council), and the judicial branch (the Supreme People's Court and the Supreme People's Procuratorate).[179] The NPC and its standing committee are comprised of representatives elected by citizens, possessing the legislative power of the state.[180] The State Council enacts administrative regulations with authority delegated by the NPC and also has limited inherent power to enacting administrative regulations on certain aspects.[181] The component departments of the State Council, such as the Ministry of Finance and the Ministry of Environmental Protection, have no inherent power of lawmaking but only enact administrative rules with the authority delegated by laws and administrative regulations.[182] Some certain powers have to be reserved in the legislative branch.[183] Others could be delegated but are subject to restrictions on the scope and procedures.[184]

Environmental tax delegation in China shows a divergent trend from the shrinking tax delegation in general. As Subsection A will show, tax delegation, including environmental tax delegation, used to be broad and uncontrolled in the form of special delegation before 2015. In 2015, the government modified the Legislation Law to strengthen control of tax delegation. Since then, special tax delegations have been gradually phased out and clause-based delegations are becoming the primary form of tax delegation. Furthermore, the scope and degree of delegation under the clause-based have also been shrinking and decreasing. However, as Subsection B will prove, despite the general trend towards narrow and controlled tax delegation, environmental tax delegation is distinguishably broader

25, 2016, effective Jan., 1, 2018), 2016 STANDING COMM. NAT'L PEOPLE'S CONG., GAZ. (China) [hereinafter Environmental Protection Tax Law].

177. *Id*.

178. See *infra* note 184–91 and the accompanying text.

179. XIANFA art. 57, 62 (1982) (China) (These three branches of the central government, however, do not strictly follow the principle of separation of powers as in the U.S. The NPC is the highest organ of state power, leading and appointing / electing the high-level officials of the executive branch and the judicial branch).

180. *Id*. at art. 58.

181. *Id*. at art. 89; *see* Lifa Fa (中华人民共和国立法法(2015修正)) [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., effective Mar. 15, 2015), art. 65, 2015 STANDING COMM. NAT'L PEOPLE'S CONG., GAZ (China) [hereinafter Legislation Law of 2015].

182. Legislation Law of 2015 *supra* note 181, at art. 8.

183. *Id*. at art. 9 (describing non-delegable legislative affairs include the affairs concerning criminal offences and their punishment, mandatory measures and penalties involving deprivation of citizens of their political rights or restriction of the freedom of their person, and the judicial system).

184. *Id*. at art. 10–12 (explaining that the Legislation Law requires legislative delegations to provide for specific purpose and scope, imposes a time limit on delegation, and disallows repeated delegation).

than the delegation of fiscal taxes. For example, the Individual Income Tax and the Corporate Income Tax are narrower.[185] Such broader delegation was driven by the regulatory purpose of environmental taxes. A review of environmental tax delegation in the context of general tax delegation could provide some lessons for the U.S.

A. General Trend Towards Narrow and Controlled Tax Delegation

1. Pre-2015: Two Forms of Broad and Uncontrolled Tax Delegation

In China, there are two primary forms for tax delegation: special delegation and clause-based delegation. Special delegation refers to the form of legislative delegation through special delegating decisions issued by the legislature.[186] Special delegation decisions usually provide a general policy goal of a tax law or several tax laws, leaving the delegated entities to enact the tax laws.[187] The Standing Committee of the NPC has so far issued two special tax delegation decisions respectively in 1984 and 1985.[188] Both have similar broad delegation and background of economic reform.[189] The 1984 Delegation Decision broadly "delegated the State Council to formulate relevant tax rules during the process of the profit-to-tax reform for state-owned enterprises and the industry-and-business tax reform" without any substantive guidance or restrictions.[190]

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185. Nián qǐyè suǒdéshuì fǎ (2007年企业所得税法) [Corporate Income Tax Law of 2007] (promulgated by the Standing Comm. Nat'l People's Cong. March 16, 2007), art. 65, STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China) [hereinafter Corporate Income Tax Law of 2007] (The Individual Income Tax is imposed on individual income for fiscal revenue. Individual Income Tax Law of 1980, amended in 2011. The Corporate Income Tax is imposed on corporate income for fiscal revenue).

186. *See*刘桂清(Liu Guiqing), 税收调控中落实税收法定原则的正当理由和法条授权立法路径新探(*New Exploration on the Legitimacy of Applying the Principle of Taxing According to Law to Regulatory Taxation and Its Pathway through Clause-Based Delegation*), 3税务研究(TAX 'N RES.) 83, 85 (2015).

187. *See* 莫纪宏(Mo Jihong), 《立法法》修订应当明确和理顺立法授权关系(*Amendment to Legislation Law Should Clarify and Rationalize Legislative Authorization Relationship*), 6江苏行政学院学报 (J. OF JUANGSU ADMIN. INST.) 121, 124 (2014).

188. 《关于授权国务院改革工商税制和发布试行有关税收条例（草案）的决定》(Decision on Delegating the State Council to Reform Industry-and-Business Tax System and Promulgate Relevant Tax Rules), issued by the NPC in 1984, abolished in 2009; 《关于授权国务院在经济体制改革和对外开放方面可以制定暂行的规定或者条例的决定》(Decision on Delegating the State Council to Enact Temporary Rules on Economic System Reform and Opening-Up), issued by the NPC in 1985.

189. Guanyu shouquan guowuyuan gaige gongshang shuizhi he fabu shixing youguan shuishou tiaoli (cao'an) de juedìng (关于授权国务院改革工商税制和发布试行有关税收条例（草案）的决定) [Decision on Delegating the State Council to Reform Industry-and-Business Tax System and Promulgate Relevant Tax Rules] (promulgated by Standing Comm. Nat'l People's Cong., Sept. 18, 1984) 1984 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China), abolished in 2009,; Guanyu shouquan guowuyuan zai jingji tizhi gaige he duiwai kaifang fangmian keyi zhiding zhanxing de guiding huozhe tiaoli de jueding (关于授权国务院在经济体制改革和对外开放方面可以制定暂行的规定或者条例的决定) [Decision on Delegating the State Council to Enact Temporary Rules on Economic System Reform and Opening-Up] (promulgated by Standing Comm. Nat'l People's Cong., Apr. 10, 1985, effective 1985) 1985 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China)..

190. 关于授权国务院改革工商税制和发布试行有关税收条例（草案）的决定》(Decision on Delegating the State Council to Reform Industry-and-Business Tax System and Promulgate Relevant Tax Rules), issued by the NPC in 1984.

There were two primary reasons for the 1984 Delegation Decision. The first reason was that due to the "low tax" and "fee instead of tax" policies before 1980, the Chinese tax system was simple with few tax laws, but ongoing economic reform demanded constant improvement of the tax laws to reflect the rapidly changing circumstances. Secondly, as the NPC and its standing committee then were incapable of enacting the numerous tax laws to fulfill the needs from the reform activities, the legislature delegated the taxing power to take advantage of the resources and flexibility of the State Council and its component agencies.[191]

The other primary form of tax delegation is clause-based delegation. Clause-based delegation refers to the form of legislative delegation through delegating clauses in laws.[192] While special delegations can delegate the imposition of new taxes, clause-based delegations implement a legislatively established system.[193] Under clause-based tax delegation, the legislature normally establishes basic tax elements by legislation and delegates the tax authorities to elaborate specific tax elements, such as a tax base.[194] Though clause-based delegation is generally narrower than special delegation, it still could grant considerable policymaking discretion to the State Council and other administrative bodies. For instance, the Individual Income Tax Law of 2011 specified ten categories of taxable income and delegated the financial agencies of the State Council to determine other taxable incomes.[195] Under this delegation, the State Council essentially had the authority to tax any income in addition to the legislatively specified incomes.

With the broad power granted by the two special tax delegations and some clause-based delegations, the State Council and its component departments had dominated tax lawmaking in the past 30 years, leading to an administration-dominated lawmaking system rarely seen in the world.[196] More than eighty percent of taxes were initially established by the State Council in the form of tax regulations, followed by the specific rules from the Ministry of Finance and the State Administration of Taxation to implement these tax regulations.[197] Before 2015, among the seventeen categories of taxes, only three of them, the corporation income

191. *See*曹静韬(Cao Jintao), (中国税收立法研究》(STUDY ON CHINA'S TAX LEGISLATION) 28 (Beijing: Economic Science Press, 2016).

192. *See* Liu Guiqing, *supra* note 183, at 85.

193. *Id*. at 85.

194. *Id*. at 86.

195. Ge ren suo de shui fa (2011) xiuizheng) (中华人民共和国个人所得税法(2011修正)) [Individual Income Tax Law of the People's Republic of China (2011 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., June. 30, 2011, effective Sept. 10, 1980),) art. 2, 2011 STANDING COMM. NAT'L PEOPLE'S CONG., GAZ. (China) [hereinafter Individual Income Tax Law 2011 Amendment].

196. *See*彭礼堂(Peng Litang), 中国税收授权立法：从严重越位到严格禁止(*Chinese Tax Delegation: From Serious Offside to Strict Prohibition*), 2 jīng jì fǎ lùn cóng经济法论丛 (ECON. L. REV.) 290, 300 (2017).

197. *Id*. at 300.

tax,[198] the individual income tax,[199] and the vehicle and ship tax,[200] were established by the NPC or its standing committee; all other 14 categories were imposed on the basis of rules enacted by the State Council.[201] In addition to the State Council, the Ministry of Finance and the State Administration of Taxation also had great power in determining basic elements of taxes. For example, in 2007, the Ministry of Finance issued a rule to increase the rate of the stamp tax for stock exchange in the middle of the night without notice to the public in advance.[202] Additionally, in 2014, the Ministry of Finance increased the rate of the consumption tax for petroleum products several times throughout the year.[203]

The broad tax delegation, especially the uncontrolled special tax delegation, has long been criticized by scholars as "blank delegation," which is against the tax principle of legality.[204] In 2013, thirty-two NPC representatives jointly submitted a proposal advocating that taxing power should be returned back to the NPC.[205] This proposal attracted extensive discussion on the distribution of taxing powers among the public.[206] Finally, the government was pushed to take action.[207]

2. The 2015 Legislation Law Amendment Strengthened Control of Tax Delegation

The 2015 revision of the Legislation Law was widely acknowledged as a victory of tax law scholars advocating for the tax principle of legality.[208] In Chinese literature, the tax principle of legality is widely deemed as a basic principle of tax law, governing the distribution of taxing powers.[209] This principle essentially prescribes that tax authorities shall only impose taxes according to law, and taxpayers

198. Corporate Income Tax Law of 2007, *supra* note 185.

199. *See generally* Individual Income Tax Law *supra* note 195.

200. 2011 Nián chēchuán shuìfǎ (年车船税法) [Vehicle and Ship Tax Law of 2011] (promulgated by the Standing Comm. Nat'l People's Cong. July 19, 2011), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China) [hereinafter Vehicle and Ship Tax Law of 2011].

201. *See* Peng Litang, *supra* note 196, at 301.

202. *See* Gu Hong Qing, *Transparent Administration and the Midnight Stamp Tax Rise-Up*, SINA (May 31, 2007), http://finance.sina.com.cn/stock/stocktalk/20070531/08333647539.shtml.

203. *See* Nie Rming, *Foreign Media Question that the Three Times of Consumption Tax Rate Changes by the Department of Finanace and the State Administration of Taxation are Illegal*, FINANCIAL TIMES (Jan, 21, 2015), https://www.guancha.cn/economy/2015_01_21_306959.shtml.

204. *See* Peng Litang, *supra* note 196, at 301; *see also* Liu Jianwen (刘剑文) and Geng Ying (耿颖), *Shuishou Shouquan Lifa Quan De Hefa Xingshi: Fansi Yu Jiangou*, (税收授权立法权的合法行使：反思与建构) (*Legitimate Use of Delegated Taxing Power: Rethinking and Construction*), 5 J. OF CHINESE ACAD. OF GOVERNANCE 31, 32 (2015).

205. *See generally* Zhao Dongling et al. (赵冬苓等), *Guanyu Zhongzhi Shouquan Guowuyuan Zhiding Shuishou Zahn Hang Guiding Huozhe Tiaoli De Yi An (关于终止授权国务院制定税收暂行规定或者条例的议案)* (*Proposal Concerning Ending the Delegation of the State Council to Enacting Tax Regulations*) (2013).

206. *See* Peng Litang, *supra* note 196, at 292.

207. *Id.*

208. *See* Jianwen & Ying, supra note 204, at 31.

209. *See generally* Zhu Daqi (**朱大旗**), SHUI FA (**税法**)(TAX LAW) 11 (2010).

shall only pay taxes according to law.[210] In accordance with this principle, basic tax elements, including taxpayers, tax bases, tax rates, and tax preferences, as well as the procedures for tax collection and administration, should be specified by law.[211] While the definition of "law" here clearly includes the laws directly enacted by the NPC, it is unclear whether the laws enacted by delegated entities fall into this definition.

Consistent with the tax principle of legality, the Legislation Law was revised in 2015 to stipulate that "basic tax rules, including the imposition of taxes, the decision of tax rates, and tax collection administration, should only be governed by laws."[212] Many scholars have interpreted the terms of "only be governed by laws" as requiring the basic tax rules to be determined by the legislature itself without delegation.[213]

3. Post-2015: From Special Delegation to Clause-Based Delegation

In recent years, special tax delegations and the tax regulations enacted under such broad delegation have been gradually phased out. In 2015, the Central Committee of the Communist Party of China decided that all new taxes should be imposed by laws enacted by the NPC and its standing committee and also made a schedule for the disposing of all outstanding rule-based taxes, by either transforming them into NPC legislation or abolishing them altogether.[214] In 2016, the NPC Standing Committee enacted the Environmental Protection Tax Law, which is essentially the result of legislating the rule-based pollution fee into a statute-based environmental protection tax.[215] In addition, according to the revised legislative plan of the 12th NPC, seven new or existing taxes would be deliberated by the NPC or its standing committee before March 2018.[216] All remaining taxes were planned to be enacted by the NPC or its standing committee before 2020.[217]

Newly enacted tax legislations by the NPC show that the clause-based delegation model is becoming the dominant model of tax delegation (see the Table

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210. See刘剑文(Liu Jianwen), 《财税法专题研究》(SELECTED ISSUES IN FISCAL AND TAX LAW). 15 *See* Liu Jianwen (刘剑文), Caishui Fa Zhuanti Yanjiu (财税法专题研究) (Selected Issues in Fiscal and Tax Law) 15 (Beijing: Peking University Press, 2007); *see also* Zhang Shouwen (张守文), Lun Shuishou Fading Zhuyi, (论税收法定主义) (*Theory of Taxing According to Law*), 6 FAXUE YANJIU (法学研究) (CHINESE J. OF LAW) 57, 59 (1996) (note that "the principle of taxing according to law means that rights and obligations of taxpayers and tax authorities should be stipulated by law, all elements of tax law should only be stipulated by law, no entity should impose tax or reduce tax without law).

211. *See* Zhang Shouwen, *supra* note 210, at 59; *see also* Zhu Daqi, *supra* note 209, at 11. [Due to the ongoing COVID-19 pandemic, the Editorial Board was unable to independently verify the 'Zhu Daqi' source. Eds.]

212. Legislation Law of 2015, *supra* note 181, at art. 8.

213. *See, e.g.*, Schön, *supra* note 56, at 6.

214. *See* 中共中央委员会(Central Committee of the Chinese Communist Party),《贯彻落实税收法定原则的实施意见》(*Opinions on Implementing the Principle of Taxing According to Law*), issued in 2015.

215. Environmental Protection Tax Law *supra* note 176.

216. Legislative plan of the 12th NPC, http://www.npc.gov.cn/npc/xinwen/2015-08/03/content_1942908.htm.

217. *See* Legislative Affairs Commission of the NPC Standing Committee, *Taxing according to Law is A Basic Principle of Tax Lawmaking and Tax System*, Mar. 26, 2015, PEOPLE'S DAILY, http://www.npc.gov.cn/npc/padb/2015-03/26/content_1931630.htm.

1 below for the delegating clauses in the Farmland Occupation Tax Law[218] and the Vehicle Purchase Tax Law[219], and Table 3 in Section B of this Chapter for the delegating clauses in the Environmental Protection Tax Law). The State Council and its ministries no longer possess unlimited power to make tax rules under special delegations but have to dance in the circles delineated by delegating clauses.

Table 1: Delegating Clauses in the Farmland Occupation Tax (2018) and the Vehicle Purchase Tax Law (2018) (emphasis added)

Tax Law	Delegating Clause	Content
Farmland Occupation Tax (2018)	Article 4	The rates of farmland occupation tax are provided for as follows: . . . *The State Council* shall, in light of the per capital farmland and the economic development, determine the average tax rate of each province, autonomous region or municipality directly under the Central Government. The applicable tax rate of each place shall, within the brackets as prescribed in the preceding paragraph of this Article, be *determined by the standing committee of the people's congress at the same level, and filed with the Standing Committee of the National People's Congress and the State Council*. The average applicable tax rate shall not be lower than the average tax rate as prescribed in paragraph 2 of this Article.[220]
	Article 7	The farmland occupation tax shall be exempt or reduced under either of the following circumstances: ⋯ (5) Other circumstances entitling exemption or reduction of farmland occupation tax as *approved by the State Council*. *The State Council shall file* the decision to exempt or reduce farmland occupation tax, under the (5) category in the preceding paragraph, *with the Standing Committee of the National People's Congress*.[221]

218. Nián gēngdì zhànyòng shuìfǎ (2018年耕地占用税法) [Farmland Occupation Tax Law 2018, art. 4.] (promulgated by the Standing Comm. Nat'l People's Cong. Dec 29, 2018), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China) [hereinafter Farmland Occupation Tax Law 2018].

219. 2018 Nián chēliàng gòuzhì shuìfǎ (2018年车辆购置税法) [Vehicle Purchase Tax Law of 2018] (promulgated by the Standing Comm. Nat'l People's Cong. Dec 29, 2018), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China) [hereinafter Vehicle Purchase Tax Law of 2018].

220. Farmland Occupation Tax Law 2018, *supra* note 218, at art. 4.

221. *Id.*, art. 7.

Vehicle Purchase Tax Law (2018)	Article 9	The exemption or reduction of vehicle purchase tax shall be implemented according to the following provisions: . . . (4) Under any other circumstance of tax exemption or reduction as *provided for by the State Council*, tax may be exempted or reduced according to the relevant provisions. *The State Council shall file* the decision to exempt or reduce tax, under the (5) category in the preceding paragraph, *with the Standing Committee of the National People's Congress*.[222]

4. Post-2015: Towards Narrow Delegation Under Clause-Based Delegation

In addition to the shift from special delegation to clause-based delegation, the scope and degree of delegated taxing power under the clause-based delegation have also been reduced in recent amendments of tax laws. This trend could be seen clearly, for instance, by a comparison between the delegation provisions in the 2011 Individual Income Tax Law ("IITL")[223] and the related 2018 amendment[224] (see the Table 2 below).

Table 2: Delegating Clauses in the 2011 Individual Income Tax Law and the 2018 Individual Income Tax Law (emphasis added)

Tax Law	2011	2018
Individual Income Tax Law	Article 2 Individual incomes set forth below shall be subject to payment of individual income tax: . . . 11. other incomes specified as taxable *by the department of the State Council for finance*.[225]	Deleted
	Article 3 Individual income tax rates: . . . 4. For incomes from remuneration for labor	Deleted

222. 2018 Nián chēliàng gòuzhì shuìfǎ (2018年车辆购置税法) [Vehicle Acquisition Tax Law 2018] (promulgated by the Standing Comm. Nat'l People's Cong. Dec 29, 2018), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China) [hereinafter Vehicle Acquisition Tax Law 2018].

223. Individual Income Tax Law 2011 Amendment, *supra* note 195.

224. Ge ren suo de shui fa (中华人民共和国个人所得税法(2018修正)) [Individual Income Tax Law (2018 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2018, effective Jan. 1, 2019) 2018 STANDING COMM. NAT'L PEOPLE'S CONG., GAZ (China) [hereinafter Individual Income Tax Law 2018 Amendment].

225. Individual Income Tax Law 2011 Amendment, *supra* note 195, at art. 2.

	services, the flat tax rate is applicable and the tax rate is 20 per cent. If a single payment of remuneration for labor service is excessively high, an additional proportion of tax may be levied thereon, and the concrete measures shall be provided for *by the State Council*.[226]	
	Article 4 Individual incomes set forth below shall be exempt from individual income tax: . . . 10. incomes which are approved to be exempt from tax *by the department of the State Council for finance*.[227]	Article 4 Individual incomes set forth below shall be exempt from individual income tax: . . . (10) Other tax-exempt income as prescribed *by the State Council*. The tax exemptions prescribed in subparagraph (10) of the preceding paragraph shall be *filed by the State Council with the Standing Committee of the National People's Congress*.[228]
	Article 5 Upon approval, individual income tax may be reduced under any of the following circumstances: . . . 3. other tax reductions approved *by the department of the State Council for finance*.[229]	Article 5 Other tax reductions may be prescribed *by the State Council but shall be filed with the Standing Committee of the National People's Congress*.[230]
		Article 10 Under any of the following circumstances, a taxpayer shall file a tax return in accordance with the law: . . . (7) Any other circumstances prescribed *by the State Council*.[231]
		Article 11

226. *Id.* at art. 3.
227. *Id.* at art. 4.
228. *Id*.
229. *Id.* at art. 5.
230. *Id*.
231. Individual Income Tax Law 2018 Amendment, *supra* note 224, at art. 10.

		The individual income tax on the comprehensive income obtained by a resident individual shall be calculated annually; if there is a withholding agent, the withholding agent shall withhold and prepay taxes on a monthly or transaction-by-transaction basis; and if the filing of a tax return on a consolidated basis is needed, the return shall be filed from March 1 to June 30 of the next year after obtaining the income. The measures for withholding and prepayment shall be developed *by the taxation department of the State Council*.[232]
	Article 12 The starting or suspending of the collection of individual income taxes on bank deposit interests or the collecting of individual income taxes at a reduced rate as well as the specific measures for such purposes shall be provided for *by the State Council*.[233]	Article 18 The imposition, reduction, or suspension of collection of individual income tax on interest income from savings deposits and the specific measures shall be specified *by the State Council and filed with the Standing Committee of the National People's Congress*.[234]
	Article 14 *The State Council* shall, pursuant to the provisions of this Law, formulate the regulation for its implementation.[235]	Article 19 *The State Council* shall, pursuant to the provisions of this Law, formulate the regulation for its implementation.[236]

The 2018 amendment of the IITL has reduced the scope and degree of delegation in the following aspects:

First, the 2018 IITL no longer delegates the power to determine the tax rate and tax base of individual income tax. Article 2 and Article 3 of the 2011 IITL, which

232. *Id*. at art. 11.
233. *Id*. at art. 12.
234. *Id*. at art. 18.
235. *Id*. at art. 14.
236. *Id*. at art. 19.

delegated the State Council the power to determine taxable income and tax rates for income from labor services, were eliminated in the 2018 IITL.[237] This change shows the impacts of the strengthened tax principle of legality in the 2015 Legislation Law, which stipulates that basic tax systems, including the imposition of taxes, the decision of tax rates, and tax collection administration, should only be governed by laws.[238]

Second, the 2018 IITL imposes stricter control over the power to provide tax preferential measures. The 2018 IITL kept some provisions, including Articles 4, 5, and 18, delegating the power to decide on tax preferential measures.[239] However, the delegated entities under these articles have been limited to the State Council, instead of its department in charge of financial regulations under Articles 4 and 5 of the 2011 IITL.[240] Furthermore, the 2018 IITL requires the State Council to file with the Standing Committee of the NPC after making a decision in accordance with the delegated power, strengthening the control of delegated lawmaking by the legislature.[241]

Third, only the delegation of enforcement powers is expanded in the 2018 IITL. In addition to the delegating clauses mentioned above, the 2018 IITL delegate enforcement powers in Articles 10, 11, and 19. Among these delegating clauses, Articles 10 and 11 did not exist in the 2011 IITL. These delegating clauses have specified the discretion of the State Council and its taxation department in enforcing the IITL.[242] For example, Article 11 directly delegates the taxation department of the State Council to determine measures for withholding and prepayment of tax.[243] Because enforcement issues do not involve major policy judgement, but demand flexible responses to individual cases, these provisions grant discretion to the State Council without the need to file with the Standing Committee of the NPC.[244]

The 2018 IITL shows the general trend toward narrow and controlled delegation under clause-based delegation. Such narrow and controlled delegation is close to the typical detail-filling delegation in the U.S. tax law, which only delegates power to elaborate the definitions of tax base and design enforcement mechanisms.[245]

B. Broader Delegation of Environmental Taxes

From broad delegation under the form of special delegation to narrow delegation under the form of clause-based delegation, tax delegations are now subject to strict control under the Legislation Law.[246] This section will discuss the practices of environmental tax delegations in China. These practices show that the

237. Individual Income Tax Law 2011 Amendment, *supra* note 195, at art. 2–3.
238. Legislation Law of 2015, *supra* note 181, at art. 8.
239. Individual Income Tax Law 2011 Amendment, *supra* note 195, at art. 4–6, 18.
240. *Id*. at art. 4–5.
241. *Id*.
242. *Id.* at art. 10–11, 19.
243. *Id.* at art. 11.
244. *Id.* at art. 10–11.
245. *See supra* notes 74–78 and the accompanying text.
246. *See generally* Individual Income Tax Law 2011 Amendment, *supra* note 195, at art. 8.

Legislature has considered the regulatory nature of environmental taxes in determining their delegations. Therefore, delegating a broader scope and higher degree of policymaking discretion to the administrative branch and state governments.

1. Delegation of The Pollution Fee

China has explored the use of environmental taxes for more than three decades. The enactment of the Environmental Protection Tax Law by the end of 2016 created China's first tax specifically for environmental regulation. However, this new environmental tax was not established from the ground up. Rather, it was created from an updated version of the 30-year-old pollution fee system.[247] The basic features of the pollution fee system have been preserved in the new Environmental Protection Tax (hereafter "EPT").[248] In view of this fact, it will be helpful to review the delegation of the pollution fee first.

The original pollution fee did not fall into the concept of "environmental fee,"[249] which is deemed as an exchange for government services, but was more like an environmental tax.[250] With the basis of the polluter pays principle and the intent to discourage pollution discharges, the pollution fee covered a broad scope of pollutants, including wastewater, waste gas, solid waste, and noise pollution.[251] The polluters generally were required to pay an amount of pollution fee in proportion to the total amount of pollution discharged.[252] An exception was that polluters discharging wastewater had to pay their fees at doubled rates if the concentration of the wastewater exceeded national or local standards.[253] Paying pollution fees did not exempt polluters from any liability for preventing and abating pollution and compensating for pollution damages, nor from other liabilities provided for by law and administrative regulations.[254] Environmental Protection Bureaus ("EPBs") at the county level or above were responsible for the collection of fees.[255] The collected fees were earmarked for environmental protection[256] and allocated between the central government and local governments at a ratio of one to nine.[257]

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247. *See* Paiwu fei zhengshou shiyong guanli tiaoli (排污费征收使用管理条例) [Regulations on the Collection and Use of Pollutant Discharge Fees] (promulgated by the St. Council, Jan. 2, 2003, effective July 1, 2003) ST. COUNCIL GAZ. (China) [hereinafter CUPDF Regulations].

248. *See* T.B. Qin & P. Chen, *The Environmental Fee-for-Tax Reform in China: A One-Size-Fits-All Solution for Environmental Problems?*, in CRITICAL ISSUES IN ENVIRONMENTAL TAXATION 562, 562–63 (Lin-Heng Lye et al. eds., 4th ed. 2009).

249. *See supra* notes 65–67 and the accompanying text (discussing the difference between an "environmental tax" and "environmental fee.").

250. *See generally* Yan Xu, *supra* note 174, at 305–306 ("As in many other jurisdictions, taxes and fees are considered two different concepts in China. A tax is imposed on the community as a whole and its revenue is incorporated into the general budget, while a fee is levied on specific persons in proportion to services rendered, and its revenue is used for defined purposes.").

251. CUPDF Regulations, *supra* note 247, at art.12.

252. *Id.*

253. *Id*.

254. *Id*.

255. *See id.* at art. 3, 6, 7, 19.

256. *Id*. at art.18.

257. *See* Qin & Chen, *supra* note 248, at 562–63.

The NPC broadly delegated the power to imposing the pollution fee to the State Council. First, though the delegation of pollution fee seemed to belong to the category of clause-based delegation, the delegating law almost provided no guidance and restriction on the use of the delegated power. The Environmental Protection Law, which is the delegating law, only briefly provides for that "[polluters] shall pay pollutant discharge fees in accordance with the relevant provisions of the state" and offers no principles governing the design of tax rates or tax base.[258] In light of this "blank delegation," the delegation of a pollution fee was closer to the form of special tax delegation by nature, or quasi-special tax delegation, which granted the State Council unlimited power to imposing the pollution fee.[259]

Second, the State Council re-delegated the power again to its component departments. The State Council did not determine the rates and bases of the pollution fee by itself but re-delegated the power to competent component departments of the State Council to determine these basic tax elements.[260] In determining the key elements of the pollution fee, these agencies need to consider "the needs for promoting pollution control industries, the goals of pollution prevention and control, the economic and technical conditions of the country, and the affordability of the dischargers."[261] Additionally, local governments are delegated the power to impose their own pollution fees where the national standards are silent.[262]

2. Delegation of The Environmental Protection Tax

The EPT is generally consistent with the original pollution fee with regard to taxpayers, tax bases, and tax rates.[263] Nevertheless, several adjustments have been made to fix the drawbacks in the old pollution fee system. First, taxpayers are still the entities discharging pollutants directly to the environment.[264] Second, the EPT is also imposed on the four categories of pollutants under the pollution fee system, except the volatile organic compounds ("VOCs").[265] The top three or five items of pollutants ranked in descending order of pollution equivalents from each discharge

258. *See* Huanjing baohu fa 2014 xiudìng (中华人民共和国环境保护法2014修订) [The Environmental Protection Law (2014 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong. Apr. 24, 2014, effective Jan. 1, 2015), art. 43, 2014 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

259. *See generally supra* notes 196–199 and the accompanying text.

260. *See* CUPDF Regulations, *supra* note 247, at art. 11 (listing the departments to receive delegations, which include the price department, financial department, environmental protection administrative department, and foreign economic and trade department of the State Council).

261. *Id*.

262. *Id*.

263. *See* Qin & Chen, *supra* note 248, at 562–63.

264. Environmental Protection Tax Law, *supra* note 176, at art. 2.

265. *Id*. at art. 3, app. VOCs pollution fees are currently piloted in the petrochemical and packaging and printing industries. At present, Beijing, Shanghai, Jiangsu Province, Anhui Province, Hunan Province, Sichuan Province, Tianjin, Liaoning Province, Zhejiang Province and Hebei Province, a total of ten provinces-level areas, have officially issued a pilot program to levy VOCs pollution fees. Some provinces and cities have also expanded the pilot industry. *See* 葛察忠(Ge Chazhong et al.),《基于绿色发展理念的《环境保护税法》解析》 (*Analysis on the Environmental Protection Tax Law Based on the Concept of Green Development*), (ROMANIZATION OMITTED) 环境保护 (45 ENVTL. PROTECTION, no. 02–03, 2007, at 15–18).

exit are taxed.[266] Third, the minimum rates of the pollution fee were set as the minimum rates of the EPT.[267] For example, before the abolishment of the pollution fee, air pollutants in most provinces were charged at the rate of 1.2 yuan per pollution equivalent.[268] Consistent with this rate, air pollutants are subject to a minimum rate of 1.2 per unit under the EPT.[269] Fourth, tax exemptions are provided for small-scale agricultural discharges, movable pollution sources, sewage and garbage treatment sites.[270] Twenty-five percent or half-rate reductions are provided for pollution discharged with a concentration of thirty percent or fifty percent lower than the standards while also meeting the total amount control standards.[271]

Consistent with the general trend toward narrow and controlled tax delegation, the delegation of the EPT is less broad than the delegation of the pollution fee. One primary objective of this so-called "fee to tax" reform is to implement the tax principle of legality as reflected in the 2015 Legislation Law.[272] While the pollution fee is provided by a single clause in the Environmental Protection Law ("EPL"),[273] the EPT is established by a special Environmental Protection Tax Law ("EPTL") with multiple clauses.[274] The EPTL prescribes specific rules on the key tax elements of the EPT and lists all the taxable pollutants and applicable tax rates in the form of an appendix, as well as other key elements such as tax exemptions and reductions.

Table 3: Delegating Clauses in the 2016 Environmental Protection Tax Law (emphasis added)

Tax Law	Delegating Clause	Content
Environmental Protection Tax Law (2016)	Article 6	… *The people's governments of all provinces, autonomous regions and municipalities directly under the Central Government* shall, by taking into overall consideration the environmental carrying

266. Environmental Protection Tax Law, *supra* note 176, at art. 9.

267. *See generally* Lou Jiwei (楼继伟), (*Chinese Romanization Omitted*) (关于《中华人民共和国环境保护税法（草案）》的说明) [*Notes on the "Environmental Protection Tax Law of the People's Republic of China (Draft)"*] (Aug. 29, 2016), http://www.npc.gov.cn/wxzl/gongbao/2017-03/29/content_2019467.htm.

268. *Id*.

269. *See* Environmental Protection Tax Law, *supra* note 176, at art. 6.

270. *Id*. at art. 12

271. *Id*. at art. 13.

272. *See* Lou Jiwei, *supra* note 267.

273. Huan jung bao hu fa (中华人民共和国环境保护法) [Environmental Protection Law] (promulgated by Standing Comm. of the Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989), art. 28, 1989 STANDING COMM. NAT'L PEOPLE'S CONG., GAZ (China).

274. Environmental Protection Tax Law, *supra* note 176, at art. 6.

		capacities, status quo of pollutant discharges, and the requirements of economic, social and ecological development goals, determine and adjust the specific tax amounts applicable to taxable air pollutants and water pollutants within the range of the tax amounts as prescribed in the Schedule of Tax Items and Tax Amounts of Environmental Protection Tax attached to this Law, and *report them to the standing committees of the people's congresses at the same levels for decision, and to the Standing Committee of the National People's Congress and the State Council for recordation*.[275]
	Article 9	… *The people's government of a province, autonomous region or municipality directly under the Central Government* may, according to the special needs of the local area for pollutant discharge reduction, increase the number of taxable items of pollutants discharged from the same discharge outlet, on which environmental protection tax is collected, which shall be *reported to the standing committee of the people's congress at the same level for decision and to the Standing Committee of the National People's Congress and the State Council for recordation*.[276]
	Article 10	The discharge of taxable air pollutants, water

275. *Id.* at art. 6.
276. *Id*. at art. 9.

		pollutants, or solid wastes and decibels of noises shall be calculated by using the following methods and in the following orders: . . . (4) Where the calculation cannot be made by using the methods as specified in Items (1) through (3) of this Article, the discharges or decibels thereof shall be ratified and calculated by using the sampling calculation method as *prescribed by the competent department of environmental protection of the people's government of the province, autonomous region, or municipality directly under the Central Government*.[277]
	Article 12	The following circumstances shall be exempted from environmental protection tax for the time being: . . . (5) Other circumstances exempted from tax as *approved by the State Council*.[278]
	Article 22	The specific measures for the filing of environmental protection tax returns by taxpayers engaging in ocean engineering for their discharges of taxable air pollutants, water pollutants or solid wastes to the sea areas under the jurisdiction of the People's Republic of China shall be provided for *by the competent tax department of the State Council in conjunction with the competent oceanic department of the State Council*.[279]

277. *Id.* at art. 10.
278. *Id.* at art. 12.
279. *Id.* at art. 22.

Despite the general trend toward narrow delegation, the EPTL still keeps broader delegation than the cases of the Individual Income Tax Law and the Corporate Income Tax Law. First, the EPTL authorizes local governments to adjust the tax rates and bases applicable to the corresponding local areas.[280] The EPTL provides that local governments shall determine and adjust the specific tax rates applicable to taxable air pollutants and water pollutants within the range of the tax rates as prescribed in the EPTL, considering local environmental carrying capacities, status quo of pollutant discharges, and the economic, social, and ecological development goals.[281] For such tax rate determination and adjustment to enter into force, local governments shall report them to the standing committees of local people's congresses at the same levels for decision and to the Standing Committee of the NPC and the State Council for recordation.[282] In comparison, the IITL and the Corporate Income Tax Law delegate local governments no power to decide on tax rates.[283]

Aside from delegating the power regarding the tax rates, the EPTL also delegates local governments the power to change the tax bases.[284] The EPTL allows local governments to tax more pollutants discharged from the same discharge outlet, considering the special local needs for pollutant discharge reduction, in addition to the taxable pollutants already specified by the EPTL.[285] Similarly, local governments shall report the addition of taxable pollutants to the standing committee of local people's congress at the same level for decision and to the Standing Committee of the NPC and the State Council for recordation.[286]

Second, the State Council and competent agencies have more power than only elaborating on base definitions and enforcement rules. To begin with, the State Council has unlimited power to decide the circumstances that qualify for exemptions of the EPT in addition to the four circumstances as specified in the EPTL.[287] The only requirement for this delegation is that the State Council shall report the added exemptions to the Standing Committee of the NPC for recordation, which imposes no substantive restriction on the delegated power.[288] Moreover, the State Council has more power to decide on the tax base than just elaborating the tax base definitions. While the EPTL does not explicitly delegate such power to the State Council, a rule issued by the State Council provides that the specific scope of "other solid waste" in the EPTL shall be determined according to the procedures, as specified in Article 6

280. *Id.* at art. 6.

281. *Id*.

282. *Id*.

283. Individual Income Tax Law 2011 Amendment, *supra* note 195, at art. 3; Qǐyè suǒdéshuì fǎ (2017 Xiūzhèng) [Xiànxíng yǒuxiào] (中华人民共和国企业所得税法) (2017修正) [Enterprise Income Tax Law (2017 Amendment)] (promulgated by Standing Comm. of the Nat'l People's Cong., Feb. 24, 2017, effective Feb. 24, 2017), art. 4, 2017 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

284. Environmental Protection Tax Law, *supra* note 176, at art. 9.

285. *Id.*

286. *Id.*

287. *Id.* at art. 12.

288. *Id.*

paragraph 2 of the EPTL.[289] If this rule is deemed as complying with the EPTL, it shows that the State Council has power to decide what solid wastes shall be taxed rather than interpreting the definitions of taxed solid wastes.

3. Lessons for Environmental Tax Delegation in the U.S.

In determining the appropriate scope and degree of delegation, the NPC standing committee has taken the regulatory purpose of environmental taxes into consideration. The legislative history of the EPTL shows that the legislators, recognizing the difference among local conditions, allow local governments to differentiate the specific rate levels for the same taxable pollutants.[290] Such local conditions are not fiscal conditions, but regulatory conditions, as local governments are required to consider factors such as the environmental carrying capacities, status quo of pollutant discharges, and the economic, social and ecological development goals in determining the applicable tax rates.[291] Similarly, local governments have to consider the special local needs for pollutant discharge reduction, which is also a regulatory condition, in deciding on whether to increase the number of taxable pollutants.[292] While the NPC and its standing committee conceivably could consider these divergent local conditions and determine the applicable tax rates for different local areas, the complicated and uncertain nature of these local conditions makes it unrealistic for legislators to do so for regulatory taxes.

Despite the expanded delegation of environmental taxes for regulatory purpose, such delegation may still be inadequate for regulatory needs at a national or global scale. The EPTL sets the range of tax rates and authorizes local governments to determine the applicable tax rates, but it stops short of granting the State Council the same ability.[293] Delegation to local governments for their expertise and flexibility may work well for local environmental issues, but it is unlikely to help address environmental issues at the national or global scale, such as climate change. To properly address climate change, the legislators should consider delegating the power to the State Council or relevant agencies in charge of environmental protection over the whole country. This observation is also true when the U.S. Congress considers addressing climate change.

V. DELEGATING CARBON TAX RATES

In view of the inadequate delegation of taxing power to regulate environmentally harmful behaviors, combined with the benefits and feasibility of

289. Huánjìng bǎohù shuìfǎ shíshī tiáolì [Xiànxíng yǒuxiào] (中华人民共和国环境保护税法实施条例 [现行有效]) [Regulation on the Implementation of the Environmental Protection Tax Law] (promulgated by State Council, Dec. 25, 2017, effective Jan. 1, 2018), art. 2, CLI.2.307655(EN) (Lawinfochina).

290. *See generally* Guānyú "zhōnghuá rénmín gònghéguó huánjìng bǎohù shuìfǎ (cǎo'àn)" de shuōmíng (關於《中華人民共和國環境保護稅法（草案）》的說明) [Notes on the Environmental Protection Tax Law (Draft) of the People's Republic of China] (promulgated by Standing Comm. of the Nat'l People's Cong., Aug. 29, 2016, effective Aug. 29, 2016) 2016 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

291. Environmental Protection Tax Law, *supra* note 176, at art. 6.

292. *Id.* at art. 9.

293. *Id*. at art. 6.

expanded environmental tax delegation as shown by the Chinese case study, the rest of this article proposes that Congress should delegate the power to determine carbon tax rates to the EPA. Carbon tax is an environmental tax imposed on carbon emissions for the purpose of curbing carbon emissions and thereby mitigating climate change.[294] This article does not intend for the EPA to invent a carbon tax from scratch but to ensure that the tax rate is adequate to realize certain emission-reduction goals or internalize social costs of carbon emissions. In performing this task, the EPA should utilize their expertise and flexibility to figure out the proper carbon tax rates and constantly adjust them in response to changing circumstances.

The assumption that Congress delegates to the EPA the ability to decide rates of carbon taxes requisite to achieve certain goals for carbon emission reduction, or to internalize social costs of carbon emissions, will be used. Congress may want to further provide more specific factors that the EPA has to consider in determining the proper carbon tax rates or adopt a formula linking relevant factors–independent variables and tax rate levels as dependent variables. This section argues that the regulatory nature of carbon taxes justifies such delegations, and the common objections to tax delegations allegedly based on the principles of democracy are invalid for regulatory taxes.

A. Regulatory Demand for Carbon Tax Delegation

To come up with desirable environmental regulation, a decision-making authority should have expertise in environmental policymaking, flexibility to adapt in the face of the uncertainty and volatility of the climate change issue, and the ability to coordinate different climate change policies. These are the positive justifications for carbon tax *delegation.*

1. Expertise in Environmental Policymaking

To begin, environmental taxes should be delegated to take advantage of agency expertise. Environmental policymaking, due to the complex nature of the ecosystem and environment,[295] often requires highly technical and scientific understanding of the matters to be regulated.[296] The complexities result from two dominant factors:

"[F]irst, the complexities within the workings of the ecosystem itself, and second, the complexities of a highly industrialized economy, the activities of which are the primary object for environmental regulation . . . ." With regard to the climate change issue, multiple factors have caused climate change, and climate change has caused multiple risks and harms to the environment and society.[297]

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294. *See* Avi-Yonah & Uhlmann, *supra* note 7, at 7.

295. *See* J. B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How to Cleanup the Environment by Making a Mess of Environmental Law*, 34 HOUST. L. REV. 933 (1997) (describing the complexity of environmental issues and discussing its implications for law); *see* Daniel Farber, *Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty*, 37 U.C. DAVIS L. REV. 145 (2003).

296. *See* Krotoszynski, *supra* note 81, at 243.

297. *See generally* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 8–10 (2008).

Compared to Congress, environmental agencies have the advantage of expertise, with respect to environmental policymaking, including environmental taxes.

Broad delegation in environmental law implies the demand for agency expertise in environmental rulemaking.[298] Congress has already delegated considerable authority to environmental agencies to interpret and enforce environmental laws, including environmental standards.[299] These delegations presumably reflect a congressional determination that environmental agencies have comparative advantages, in terms of expertise and time, with respect to these aspects of environmental governance.[300] Such congressional determination also applies to environmental taxes. Assuming that legislatures delegate regulatory authority to environmental agencies for their expertise to craft sensible regulations that are consistent with congressional intent, legislatures might want to permit environmental agencies to modify tax rates with similar results.

Due to the comparative advantage of expertise in environmental policymaking, the EPA could develop institutional competence to properly set carbon tax rates. First, the EPA has acquired expertise of economic evaluation through cost-benefit analysis of environmental regulation. Agencies have long been required to prepare cost-benefit analyses of proposed regulations since 1981.[301] For environmental regulations, the benefits primarily include the avoided social costs of reduced pollution or other damages to the environment; their costs primarily include the costs of regulated entities in adopting new technologies to reduce pollution. Through the performance of the cost-benefit analysis, the EPA has accumulated great expertise in calculating social costs of pollution, as well as costs of pollution abatement, which are a critical basis for the determination of environmental tax rates, according to economic theories.[302]

Second, the EPA has already issued reports on the social costs of carbon emissions as basis for the climate change policy.[303] Such estimates are inevitably

298. *See* Hines & Logue, *supra* note 22, at 242 (noting that the delegate-to-the-experts principle applies on a grander scale to the Clean Air Act).

299. 42 U.S.C. §§ 1251–1388 (2012) (granting the EPA extraordinary powers to regulate air and water); 42 U.S.C. §§ 7401–7515 (2012); Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970), *reprinted as amended in* 5 U.S.C. app. (1970), *and in* 97 Stat. 485 (1983)*;* U.S.C. § 7521(a)(1) (2012) (empowering (and requiring) the EPA administrator to set emissions standards for "any air pollutant . . . which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.").

300. *See* Hines & Logue, *supra* note 22, at 242.

301. *See*, *e.g.*, Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (directing agencies to only implement regulations if "the potential benefits to society . . . outweigh the potential costs to society"); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1994) (instructing agencies "to assess both the costs and benefits of [an] intended regulation" and implement only those for which the benefits outweigh the costs).

302. As set forth above, in accordance with the Pigouvian tax theory, the rate level of an ideal carbon tax should follow the social cost of carbon emissions; otherwise, according to Baumol and Oate's theory, carbon tax rates should be higher than costs of pollution reduction to generate enough motivation for rational taxpayers. *See supra* notes 31–34 and the accompanying text.

303. *See* INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES, UNITED STATES GOVERNMENT, TECHNICAL SUPPORT DOCUMENT: TECHNICAL UPDATE OF THE SOCIAL COST OF CARBON

controversial due to the uncertain nature of environmental consequences caused by carbon emissions, along with the difficulty in monetizing the harm to the environment, economy, and society.[304] Nevertheless, the EPA has been frequently assigned similar tasks in the past for agency expertise, such as calculating the value of harm to health caused by air pollution.[305] Considering that climate change has more uncertainties and complexity than air pollution issues, Congress would reasonably need more professional expertise on climate change policies. To evaluate social costs of carbon emissions on a more solid basis, the EPA could establish reasonable methodologies and processes for evaluation, cooperate with economic agencies on monetizing potential harm, and refer to international consensus.

The expertise of congressional tax committees developed for generating and collecting revenues is insufficient in formulating carbon tax policies. The tax committees of Congress are in charge of environmental policies implemented through the Tax Code.[306] With the special institutional capacity in the form of the Joint Committee on Taxation ("JCT"), Congress could enact tax legislation consisting of detailed statutory directives, leaving few issues to be resolved by the Treasury.[307] Such special institutional capacity has been deemed to result from a combination of historical coincidence and path dependence.[308] However, determining carbon tax rates demands expertise in environmental sciences and regulatory policies instead of fiscal policies.[309]

Consistent with the Pigouvian tax theory, determination of carbon tax rate demands expertise in environmental sciences to know the variety of social harm caused by carbon emissions, such as global warming, extreme weathers, seawater acidification, sea level rise, and their exact costs.[310] If the tax rate is based on certain goals of carbon emission reduction instead of the social cost of carbon emissions, regulators have to calculate the proper rate level motivating the industries to develop

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FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12,866 (May 2013, *revised* August 2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf.

304. *See*, *e.g.,* Murphy et al., *supra* note 17*,* 2–9 ("[P]arameters are needed to calculate the social cost of carbon that by their essence are subjective, such as the analyst's view on the proper weight to be given to the welfare of future generation.").

305. *See* 42 U.S.C. § 7411(a)(1) (2012) (delegating the EPA to determine emission limitations for new and existing stationary sources with the consideration of "the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirement.").

306. *See* Milne, *supra* note 42, at 426.

307. *See* Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 196–203 (2017) (noting that the JCT helps Congress to control tax rulemaking by intervening at several important junctures in the legislative process, including devising tax legislation, providing revenue estimates, as well as consideration and negotiation of tax legislation by the House Ways and Means Committee and Senate Finance Committee).

308. Congress developed the pattern of having legislative committees draft detailed tax legislation during the First World War. At that time, the country needed to enact several tax statutes in succession to provide funding, but no large, well-staffed, and experienced agency existed to which Congress could have delegated the tax lawmaking task. *See* Hines & Logue, *supra* note 22, at 259 (*citing* George K. Yin, *Legislative Gridlock and Nonpartisan Staff*, 88 NOTRE DAME L. REV. 2287, 2295 (2013)).

309. *See supra* note 35–40 and the accompanying text.

310. *See* INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES, *supra* note 303.

and deploy carbon reduction technologies. Such calculation still demands expertise in available carbon reduction technologies and their costs for certain industries.

2. Flexibility to Uncertainty and Volatility

In addition to the need for expertise, environmental regulation by taxation also demands flexibility due to the uncertain and dynamic nature of environmental issues. Delegated policymaking to agencies allows more flexibility than congressional lawmaking.[311]

Environmental policymaking is lined with uncertainties.[312] Three types of uncertainty relate to the future levels of carbon emissions.[313] First, unexpected changes in the overall status of the economy (either caused by changes in long-term growth or by business-cycle fluctuations) will impact future emissions levels.[314] Second, policymakers may set the emissions price too low or too high, reflecting the uncertainty in the aggregate marginal abatement costs at the time of implementation.[315] Finally, the marginal abatement costs may shift dramatically over time due to new technologies.[316]

A carbon tax offers an example of the considerable uncertainty involved in the policymaking of environmental tax. There is uncertainty as to both the social cost of carbon and the cost of abating carbon emissions.[317] New information is likely to emerge constantly with the ever-progressing scientific understanding of and technological solution to climate change.[318] Both of these uncertain costs are relevant in deciding how much to adjust the price of carbon. There is a real danger that, if later adjustments to a carbon pricing system were left entirely to legislatures under normal legislative processes, legislatures would fail to act as new information is received. That could lead to significant costs as the price of carbon could be either too high or too low based on the latest information.[319]

When drafting the broad delegations in the CAA,[320] legislators likely understood in general the need to regulate air quality and the hazards of pollution to human well-being and the environment. However, they would not have been

311. *See* Hines & Logue, *supra* note 22, at 243 (arguing that agencies can react more quickly to new information than Congress can, including recent scientific findings and changed circumstances).

312. *See* Lazarus, *supra* note 71, at 19–23.

313. *See* Josephy E. Aldy et al., *Resolving the Inherent Uncertainty of Carbon Taxes: Introduction,* 41 HARV. ENVTL. L. REV. F. 1 (2017).

314. *Id.*

315. *Id.*

316. *Id.*

317. *See* David Anthoff & Richard S. J. Tol, *The Uncertainty About the Social Cost of Carbon: A Decomposition Analysis Using Fund,* 117 CLIMATIC CHANGE 515 (2013) (discussing the uncertainty of the social cost of carbon); *see generally* Carolyn Fischer & Richard D. Morgenstern, *Carbon Abatement Costs: Why the Wide Range of Estimates?,* 27 ENERGY J. 73 (2005) (discussing the uncertainty of the cost of abating carbon emissions).

318. *See* Gillbert E. Metcalf & David Weisbach, *The Design of a Carbon Tax*, 33 HARV. ENVTL. L. REV. 499, 519 (2009).

319. S*ee generally* Robert S. Pindyck, *Uncertainty in Environmental Economics*, 1 REV. ENVTL. ECON. & POL'Y 45 (2007) (discussing the challenge of uncertainty in setting the price of carbon as well as other environmental policies).

320. 42 U.S.C. § 7601 (2012).

expected to keep up-to-date on all of the subsequent scientific advances and accumulating knowledge concerning pollutants that threaten public health, as well as what should be done about them. That is why the statute empowers the EPA to determine which pollutants might "reasonably be anticipated to endanger public health or welfare" in the motor vehicle context.[321]

In view of the uncertain nature of environmental issues, legislatures might want to delegate the environmental tax rate authority to the executive branch to afford greater policy flexibility in response to changing environmental conditions and new scientific developments. First, Congress faces great transactional costs in fine-tuning environmental policies due to the large number of issues, the large number of participants in a group decision-making process, inadequate information, and inadequate foresight.[322] In comparison, agencies encounter much lower transactional costs as the *Securities and Exchange Commission v. Chenery* case has confirmed agencies' flexibility in adopting rules in advance or developing policy gradually over time.[323]

Second, an agency that specializes in environmental policies is better positioned than legislatures to react quickly and effectively to environmental situations.[324] In contrast, since Congress has the responsibility for all national policies, it lacks the expertise.[325] Detailed legislation without necessary delegation would lead to an inflexible administration, which fails to respond to shifts in voter preferences, situational variance, and local differences.[326] The implementation of the policy itself will tend to reveal additional information that policymakers did not have before.[327] For example, if there was less carbon abatement than expected from a carbon tax, this would suggest that abating carbon is more expensive than expected.

3. Coordination of Environmental Policies

Delegation is necessary for coordinating different environmental policy instruments in effectively achieving a common goal.[328] Given a pre-determined goal of pollution reduction, the strictness of other environmental regulations, such as the pollutant discharge standards, will directly impact the regulatory demand for environmental taxes.[329] As the power to formulate pollutant discharge standards has already been widely delegated to environmental agencies,[330] environmental taxes rates should also be delegated to agencies. Though legislatures may play the role as coordinators, they are inefficient due to the lack of expertise and flexibility as set forth above.

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321. 42 U.S.C. §§ 7601, 7521(a)(1) (2012).

322. *See* Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987).

323. *Id*. at 404.

324. *See* Hines & Logue, *supra* note 22, at 243.

325. *See id.* at 242.

326. *See* Mashaw, *Prodelegation*, *supra* note 21, at 97–98.

327. *See* David Kamin, *Legislating for Good Times and Bad*, 54 HARV. J. ON LEGIS. 149, 199 (2017).

328. *See generally* OECD, *Instrument Mixes for Environmental Policy*, at 17 (2007), https://read.oecd-ilibrary.org/environment/instrument-mixes-for-environmental-policy_9789264018419-en#page4.

329. *Id*.

330. *See* Hines & Logue, *supra* note 22, at 236.

First, to protect the environment in an effective and efficient way, coordination of different environmental policy instruments is significantly important. If properly coordinated, different environmental policy instruments can collectively realize a common goal of environmental protection and enlarge the functions of each other.[331] On the one hand, many environmental problems are multifaceted–in addition to the total amounts of releases of a certain pollutant, where emissions take place, when they occur, how a polluting product is applied, and other factors must be considered.[332] On the other hand, certain instruments can mutually underpin each other; for example, a labelling scheme can enhance the responsiveness of firms and households to an environmentally related tax, while the existence of the tax helps draw attention to the labelling scheme.[333] The mixture of various environmental policy instruments can also limit uncertainty with respect to the compliance costs, enhance the intensity of enforcement, and reduce administrative costs.[334] Contrarily, poorly coordinated environmental policy instruments not only waste administrative resources, but also compromise the functions of each other.[335] There is a danger that one instrument will unnecessarily hamper the flexibility to find low-cost solutions to a problem that another instrument could have offered if it had been used on its own.[336]

Due to the importance of environmental policy coordination, environmental policymakers should have the power to coordinate different environmental policy instruments, which demands delegation. For optimal coordination, the same authority should have the power to formulating and adjusting different, but relevant, environmental policy instruments. For example, if one agency possesses the power to determine pollutant discharge standards, the same agency should also have the power to rate-set environmental taxes. This is justified on the ground that given a pre-determined goal of pollution reduction, the strictness of the pollutant discharge standards will directly impact the demand for environmental taxes. As the lawmaking power of many environmental policies other than environmental taxes, such as pollutant discharge standards, has been widely delegated to environmental agencies, environmental tax rates should also be delegated to agencies.

The case of the EPT of China offers a good illustration of the need to coordinate environmental taxes and other environmental policies. Coordination is particularly crucial due to the fact that whether and to what extent polluters should pay the EPT depends on the relevant pollutant discharge standards or other environmental standards. For instance, polluters do not pay the EPT if they store or dispose of solid wastes at any facility or site that meets environmental standards, but polluters have to pay the EPT if such facility or site fails to meet environmental standards;[337] sewage and garbage treatment sites do not have to pay the EPT if they fulfill relevant pollution discharge standards but have to pay the tax if not;[338] and

331. *See* OECD, *Instrumental Mixes for Environmental Policy*, *supra* note 328, at 17.
332. *Id*. at 21.
333. *Id*. at 17.
334. *Id*.
335. *Id*. at 18.
336. *Id*.
337. Environmental Protection Tax Law, *supra* note 176, at art. 4–5.
338. *Id*. at art. 5, 12.

polluters are entitled to a twenty-five percent reduction of the EPT if the concentration value of the taxable air or water pollutants is lower than seventy percent of applicable pollutant discharge standards, as well as a fifty percent reduction for the concentration value lower than fifty percent of applicable pollutant discharge standards.[339] In view of such an interdependent relationship between the EPT and the relevant environmental standards, coordination between these two policies is needed for achieving the overall regulatory goals. Therefore, it is inadequate for an agency to only have the power to enforce the EPT. As the power to determine these environmental standards is broadly delegated to environmental agencies, the power to determine EPT rates should also be delegated to improve the executive branch's policy-coordinating capacity.

Second, rate-setting power should also be delegated in alignment with the already delegated power of elaborating tax base. If the executive branch seeks to adjust the tax base of environmental taxes, having the ability to also make rate adjustments might be extraordinarily useful for achieving the overall regulatory goals–and for avoiding overregulation. This is because multiple pollutants often come from the same source.[340] For instance, coal burning can produce various pollutants including sulfur dioxide, nitrous oxides, carbon monoxide, carbon dioxide, smoke and others.[341] Therefore, taxing a new pollutant such as carbon dioxide is likely to curb the use of coal, and thus reduce the generation and discharge of many other same-source pollutants at the same time.[342] In other words, taxing a new pollutant may reduce the regulatory demand for taxing other pollutants. In view of this fact, if the executive branch has delegated the power to define the tax base, it should also have the power to adjust the tax rates for coordination purposes.

B. Invalid Legitimacy Objections to Tax Delegation

Despite the regulatory demand for expanding the delegation of rate-setting power, some scholars may argue that such delegation will cause a legitimacy crisis. As this subsection will show, the primary argument is that taxes are special for their distributional consequences and transfer of property from private parties to the government, therefore, demanding stricter democratic control by Congress.[343] In addition, opponents to tax delegation also argue that tax delegation consolidates too much power in one branch of government.[344]

339. *Id*. at art. 13.

340. *See* Alice Kaswan, *Climate Change, The Clean Air Act, and Industrial Pollution*, 30 U.C.L.A. J. ENVTL. L. & POL'Y 51, 63 (2012).

341. *Id.*

342. *See* Alice Kaswan, *Controlling Power Plants: The Co-Pollutant Implications of EPA's Clear Air Act Section 111(D) Options for Greenhouse Gases*, 32 VA. ENVTL. L. J. 173, 176 (2014) ("Measures to reduce GHGs, like shifting from coal to natural gas or reducing the use of fossil fuels, will simultaneously reduce co-pollutants, offering significant co- benefits.").

343. *See* Hines & Logue, *supra* note 22, at 257; *see* Schön, *supra* note 56, at 4–7; *see* Krotoszynski, *supra* note 81, at 245.

344. *See* Krotoszynski, *supra* note 81, at 244.

1. Distributional Consequences of Tax

The most common argument against the delegation of tax rates is the concern over the control of property deprivation and distributional consequences.[345] Opponents to tax delegation, deeming taxation as the most prominent and extensive intrusion of the state's power into the sphere of the individual, argue that the democratic nature of the legislative process is necessary for the imposition of taxes.[346] In addition, some scholars view the distribution of tax burdens to be a quintessentially political decision, entailing tradeoffs among different groups of taxpayers.[347] Many scholars believe the interests of taxpayers are best represented and voiced in the rough-and-tumble of the tax legislative process in Congress.[348]

The distributional concern is less justified in the case of environmental taxes, considering their regulatory nature, than in fiscal taxes. First, Congress has frequently delegated environmental regulatory powers that have similar distributional consequences to agencies in practice.[349] The EPA has enacted rules, such as pollution discharge standards, that have similarly affected the distribution of benefits and burdens of environmental protection.[350] For example, the EPA has made the decision to designate carbon dioxide and other greenhouse gases as pollutants under the CAA,[351] which was later upheld by the Supreme Court.[352] That decision, coupled with the agency's proposed rules to cut emissions from existing coal plants by as much as thirty percent by 2030, could obviously have significant distributional consequences.[353] The EPA's regulation of greenhouse gases influences the prices of cars, trucks, and energy, thereby changing the profitability of affected industries and real wages in the economy.

Some may argue that the analogy above is invalid because environmental taxes and regulations are two distinctive species: regulations work with a binary code of "permission versus prohibition," while taxation simply sets prices for a given behavior without any positive or negative assessment of the activity.[354] This distinction is less obvious at a closer look. On one hand, environmental taxes encourage taxpayers to give up some or all taxed activities, such as production processes that generate pollutions, thus functioning like an outright prohibition of the abandoned activities.[355] On the other, each regulatory prohibition can be modeled

345. *See* Hines & Logue, *supra* note 22, at 257.

346. *See* Schön, *supra* note 56, at 4–7.

347. *See* Hines & Logue, *supra* note 22, at 257.

348. *Id*. at 257.

349. *See generally* Lazarus, *supra* note 71 (surveying the ways in which environmental regulation can have distributional consequences).

350. *See* Hines & Logue, *supra* note 22, at 258.

351. *See* Regulating Greenhouse Gases Under the Clean Air Act, 73 Fed. Reg. 44,354 (proposed July 30, 2008) (to be codified 40 C.F.R. ch. 1).

352. Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 532 (2007) (holding that greenhouse gases fit "well within the Clean Air Act's capacious definition of 'air pollutant'").

353. *See* Amy Harder, *EPA Sets Draft Rule to Cut Carbon Emissions by 30% by 2030*, WALL ST. J. (June 2, 2014, 4:35 PM), http://online.wsj.com/articles/epa-rule-to-cost-up-to-8-8-billion-annually-sources- say-1401710600.

354. *See* Schön, *supra* note 84, at 5.

355. *Id*. at 6.

as a highly progressive tax, which applies a zero rate until the regulated entity crosses a certain limit (e.g. a pollution discharge standard).[356] Apart from quite severe cases, which lead to professional disqualification or imprisonment, all adverse consequences of violating regulatory prohibitions can be expressed in monetary terms like a tax.[357] Therefore, both regulation and taxation simply lead to an increase in the cost attached to a certain environmental behavior. Thus, prohibiting or pricing a given behavior is not a valid justification for the tax/regulation distinction.

The second reason why distributional concerns are not justified for environmental taxes is that the existing details-filling delegations already have distributional impacts.[358] Tax rates, bases, and preferential measures of carbon taxes together determine their tax burden and regulatory impacts.[359] The regulatory power to set up tax base definitions and enforcement measures, which the executive branch routinely undertakes, automatically carries implications for the distribution of tax burdens.[360] For instance, choosing between the exact method, the table method, and the value method to calculate the amount of the ODC tax on imported taxable products may result in extremely different numbers.[361] Moreover, taxing a new pollutant is likely to reduce the generation and discharge of many other pollutants emitted from the same source. Therefore, delegating both base-elaboration power and rate-adjustment power is necessary for avoidance of excessive tax burdens on polluters without undermining the realization of regulatory goals.

Supposing distributional concerns still exist, delegating carbon tax rates would not get rid of the congressional control of the distributional effects. A first approach is that Congress could pass a law requiring the executive branch to select tax rates and bases that internalize the social costs of carbon emissions or promote a given goal of carbon reduction.[362] By passing this law, Congress could control the distributional effects in accordance with the polluter pays principle, which is the widely recognized principle governing distribution of environmental interests.[363] The EPA should take advantage of its expertise and flexibility to figure out and update the social costs of carbon emissions or the goal of carbon reduction, and then determine the tax rates that best follow the Pigouvian tax or the Baumol-Oates approach. To ensure the compliance of congressional guidance, Congress could, by

356. *See* Masur & Posner, *supra* note 4, at 115 (suggesting that a Pigouvian environmental tax could be structured in the following way to be like a command-and-control regulation: "(1) Set an emissions limitation at or near zero emissions; (2) Set the fine that scales with the amount of pollution in excess of the limitation so that it is equal to the desired level of Pigouvian tax; and (3) Initiate an administrative proceeding against every polluter in order to collect the appropriate taxes (fines).").

357. *See* Schön, *supra* note 84, at 6.

358. *See supra* Chapter III, Section A(1).

359. *See* Milne, *supra* note 13, at 428.

360. *See* Hines & Logue, *supra* note 22, at 261.

361. *See supra* notes 98–104 and the accompanying text (discussing the exact method, the table method, and the value method).

362. *See supra* notes 31–35 and the accompanying text (discussing the Pigouvian theory and the Baumol-Oates approach).

363. *See* Milne, *supra* note 13, at 5 (describing that the polluter pays principle addresses the issue of "who should pay": the polluter should be the entity that pay for the pollution it causes).

reference to the Chinese EPT,[364] set a range of tax rates for the EPA to choose from and review the EPA's choice regularly.

Second, Congress could go further to set the tax rates and delegate the EPA to adjust the tax rates if carbon reductions are not met. To address the uncertainty of carbon taxes, scholars have put forward some legislation-based mechanisms without the need for delegation.[365] For instance, in the event that the goals of carbon reduction are not met during the compliance period, Congress is advised to enact a statute providing that carbon tax rates would be increased by some set percentage that legislatures deem sufficient to realize the carbon reduction goals.[366] While this approach ensures better separation of powers than the first approach, legislatures would face difficulty in deciding on the optimal rate-change formula, which depends on the uncertainty related to future levels of carbon emissions.[367] To address the uncertainty properly, the better approach would be to delegate at least some discretion for the EPA to adjust the tax rate.

2. Transfer of Property to the Government

Although both environmental taxes and regulations can be regarded as distributive deprivation of private properties, some may still argue that there is a borderline between the private sector and the public sector. While regulatory instruments redistribute wealth and income among private parties, the use of tax instruments is associated with the transfer of private funds to the public coffers.[368] To provide checks against arbitrary or unjust transfer of property to the government, the due process doctrine and the separation of powers doctrine require strict scrutiny of tax delegations.[369]

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364. Environmental Protection Tax Law, *supra* note 176, at art. 6.

365. Some economists have come up with the design of a Tax Adjustment Mechanism for Policy Pre-Commitment (TAMPP), which is an adjustment mechanism for a carbon tax rate to ensure that targeted emission reduction milestones are met over the decade following implementation. *See, e.g.,* Marc Hafstead et al., *Adding Quantity Certainty to a Carbon Tax through a Tax Adjustment Mechanism for Policy Pre-Commitment*, 41 HARV. ENVTL. L. REV. F. 41 (2017).

366. *See, e.g.,* Gilbert E. Metcalf, *Cost Containment in Climate Change Policy: Alternative Approaches to Mitigating Price Volatility*, 29 VA. TAX REV. 381, 391–92 (2009) (proposing a Responsive Emissions Autonomous Carbon Tax ("REACT") with the following features: first, an initial tax rate and standard rate of growth for the tax is set at the outset; second, benchmark targets for cumulative emissions are set for a control period, which could be one year, five years, ten years, or some other time interval; third, if cumulative emissions exceed the benchmark targets at the specified interval, the growth rate of the tax is increased to a higher rate until cumulative emissions fall to or below their benchmark targets in subsequent years).

367. *See* Josephy E. Aldy et al., *supra* note 313, at 11. The author states that there are three types of uncertainties related to future levels of emissions. First, unexpected changes in the level of the overall economy (either caused by changes in long-term growth or by business-cycle fluctuations) will impact future emissions levels. Second, policymakers may set the emissions price too low or too high, which reflects uncertainty in the aggregate marginal abatement costs at the time of implementation. Finally, the marginal abatement costs may shift dramatically over time due to new technologies.

368. *Id*. at 6.

369. *See* Krotoszynski, *supra* note 81, at 245.

Nevertheless, a closer look reveals the need for some further distinctions.[370] On one hand, environmental taxes may not necessarily transfer funds between the private and public sectors. With the purpose of regulation, environmental taxes only create revenue incidentally.[371] The revenue of an environmental tax might go to the general budget of a state, similar to any fiscal tax, or it may also be used to set up a special fund dedicated for environmental protection.[372] This keeps the money in the environmental protection system but not in the hands of public coffers. However, regulatory action can also be designed so as to transfer private funds to the public coffers. A legislator may license environmental permits against consideration, as in the case of a cap-and-trade market.[373] Therefore, whether private funds are transferred to the public budget or not is also an invalid justification for the taxation/regulation distinction in determining delegation issues.

3. Consolidation of Power in One Branch of Government

In addition to the first two objections derived from the "special nature" of tax delegation, a third objection is that delegating tax rates may consolidate too much power in one branch of government. One potential concern from this consolidation of power is that, with the combination of revenue authority and spending authority, rational bureaucrats will seek to excessively expand their jurisdiction and programs.[374] This concern is unwarranted because the purpose of a carbon tax is to regulate carbon emissions instead of raising revenue for the EPA.[375] The revenue might be recycled to the economy, or attributed to the general budget, but not necessarily earmarked to the EPA for environmental protection.[376] If Congress decided to earmark the revenue, it could limit the purposes to use the revenue and prevent the EPA from overly expanding their regulatory ability.

Another concern is that, as the EPA Administrator and other high-ranking EPA officials appointed by the President, they may tend to change the carbon tax rates to unfairly benefit the political future of the President and their political party.[377] For example, they might decrease carbon tax rates to boost the economy before an election or adjust the tax rates in other ways to maximize the President's election base.[378] This concern is also baseless as it has not been a problem in other measures for environmental regulation. For example, traditional command-and-control regulations, although less efficient, could be manipulated to favor certain groups,

370. *See* Brian D. Galle, *Tax, Command . . . or Nudge? Evaluating the New Regulation*, 92 TEXAS L. REV. 837, 849, 869 (2014).

371. *See* Määttä, *supra* note 29, at 38 (noting that regulatory taxes are instituted to encourage tax minimization, that is to reduce taxable activity).

372. *See* Milne, *supra* note 42, at 434 (discussing multiple uses of revenue generated from environmental taxes).

373. *See* Cameron Hepburn, *Regulation by Prices, Quantities, or Both: A Review of Instrument Choice*, 22 OXFORD REV. OF ECON POL'Y 226, 236 (2006).

374. *See* Krotoszynski, *supra* note 81, at 244.

375. *See supra* note 34–41 and the accompanying text.

376. *See* Milne, *supra* note 13, at 434.

377. *See* Hines & Logue, *supra* note 22, at 262.

378. *Id*.

industries, or districts before sensitive elections.[379] However, Congress has still granted the EPA considerable discretion to formulate environmental regulations.[380]

C. Carbon Tax Delegation for Responsible Lawmaking

Whether the above-mentioned democracy concerns are justified, reserving the power to determine carbon tax rates in Congress might not lead to responsible lawmaking to address climate change. Though climate change has been widely recognized by scientists as an "action or die" issue, and carbon tax has been a cost-effective method to reduce carbon emissions,[381] none of the more than ten carbon tax proposals put forward in Congress has become law.[382] To break this legislative gridlock, the agency decision-making process may be a promising solution.

1. Is Congressional Democracy a Valid Solution?

Elected Congress members do not necessarily follow the democratic consensus in addressing climate change. Climate change is a "super-wicked" policy problem featured with near-term and certain pain through increased prices on fossil fuels but with uncertain and long-term benefits from carbon emissions reduction.[383] Due to the difficulty of long-sighted thinking, any carbon tax proposal may have inadequate public support and perilous political footing.[384] Moreover, carbon tax supporters are unlikely to compete with carbon tax opponents.[385] Carbon taxes impose costs in a concentrated manner on certain groups, such as fossil fuel industries, but bring scattered benefits to the general public.[386] Therefore, affected groups have strong economic motivation to fight against carbon taxes, and they are often more organized than the public in general.[387] The concentrated costs have already caused considerable industries, states, unions, and political parties relying on fossil fuel production, distribution, and use to form a formidable coalition of political opposition to carbon tax.[388]

The political complexity of the climate change issue demands delegation of rate-setting power to more decisive entities. Whether the public agrees on the

379. *See* Lazarus, *supra* note 71, at 852 (stating that the highly centralized nature of command-and-control regulations may be one of the most significant structural causes of existing distributional inequities).

380. *Id.* at 236.

381. Initiative on Global Markets Forum, *Carbon Tax*, U. OF CHI. BOOTH SCH. (Dec. 20, 2011), https://perma.cc/ZZY7-FC8N (showing that 90% of the economists polled (95% when weighted by each expert's confidence in his/her answer) agreed or strongly agreed with the statement that a carbon tax would be a less expensive way to reduce carbon-dioxide emissions than would a collection of other policies such as fuel economy requirements for automobiles).

382. *See Bills*, CARBON TAX CENTER, https://www.carbontax.org/bills/ (last visited Oct. 16, 2020) (summarizing the carbon tax bills in the U.S.).

383. *See* BARRY G. RABE, CAN WE PRICE CARBON? 16–18 (2018). [Due to the ongoing COVID-19 pandemic, the Editorial Board was unable to independently verify this source. Eds.]

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id*. at 19–20.

necessity of carbon pricing, Congress may still be unwilling to act due to the voting cycle.[389] As voting theorists often state, "whenever three or more alternative policies exist, there is the ever-present possibility of a voting cycle which can be broken only by resort to some form of 'dictatorship' result."[390] Obviously, an issue like climate change that involves a variety of different interests has attracted more than just three alternative policies. The transactional costs of the congressional lawmaking process may also impede timely and effective actions.[391] Such transactional costs are especially high for climate change due to the large number of involved issues, the large number of interested participants in a group decision-making process, inadequate information, and inadequate foresight.[392]

Proceeding with delegation is a more responsible decision than maintaining the status quo of inaction. Compared to enacting specific carbon tax laws, Congress may be more willing to set general policy goals and delegate other entities to figure out the detailed policy design.[393] Through delegation, Congress could put the controversies in the policy details aside but proceed with foundational policy directives.[394] This theory explains why Congress delegated considerable power to agencies in environmental regulation during 1960s and 1970s. For instance, Congress might have not enacted the 1970 Amendment of the CAA if Congress had carried out a specific analysis of air pollution problems.[395] Though delegation gets Congress rid of resolving ambiguity or disagreement about the exact levels of carbon tax rates, it is a necessary first step toward progress, and citizens could hold legislators accountable for their choice.[396]

2. Agency Rulemaking for More Responsible Lawmaking

Congressional legislation is only part of the process of responsible lawmaking, and it is becoming irresponsible for addressing the climate change issue. In comparison to congressional legislation, the EPA's rulemaking process faces less voting pressure due to the decision-making power of the Administrator and other

389. *See* MASHAW, *supra* note 21, at 98.

390. *Id.*

391. *See* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 341–42 (1987) (arguing that "the iron laws of transaction costs" weakens Congress's institutional capability to resolve policy issues).

392. *See* Pierce, *supra* note 322, at 404.

393. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10–11 (1993) (stating that legislators could claim credit for the benefits of a regulatory statute while avoid the blame for the costs it will bring, because delegated agencies, instead of legislators themselves, issue the specific rules imposing the regulatory burden on the constituents of the legislators).

394. *Id.* at 11–12.

395. *See* CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT 15–16 (2002).

396. *See* MASHAW, *supra* note 21, at 146–47 ("A decision to go forward notwithstanding continuing ambiguity or disagreement about the details of implementation is a decision that the polity is better off legislating generally than maintaining the status quo. . . . If citizens want more specific statutes, or fear that legislating without serious agreements on implementing details is dangerous, they can, after all, throw the bums out.").

high-level officials.[397] Regulated industries may try to obstruct the EPA's rulemaking process, providing for excessive and irrelevant data for the EPA to analyze and respond. Such a problem is likely to be more serious for the congressional lawmaking process because legislators have less expertise and experiences to identify and acquire useful information.[398] Admittedly, other ways exist to break the voting cycle, such as rules committees, forced deadlines, random selection, and allocations of vetoes, but these options are not as responsive as agencies.[399]

In addition to responsiveness, agency rulemaking is also held accountable to Congress's intent and the public. To ensure accountability, modern regulatory state and administrative laws have already developed effective mechanisms to prevent agencies from abusing their discretionary power while preserving the benefits of their expertise and flexibility. [400]First, administrative rulemaking procedures, checked by judicial review, could promote representation of public interests by engaging in accessible and effective public participation.[401] Compared to the congressional lawmaking process, the notice-and-comment rulemaking could be more accessible to the public due to lower participation costs than the costs of lobbying or otherwise seeking to influence Congress.[402] Public participation in the agency rulemaking process is also more effective than in the congressional lawmaking process because, as the general carbon tax legislation is broken down into specific issues at the agency level, the public can know how the new rules will affect their interests and can therefore provide meaningful evaluations of the real-world consequences of the proposals.[403]

The EPA is hardly at liberty from congressional control but is checked by Congress and effectively bent to the legislative will.[404] If the carbon tax rates determined by the EPA contradict the legislature's intent, such as failure to follow the goals of carbon emissions reduction, Congress could correct the EPA's rules through various control measures, such as statutory control, legislative history, oversight, appropriations, statutory review, and confirmation of nominees.[405] Citizens could, in turn, hold Congress accountable through the election of its members, and no evidence shows that holding Congress accountable for delegated power faces special difficulty in comparison to holding Congress accountable for direct lawmaking.[406]

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397. *See* MASHAW, *supra* note 21, at 98 ("[W]henever three or more alternative policies exist there is the ever present possibility of a voting cycle which can be broken only by resort to some form of 'dictatorship' result.").

398. *See* Hines & Logue, *supra* note 22, at 242.

399. *See* MASHAW, *supra* note 21, at 98–99.

400. *See* Schuck, *supra* note 21, at 781, 783–784.

401. *Id.* at 781–782, 787.

402. *Id.* at 781.

403. *Id*. at 782.

404. *Id*. at 783–784.

405. *Id*. at 784 (introducing and discussing these congressional control measures in detail).

406. *See* Posner & Vermeule, *supra* note 26, at 1753.

VI. CONSTITUTIONALITY OF CARBON TAX DELEGATION

To be feasible, this proposal of delegating carbon tax rates must comply with the Constitution. There are two constitutional clauses, or judicially developed doctrines, that objections to such delegation could be based on: the Origination Clause and the non-delegation doctrine. In brief, the Origination Clause is unlikely applicable to a carbon tax due to the regulatory nature. The non-delegation doctrine is also unlikely to obstruct this proposal, as the proposal contains qualified "intelligent principles." Moreover, this proposal is also likely to pass tests of potential special non-delegation doctrines targeting tax delegations.

A. Origination Clause

The Origination Clause, which requires that "all Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills,"[407] could be a possible basis for challenging delegation. First, a Senate-originated revenue-raising bill violates the Origination Clause.[408] If this carbon tax comes within the definition of a revenue-raising bill and originates in the Senate, instead of the House of Representatives, it is unlikely to pass constitutional muster. Second, a revenue-raising bill originating in the House of Representatives may have to contain a certain level of specificity to comply with the Origination Clause.[409]

The Origination Clause, however, is unlikely to block this proposal because the carbon tax bill could be structured to fall out of the category of "bills for raising revenue." To determine whether a carbon tax bill is subject to the Origination Clause, the Court has relied on two factors–congressional purpose and objective facts.[410] In *United States v. Norton*, the Court stated that the Origination Clause was "confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which may incidentally create revenue."[411] Meaning, regulatory taxes with the purpose of carbon emission reduction are not subject to the Origination Clause, though they may incidentally create revenue.[412] As long as this carbon tax proposal follows the Pigouvian tax theory or is attached to a certain goal of carbon emission reduction, it is likely to fall out of the scope of the Origination Clause. This conclusion, however, is not always clear because regulatory purposes may be obscured by other concerns, such as equity and competitiveness.[413]

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407. U.S. CONST., art. I, § 7, cl. 1.

408. United States v. Munoz-Flores, 863 F.2d 654, 657 (9th Cir. 1988), *rev'd*, 495 U.S. 385 (1990).

409. *See* Rebecca M. Kysar, *The Shell Bill Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659, 709 (2014).

410. *Id.* at 671–676.

411. United States v. Norton, 91 U.S. 566 (1875).

412. *See* Määttä, *supra* note 29, at 38 (noting that regulatory taxes are instituted to encourage tax minimization, that is to reduce taxable activity).

413. OECD, *The Political Economy of Environmentally Related Taxes (2006),* https://read.oecd-ilibrary.org/environment/the-political-economy-of-environmentally-related-taxes_9789264025530-en#page8 (summarizing sectoral competitiveness, distributional impacts, political acceptance, administrative costs, and existing environmental policies as the major concerns affecting the implementation of environmental taxes).

Due to the difficulty in finding real purposes, the Court uses some objective facts as proxies for congressional purpose instead of searching for the purpose.[414] A statute falls into the scope of the Origination Clause if it funds the general budget instead of a specific program or service.[415] For instance, in *United States v. Munoz-Flores*, the Supreme Court held that the Origination Clause applies only to tax statutes with the purpose of raising revenue to support government generally, not to a statute that creates a particular government program and raises revenue for that program.[416] This carbon tax proposal could easily avoid this risk of unconstitutionality by earmarking the revenue for environmental programs or using the revenue to reduce other taxes. In fact, a number of economists and policymakers prefer to designate the use of carbon taxes to achieve a "double dividend."[417] For instance, British Columbia's carbon tax has been widely recognized as a successful example of a carbon tax, partly because of the recycling of its revenue to lower-income taxpayers by reducing income taxes.[418] This design not only reduces inefficient taxes, which discourage provision of labor, but also promotes equity by compensating lower-income taxpayers for the increased energy price.[419]

Whether this carbon tax bill is subject to the Origination Clause, the delegation of carbon tax rate would not be blocked by it. First, the bill could be initially proposed by the House of Representatives. By the terms of "originat[ing] in the House of Representatives," the Constitution does not mean that every detail of the revenue-raising bills shall be originated in the House of Representatives, as it also allows the Senate to "propose or concur with Amendments as on other Bills".[420] In practice, the House of Representatives has been proposing a "shell bill" and leaving the Senate to fill in the substance.[421] Revenue laws that are initiated as shell bills do not violate the Origination Clause because the Senate has broad power to amend the House-originated bills.[422] Second, the Origination Clause has not led the Supreme Court to impose any limit on tax delegation. In *Skinner v. Mid-America Pipeline Co.*, the Supreme Court stated that "the Origination Clause . . . implies nothing about the scope of Congress' power to delegate discretionary authority under its taxing power once a tax bill has been properly enacted."[423] Therefore, as long as this carbon tax bill originates in the House of Representatives, whether taxing power is delegated, or to what extent, is unlikely an issue with regard to the Origination Clause.

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414. *See* Kysar*, supra* note 409, at 674.

415. *See* United States v. Munoz-Flores, 495 U.S. 385 (1990); *see* Millard v. Roberts, 202 U.S. 429 (1906); *see* Twin City Bank v. Nebeker, 167 U.S. 196 (1897).

416. *Munoz-Flores*, 495 U.S. 387–98.

417. See Milne, *supra* note 13, at 10–12.

418. *See, e.g.,* Brian Murray & Nicholas Rivers, *British Columbia's Revenue-Neutral Carbon Tax: A Review of the Latest "Grand Experiment" in Environmental Policy*, 86 ENERGY POL'Y 674, 677 (2015).

419. *Id.* at 677.

420. U.S. CONST., art. I, § 7, cl. 1.

421. *See* Kysar, *supra* note 409, at 661 (noting that many important revenue laws, such as the Affordable Care Act and the American Taxpayer Relief Act of 2012, began as "shell bills") (The term "shell bill" refers to the House-originated bills whose text the Senate completely replaces in order to comply with the Origination Clause.).

422. *Id*. at 682–97.

423. Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 221 (1989).

B. Non-Delegation Doctrine

The more likely constitutional ground on which legislative delegations might be challenged is the so-called non-delegation doctrine. The non-delegation doctrine is said to arise from Article I of the Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[424] In addition, the principle of separation of powers, which is not specified in the text of the Constitution, but is an underlying principle, also contributes to the non-delegation doctrine.[425] However, the non-delegation doctrine does not absolutely exclude delegation, as Article I also provides for the "necessary and proper" clause, meaning that Congress has some authority to create agencies to execute its legislative power.[426]

Supreme Court Justices and scholars seem to agree that the doctrine no longer has any bite in face of the modern regulatory state.[427] The Supreme Court has only enforced the non-delegation doctrine in two 1935 decisions.[428] With the exception of these two early decisions, the Court has been upholding broad delegating statutes as long as they contain an "intelligible principle" to constrain the agency and facilitate judicial review.[429] By requiring an "intelligible principle," the Constitution actually places very few limits on the types of authority Congress can delegate to an agency or commission, and the limits that remain are easily satisfied.[430] For instance, the CAA delegates the EPA to set "ambient air quality

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424. U.S. CONST. art. 1, § 1.

425. *See* Jack Beerman, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 492–93 (2011) ("The nondelegation doctrine embodies a fundamental separation of powers principle, that Congress may not delegate away its legislative power.").

426. U.S. CONST. art. 1, § 8.

427. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–475 (2001) ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'") (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)); Fed. Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring in the result) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes." (citing U.S. v. Robel, 398 U.S. 258, 272 (1967) (Brennan, J. concurring))); LISA SCHULTZ ET AL., THE REGULATORY STATE (2d. ed. 2013) 185 ("The Court has justified this permissive approach in pragmatic terms: Some delegation is unavoidable given the demands on modern government, and once the Court allows some delegation, it has no basis for distinguishing constitutional from unconstitutional ones."); Posner & Vermeule, *supra* note 26, at 1722 ("In our view there just is no constitutional nondelegation rule, nor has there ever been.").

428. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *see also* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). The decisions of these cases involved different provisions of the same unusually sweeping statute, the National Industrial Recovery Act (NIRA). The NIRA authorizes the President to approve "code of fair competition" across virtually every aspect of the economy – from employment wages and hours to the price and quality of livestock. Because the Act did not define the requirement of "fair competition" and failed to provide a specific directive, the court held that the delegation of authority was "unconfined and vagrant" and thus was unconstitutional.

429. *See* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (describing the "intelligible principle" formulation actually came from a case prior to 1935).

430. *See* Hines & Logue, *supra* note 22, at 240 ("[C]onstitutional scholars and Supreme Court Justices alike seem to agree that the doctrine no longer has any bite.").

standards the attainment and maintenance of which in the judgment of the Administrator, based on [published air quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health."[431] In *American Trucking*, the Court held that this delegation was constitutional because Congress had provided an "intelligible principle" limiting the EPA's discretion.[432] The word "requisite," which "mean[s] sufficient, but not more than necessary," had delineated the required "ceiling" and "floor" to constitute an "intelligible principle."[433]Few intelligible principles provide any more guidance than the vague instruction to the EPA Administrator in the CAA to issue regulations that are "requisite to protect the public health."[434]

This carbon tax proposal could easily pass this "intelligible principle" test. As set forth above, the hypothetical proposal delegates the EPA to decide on the rates of carbon taxes "requisite to achieve certain goals for carbon emission reduction," or "requisite to internalize social costs of carbon emissions." Both phrases of "achieve certain goals for carbon emission reduction" and "internalize social costs of carbon emissions" are obviously more specific than the terms of "protect the public health" in *American Trucking*.[435] Therefore, this proposal provides an intelligible principle to guide judicial review and likely passes the test. In addition to this basic intelligible principle, Congress may also want to provide some more specific factors that the EPA has to consider in determining proper carbon tax rates or adopt a formula linking relevant factors as independent variables and tax rate levels as dependent variables. Furthermore, Congress may designate the use of the tax revenue for a specific program instead of allocating it to the general budget. In each of these cases, the carbon tax proposal is more likely to pass the review of the nondelegation doctrine.

C. Potential Non-Tax-Delegation Doctrines

No matter whether the general non-delegation doctrine is dead or not, a more critical issue is whether tax delegation should be subject to stricter restriction than delegation in other fields of law. Supporters for stricter restriction on tax delegation have raised some additional arguments based on the U.S. Constitution.

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431. 42 U.S.C. § 7409(b)(1) (2012).

432. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 474.

433. *Id*. at 473.

434. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457. Other cases have upheld broad delegations. *See* Yakus v. United States, 321 U.S. 414 (1944) (upholding the Emergency Price Control Act, which enabled the administrator to set "fair and equitable prices"); *see* Mistretta v. United States, 488 U.S. 361 (1989) (upholding a delegation to the Federal Sentencing Commission to "promulgate sentencing guidelines for every criminal offense"); *see* Loving v. United States, 517 U.S. 748, 768–69 (1996) (upholding a delegation to the President to define "aggravating factors" that permit the imposition of the death penalty in a court martial).

435. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 473.

1. Tax Exceptionalism

First, some supporters argue for the so-called tax exceptionalism in dealing with the delegation issue.[436] They rely on the importance the Founders placed on taxing power in the U.S. Constitution, which expressly assigned the taxing power to Congress.[437] Indeed, the Supreme Court has long held, and recently reaffirmed, that Congress's power to tax is broader than its power to regulate.[438] Moreover, not only does the Constitution specifically assign the taxing power to Congress, it goes so far as to specify how tax laws must be enacted. The Origination Clause, as noted above, expressly states that "[a]11 bills for raising revenue shall originate in the House of Representatives."[439] The supporters argued that placing the power to initiate tax legislation in the House forecloses the option for agencies to be the source of tax policy.[440]

The theory of tax exceptionalism, however, makes the mistake of mixing up two related, but separate, issues–distribution of power and delegation of power. Constitutional distribution of power to certain institutions does not necessarily lead to restriction on the institutions' authority to delegate such power.[441] In line with this principle, though the Taxing Power Clause expressly distributes federal taxing power to Congress, and the Origination Clause requires revenue-raising bills to originate in the House of Representatives, both clauses do not necessarily impose limits on Congress's power to delegate its taxing authority.[442] As long as Congress retains the power to alter or withdraw delegated taxing authorities, Congress is in charge of taxing power in compliance with the Taxing Power Clause.[443]

Currently, court decisions are rejecting this tax exceptionalism argument. The Supreme Court in *Mid-America Pipeline* rejected the invitation to construe tax statutes more strictly than other statutes, by stating that "[w]e find no support, then, for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter non-delegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power."[444] The Court reasoned that nothing in the placement of the Taxing Clause "would distinguish the power to tax from other enumerated powers in terms of the scope and degree of authority that Congress may delegate to the Executive

436. *See, e.g.,* Krotoszynski, *supra* note 81, at 243 (arguing that "whatever merits of delegation in other context, one should view skeptical delegations of authority over the ability to raise and expend revenue").

437. U.S. CONST. art. 1, § 8.

438. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (holding that, although the Commerce Clause does not provide Congress with the authority to require individuals to purchase health insurance, the taxing clause does provide Congress with the power to tax people for not buying health insurance); *see also id.* at 2600 ("[T]he breadth of Congress's power to tax is greater than its power to regulate. . . . ").

439. U.S. CONST. art. 1, § 7.

440. *See* Krotoszynski, *supra* note 81, at 250.

441. *See* Andre L. Smith, *The Nondelegation Doctrine and the Federal Income Tax: May Congress Grant the President the Authority to Set the Income Tax Rates*, 31 VA. TAX REV. 763, 779 (2012) (stating the current trend towards rejecting so-called tax exceptionalism).

442. *Id.* at 778.

443. *Id.*

444. Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222–23 (1989).

Branch to execute the laws."[445] It also argued that the Origination Clause "implies nothing about the scope of Congress's power to delegate discretionary authority under its taxing power once a tax bill has been properly enacted."[446] In reaching this decision, the Court gave up the "tax or fee" test developed in earlier cases for deciding on the constitutionality of tax delegation.[447] The classification of certain powers as taxes does not bring stricter restrictions on them than being classified as fees or regulations.[448]

After *Mid-America Pipeline*, the Supreme Court in *American Trucking Associations* reaffirmed it by stating that taxation is one of those "sweeping regulatory schemes [where] we have never demanded . . . that statutes provide a determinate criterion for saying how much is too much."[449] Furthermore, in 2011, the Court held in *Mayo Foundation for Medical Education & Research v. United States* that federal taxation is not exceptional, as it relates to the administrative interpretation of federal statutes.[450] While the *Mid-America Pipeline* Court did not actually deal with taxes, but simply held that if the fees at issue were taxes, the legal rules would remain unchanged,[451] the *Mayo Foundation* Court handled a federal income tax law issue.[452] The Court held that principles underlying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* apply with full force in the tax context.[453] In other words, Treasury regulations, like the rules of other administrative agencies, should be reviewed by courts under the *Chevron* standard.[454] Though the Court did not directly address the delegation issue, it indicated that no reason existed to create different non-delegation jurisprudence in the tax context.[455]

Whether tax exceptionalism might be true for fiscal taxes designed to raise revenue, it is unwarranted in the cases of environmental taxes for their regulatory purpose. Courts and scholars often explain or defend tax exceptionalism by invoking the importance of revenue-raising.[456] For instance, in *Bull v. United States*, the Supreme Court stated that "taxes are the life-blood of government, and their prompt and certain availability is an imperious need," and, thus, justify special limitations on a taxpayer's ability to challenge tax assessments and collections.[457] As environmental taxes are expected to perform regulatory functions, and not raise

445. *Id*. at 220–21.

446. *Id*. at 221.

447. *E.g.,* Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340–41 (1974) (noting that an agency has no taxing power because "taxation is a legislative function," but an agency can impose a "use fee" without implicating a nondelegation problem).

448. *See id.*

449. Whitman v. American Trucking Associations, 531 U.S. 457, 475 (2001); *see* Smith, *supra* note 441, 779 (2012).

450. Mayo Foundation for Medical Education & Research v. United States, 562 U.S. 44, 55 (2011).

451. Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222–23 (1989).

452. *Mayo Foundation for Medical Education & Research*, 562 U.S. at 55.

453. *Id*.

454. *See* Matthew H. Friedman, *Reviving National Muffler: Analyzing the Effect of Mayo Foundation on Judicial Deference as Applied to General Authority Tax Guidance*, 107 NW. L. REV. COLLOQUY 115, 130 (2012).

455. *See* Smith, *supra* note 441, at 777.

456. *See* Hickman, *supra* note 54, at 1720–21 (summarizing the defense of tax exceptionalism).

457. Bull v. United States, 295 U.S. 247, 259–60 (1935).

revenue for the operation of government, the importance of revenue-raising is unlikely to justify exceptional treatment of environmental taxes.

2. Core Legislative Functions

A second potential non-tax-delegation theory could be that taxing power is one of the core legislative functions of Congress, which shall never be delegated. In *American Trucking Associations*, Justice Thomas maintained that the legislative function, as Congress's core function, cannot be delegated even if it is accompanied by an intelligible principle.[458] Justice Thomas believed "that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"[459] This core function theory could be traced to two cases: in the 1825 case of *Wayman v. Southard*, the Court held that the delegated matter must be of sufficiently slight importance not to require resolution by Congress and must be associated with the activity of the delegated body;[460] and in *Panama Refining Co. v. Ryan*, Justice Cardozo pointed out that the Court would not permit the President to halt the shipping of "hot oil" even if intelligible principles existed.[461] After reviewing the early experiences of delegation laws, Professor Cass argued for returning back from the scope of power, as shown by the "intelligible principle" test, to the nature of power in limiting delegations.[462]

This core function theory is problematic as it leaves the Supreme Court with the responsibility for articulating a standard for determining which decisions are legislative at their core. The Court is unlikely to undertake this job but often adopts a "when you see it" approach.[463] Professor Cass argued that the nature of the power must be the linchpin for limiting delegations and tried to provide a conceptual test to determine which powers are legislative by nature.[464] He had the opinion that the essence of the legislative authority is "to prescribe rules for the regulation of the society."[465] He then broke down this standard into several factors: first, whether a delegated power is to formulate a rule applying generally to the "regulation of the society" or a more circumscribed group and setting; second, whether the delegated power to make policy choices is of major importance; and third, whether the policy choices are sufficiently basic and far-reaching.[466]

Whether the core function theory should be adopted by the Supreme Court, it is unlikely to block this carbon tax proposal. First, by nature, a regulatory tax is not different from other regulatory instruments. Like all regulatory policies,

458. Whitman v. American Trucking Associations, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

459. *Id.*

460. Wayman v. Southard, 23 U.S. 1, 46 (1825); *see* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147, 160 (2017).

461. Panama Refining Co. v. Ryan, 293 U.S. 388, 436 (1935).

462. *Id.* at 184.

463. Morrison v. Olson, 487 U.S. 654 (1988) (holding prosecutorial discretion to be a purely executive function without committing to naming all the core executive functions, perhaps the Court has the ability to identify a core function simply "when they see it").

464. *See* Cass, *supra* note 460, at 185–86.

465. *Id.* at 186.

466. *Id.* at 186–93.

regulatory taxes are applied to certain groups to change their behaviors.[467] Regulation by taxation or other instruments is a choice of approach to realize an objective, not a choice of objective itself, and therefore does not determine the importance.[468] For instance, to realize a goal of carbon emission reduction, policymakers could choose to impose a tax or require the adoption of certain technologies. Moreover, considering the comparative efficiency of taxation in achieving regulatory goals, and thus less coerciveness on regulated parties, regulation by taxation may be less important.[469] The *NFIB v. Sebelius* Court recognized the less coercive nature of taxes rather than regulations: first, the magnitude of the burden is lower than the gain from the taxed conduct; second, the burden does not fall only on knowingly breaching the standards; and third, there is no social stigma or considered unlawfulness for choosing to pay the penalty.[470]

In addition, the core legislative function is likely only the authorization to tax for a certain purpose, while all other matters, including rate-setting, belong to the executive.[471] In explaining his theory, Professor Cass comes up with an example that the decision of a capital's location and overall size is of major importance, but fixing the boundaries is not.[472] The power of fixing the boundaries likely underestimates the delegable power. As long as Congress retains the significant and basic power of authorizing the establishment of a capital, Congress should be allowed to delegate all necessary power to realize the goal.[473] In *J. W. Hampton v. United States*, the Court allowed Congress to grant the President the authority to adjust tariff rates.[474] In *Mistretta v. United States*, Congress similarly authorized the deprivations of liberty while leaving onto an agency the extent to which liberty would be deprived.[475] These cases suggest that the Court would not list carbon tax rate-setting amongst the core functions of the legislature.

3. Clear Statement Rule

Though the theories of tax exceptionalism and core functions are unlikely to obstruct this carbon tax proposal, a third theory of the clear statement rule is likely to have some bite. The rule states that an agency may not interpret an ambiguous statute to confer the power to tax.[476] As Professor Sunstein explained, clear statement canons have the effect of limiting delegations to administrative agencies and also impose an "institutional requirement" that "Congress must make that choice

467. *See supra* note 34–57 and the accompanying text.

468. *See supra* note 58–69 and the accompanying text.

469. *See supra* notes 34–41 and the accompanying text.

470. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); *see generally* Hines & Logue, *supra* note 22, at 235.

471. *See* Smith, *supra* note 441, at 780.

472. *See* Cass, *supra* note 460, at 188.

473. *Id.* at 189.

474. *See* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 410–11 (1928).

475. *See* Mistretta v. United States, 488 U.S. 361, 380–81 (1989); *see* Smith, *supra* note 441, at 779 ("[T]he Court approved of a scheme where an agency within the judiciary was permitted to set guidelines to determine criminal sentences relating to federal crimes.").

476. *See* Krotoszynski, *supra* note 81, at 247–48.

explicitly and take the political heat for deciding to do so."[477] In *National Cable Television Ass'n v. United States*, the Court held that Congress must clearly indicate "its intention to delegate" the authority to impose additional financial burden to recover administrative costs not inuring directly to the benefit of regulated parties.[478] Such "additional financial burden" refers to a "tax" instead of a "fee" as its revenue is not used for the benefit of regulated parties, but for public interest.[479] Although the *Mid-American Pipeline* Court rejected a stricter and different non-delegation doctrine for delegations of revenue authority, it did not overrule the clear statement rule.[480]

As long as Congress delegates the authority in an explicit way, tax delegations pass this test. In this carbon tax proposal, Congress expressly delegates the authority to determine carbon tax rates "requisite to achieve certain goals for carbon emission reduction" or "requisite to internalize social costs of carbon emissions." Therefore, this proposal not only passes the "intelligible principle" test under the non-delegation doctrine, but also passes the clear statement rule as a potential non-tax-delegation doctrine.

VII. CONCLUSION

Taxes are generally less delegable than environmental regulations and other regulatory areas in practice. This different treatment might be justified in the case of taxes for revenue-raising, such as income taxes. However, environmental taxes are distinguished from income taxes for their purpose of environmental regulation. With the nature of regulatory taxes, environmental taxes demand a reconsideration of the long-existing "tax vs. regulation" distinction for delegation issue.

Current delegation of environmental taxes in the Internal Revenue Code is as narrow as the case of tax delegation in general. Though some environmental statutes, the CAA in particular, seem to provide some implied delegation of power to regulate by taxation, delegated agencies have not yet imposed any environmental tax under such delegation. Such implied delegation likely fails to materialize because of the agencies' unwillingness to explore regulatory taxes and the potential constitutional requirement of explicit delegation. In comparison, environmental tax delegation in China is distinguishably broad despite the general trend toward narrow and controlled tax delegation. The Chinese legislature has considered the regulatory purpose in expanding the delegation of tax rates and tax base as well as tax exemptions and tax credits in the new Environmental Protection Tax Law. Thus, providing a valuable reference for the U.S. to expand its environmental tax delegation.

To realize the goal of environmental regulation, Congress should consider the option of delegating carbon tax rates to the EPA. Congress could delegate the EPA to determine and adjust carbon taxes rates "requisite to achieve certain goals for carbon emission reduction" or "requisite to internalize social costs of carbon

477. *See* Cass R. Sunstein, *Nondelegation Canons* 16 (John M. Olin Program in Law & Economics Working Paper No. 82, 1999), http://nrs.harvard.edu/urn-3:HUL.InstRepos:12911337.

478. Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340–43 (1974).

479. *Id.* at 340–41.

480. Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 214 (1989).

emissions." Such delegation of carbon taxes can advance the EPA's regulatory mission due to the EPA's comparative advantages of expertise in environmental policymaking, adaptability to the uncertainty and volatility of climate change issues, and coordination of environmental policy instruments. The regulatory nature of environmental taxes also weakens the legitimacy concerns of distributional consequences, transfer of property to government, and consolidation of power in one branch of government. Moreover, the EPA is likely to be more responsible than Congress in producing urgently needed, but politically unpopular, carbon tax and could be held accountable to Congress's intent and the public by administrative law.

This proposal to delegate carbon tax rates is also likely to pass constitutional muster on the basis of the Origination Clause and the non-delegation doctrine. The Origination Clause is unlikely to be applicable to this proposal because it is not a "bill for revenue raising." The non-delegation doctrine is also unlikely to block this proposal, as the proposal contains a qualified "intelligible principle" of "achiev[ing] certain goals for carbon emission reduction" or "internaliz[ing] social costs of carbon emissions." Potential non-tax-delegation doctrines like the theories of tax exceptionalism and core legislative functions are problematic and unlikely to be applicable to carbon taxes due to their regulatory purpose. While the clear statement rule may apply, this proposal could easily comply with the rule by offering an explicit delegation.

This Article demonstrates the advantages, legitimacy, and feasibility of carbon tax delegation. In view of the stalled situation in climate change lawmaking, transferring the focus from direct congressional lawmaking to the possibility of delegated lawmaking by agencies may provide a new perspective to break the gridlock of carbon tax legislation.