COMMENTS

The Uniformity Clause

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . . .[1]

Congress's power to tax, granted in the first part of this sentence, is limited by the second part, which is known as the "uniformity clause." Though the power of taxation is among the most awesome that government possesses,[2] the nature and extent of the limitation placed on that power by the uniformity clause has only infrequently been considered by the Supreme Court; in no case has the clause been relied upon to invalidate a statute. The most recent decision, *United States v. Ptasynski*,[3] which leaves the uniformity clause virtually an empty shell, invites a more thorough consideration of the clause than it has yet been given.

A review of the Supreme Court's treatment of the uniformity clause will show that the Court has tried, without success, to devise a workable rule with which to enforce it. The Court's early uniformity clause decisions[4] developed a test according to which a tax satisfies the clause if it operates in a geographically uniform manner. This test correctly reflects the purpose of the uniformity

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[1] U.S. CONST. art. I, § 8, cl. 1.

[2] *Cf.* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) ("[T]he power to tax involves the power to destroy . . . .").

[3] 103 S. Ct. 2239 (1983).

[4] The two most important cases are Head Money Cases, 112 U.S. 580 (1884) (discussed *infra* notes 6-12 and accompanying text), and Knowlton v. Moore, 178 U.S. 41 (1900) (discussed *infra* notes 13-28 and accompanying text). Other cases that discuss the uniformity clause include Regional Rail Reorganization Act Cases, 419 U.S. 102, 156-61 (1974); Fernandez v. Wiener, 326 U.S. 340, 359-61 (1945); Riggs v. Del Drago, 317 U.S. 95, 102 (1942); Phillips v. Commissioner, 283 U.S. 589, 602 (1931); Poe v. Seaborn, 282 U.S. 101, 117-18 (1930); Bromley v. McCaughn, 280 U.S. 124, 138 (1929); Florida v. Mellon, 273 U.S. 12, 17 (1927); LaBelle Iron Works v. United States, 256 U.S. 377, 392-93 (1921); Billings v. United States, 232 U.S. 261, 282 (1914); Flint v. Stone Tracy Co., 220 U.S. 107, 158-59 (1911); Downes v. Bidwell, 182 U.S. 244, 248-49 (1901); Nicol v. Ames, 173 U.S. 509, 520-23 (1899); Hylton v. United States, 3 U.S. (3 Dall.) 171, 173, 175, 181 (1796).

clause: to restrain Congress in the imposition of geographically discriminatory taxes. Unfortunately, the test is also inadequate, since all taxes, no matter how they are framed, have *some* geographically nonuniform effects. The Court's early decisions provided no clear criterion for distinguishing permissible from impermissible nonuniformity.

In *Ptasynski,* the Court attempted to establish such a criterion. The opinion in this case, however, suggests that only the most patently discriminatory taxes will even be examined for violations of the uniformity clause; furthermore, such examinations are apparently to be conducted in a manner that is extremely deferential toward Congress. *Ptasynski* teaches Congress how good draftsmanship can protect its tax laws against uniformity clause challenges; but in doing so, it deprives the clause of any force as a check on congressional power.

After criticizing the Court's uniformity clause jurisprudence, this comment argues that the uniformity clause should be read in light of the Constitution's general preference for free markets and unrestrained economic competition. While acknowledging that the framers of the clause were probably concerned primarily with preventing deliberate discrimination by majority factions in Congress, the comment argues that these concerns are best addressed by a more objective constitutional test. Borrowing from the Court's jurisprudence of the privileges and immunities clause and of the "dormant commerce power," the comment proposes and explains a new test for enforcing the uniformity clause. Though *Ptasynski* may have been wrongly decided, the decision is not a major obstacle to the Court's adopting, at the next opportunity, the approach developed here.

I. The Case Law under the Uniformity Clause

A. The Early Cases

The Constitution requires that indirect taxes—duties, imposts, and excises—be "uniform."[5] Because the goods and activities that

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[5] Following the Supreme Court's usage, this comment refers to duties, imposts, and excises as "taxes," even though the Constitution appears to distinguish "taxes" on the one hand from "duties, imposts and excises" on the other. *Compare* U.S. Const. art. I, § 8, cl. 1 (Congress may lay and collect "Taxes, Duties, Imposts and Excises," but "Duties, Imposts and Excises" must be uniform) *with* United States v. Ptasynski, 103 S. Ct. 2239, 2243 (1983) (speaking of duties, imposts, and excises as "indirect taxes"), *and* Knowlton v. Moore, 178 U.S. 41, 88 (1900) (discussing "the classes of taxes termed duties, imposts and excises").

The comment also follows the Court's convenient usage in calling duties, imposts, and

can be taxed are distributed unequally through the country, virtually all such taxes have nonuniform effects. A tax on tobacco, for example, will affect the tobacco-growing regions more severely than others. Since the Constitution expressly empowers Congress to levy indirect taxes, it must also permit some of the nonuniform effects that inevitably accompany them. The principal challenge in interpreting the uniformity clause, therefore, is to distinguish whatever nonuniformity is forbidden by the Constitution from such permissible nonuniform effects.

The Court's earliest exposition of the uniformity clause occurs in a brief dictum in the *Head Money Cases*.[6] There, the Court declared that a tax is uniform if it "operates with the same force and effect in every place where the subject of it is found."[7] This seminal formula, which may be called the "*Head Money* rule," has been frequently cited and never criticized by the Court.[8] The *Head*

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excises "indirect" taxes. *See, e.g., Ptasynski*, 103 S. Ct. at 2243. This class of taxes is very broad and perhaps not susceptible of perfectly clear definition:

> Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare.

Knowlton, 178 U.S. at 88. Apparently, the Court has assumed that the uniformity clause applies to all taxes that are not "direct" within the meaning of the apportionment clause, U.S. CONST. art. I, § 9, cl. 4. *See Knowlton*, 178 U.S. at 83; Nicol v. Ames, 173 U.S. 509, 515 (1899).

Although the constitutional meaning of "direct" taxation is notoriously elusive, *see* Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796); Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819, 853-60 (1981) (discussing *Hylton*), the Court has generally assumed that once a tax is found to be outside the reach of the apportionment clause, it is within the reach of the uniformity clause. *See, e.g., Knowlton*, 178 U.S. at 83; *Nicol*, 173 U.S. at 515-20. *But see Hylton*, 3 U.S. (3 Dall.) at 173 (Chase, J.), 175 (Paterson, J.), 181 (Iredell, J.); *Head Money*, 112 U.S. at 595-96; *infra* note 6.

[6] Head Money Cases, 112 U.S. 580 (1884). A federal statute had laid a small charge on the carrier of each alien coming by sea from a foreign port to any American port. The purpose of the charge was to raise funds for administering the immigration laws and for aiding immigrants who found themselves in distress after their arrival. *Id.* at 589-90. One challenge to the statute was based on the fact that the charge did not apply to aliens who entered over the inland borders. The uniformity clause had been violated, it was argued, because the tax applied only in those areas of the country where seaports were located. *Id.* at 583-84 (summarizing the argument for the plaintiff).

The Court ruled that the immigration charge was not a "tax" in the constitutional sense of that term, but rather a "mere incident of the regulation of commerce," to which the uniformity clause did not apply. *Id.* at 595-96. Recognizing, however, that the charge was very much like a tax, the Court provided a brief analysis indicating that the statute would have been upheld if the uniformity clause had been applicable. *Id.* at 594-95.

[7] *Id.* at 594.

[8] *See, e.g.*, United States v. Ptasynski, 103 S. Ct. 2239, 2244 (1983); Regional Rail Reorganization Act Cases, 419 U.S. 102, 160-61 (1974); Knowlton v. Moore, 178 U.S. 41, 86

Money rule reflects the Court's assumptions that "perfect" uniformity is unattainable[9] and that the Constitution must mean to forbid only *geographically* nonuniform taxation.[10] Further, the Court assumed that neither the Constitution nor the *Head Money* rule prohibits geographically nonuniform *effects,* which are the inevitable concomitants of indirect taxes.[11] The *Head Money* rule is based on a common sense reading of the uniformity clause: the framers must have intended the uniformity requirement to be attainable, but they must also have thought that it imposed some definable restriction on Congress.

The *Head Money* rule, however, does not by itself place any important limitation on congressional power. Its weakness lies in its silence about the bounds, if any, on Congress's discretion to define the "subjects" of taxation. Suppose, for example, that Congress chose to define the "subject" of an excise tax as "all tobacco grown in Maryland." With this definition, the *Head Money* rule would be formally satisfied, but the most flagrant geographic discrimination would be possible. Now suppose that some kind of natural blight arose, which reduced the yields in most American tobacco fields, but which had not spread to Maryland. Could Congress then define the subject of an excise as "all tobacco grown in Maryland," without rendering the uniformity clause meaningless? Would it make a difference if the definition were "all tobacco not harvested from fields affected by the blight"? The *Head Money*

(1900).

[9] "Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream . . . ." *Head Money,* 112 U.S. at 595 (citation omitted). The Court did not explain what "perfect" uniformity would be, nor why it cannot exist. In Knowlton v. Moore, 178 U.S. 41, 106 (1900), the Court held that only geographic uniformity is required. *See infra* notes 13-24 and accompanying text. After *Knowlton* it would be unprofitable to inquire about the precise nature of other kinds of uniformity that are not required by the Constitution.

[10] The Court assumed, without explanation, that the Constitution requires only geographic uniformity: "The uniformity here prescribed has reference to the various localities in which the tax is intended to operate." *Head Money,* 112 U.S. at 594. In Knowlton v. Moore, 178 U.S. 41 (1900), the Court explained and defended this assumption. *See infra* notes 13-24 and accompanying text.

[11] The Court based this assumption on traditional practice: "Is the tax on tobacco void, because in many of the States no tobacco is raised or manufactured? Is the tax on distilled spirits void, because a few states pay three-fourths of the revenue arising from it?" *Head Money,* 112 U.S. at 594.

Justice Miller, the author of the opinion, apparently thought that this was crucial. Some years later, he summarized the case by stating the *Head Money* rule accompanied by the following remark: "There is no want of uniformity simply because the thing taxed is not equally distributed in all parts of the United States." SAMUEL F. MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 264 (1891).

rule leaves these questions unanswered.[12]

In *Knowlton v. Moore*,[13] the Court's most thorough treatment of the framers' intent in drafting the uniformity clause, a more elaborate and well-supported version of the *Head Money* analysis was presented. The case dealt with a revenue act that included an inheritance tax exempting small legacies and taxing larger ones at progressive rates.[14] It was claimed that the inheritance tax violated the uniformity clause because it did not operate in precisely the same manner on all individuals or all property.[15] The Court held that this kind of "intrinsic uniformity" is not required by the Constitution; rather, it demands only geographic uniformity in the sense suggested by the *Head Money* rule.[16] Against the "intrinsic uniformity" interpretation, the Court offered three separate arguments.

First, the language of the uniformity clause itself suggests a geographic meaning. If "uniformity" required that taxes affect all persons or all property identically, nothing would be added by specifying that this uniformity must extend "throughout the United States." But the quoted phrase does have meaning if it is taken to qualify the term "uniform" by giving it a geographic sense. Thus, the narrower reading is more natural and accords with

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[12] The *Head Money* Court appears to have recognized the inadequacy of the *Head Money* rule. After stating the rule, it recapitulated its earlier discussion of Congress's purposes in enacting the challenged immigration charge, *see supra* note 6, and concluded: "Here there is substantial uniformity within the meaning and purpose of the Constitution." *Head Money*, 112 U.S. at 595. The opinion, however, contains no discussion of the constitutional "purpose"; nor did the Court explain how to distinguish substantial from insubstantial uniformity.

[13] 178 U.S. 41 (1900).

[14] *See id.* at 83-84.

[15] The Court termed this demand for identical treatment the "intrinsic uniformity" requirement. *Id.* at 84-85. The opinion does not make clear whether the requirement would demand that individuals or property or both be treated identically. Nor does it explain how such a requirement could be met. In any case, however, it is clear that "intrinsic uniformity" would be a far more stringent requirement than geographic uniformity. *See id.* Since *Knowlton* demonstrates that only geographic uniformity is required by the Constitution, it is no longer important to know exactly what "intrinsic uniformity" would be.

[16] A tax is uniform if it "operates with the same force and effect in every place where the subject of it is found." *Knowlton*, 178 U.S. at 86 (quoting *Head Money*, 112 U.S. at 594). *Knowlton* also uses this equivalent formulation: "wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate." *Id.* at 84.

The *Knowlton* holding, unlike the holding in *Head Money*, depends on the Court's construction of the uniformity clause. *Knowlton* is therefore more authoritative, in addition to being more carefully argued. While this provides support for the *Head Money* rule, it should be noted that *Knowlton* holds only that a progressive rate structure does not cause a tax to violate the uniformity clause.

the canon of construction that requires giving an effect to each word of the Constitution.[17]

Second, the Court pointed out that the constitutional scheme of taxation would make little sense unless the uniformity clause had a geographic meaning. Indirect taxes are least likely to affect all persons equally since few, if any, taxable goods and services are produced or consumed equally by everyone. To abolish a whole class of quite traditional taxes by an indirect and ambiguous uniformity requirement would be a perversity that should not needlessly be attributed to the Constitution.[18] Furthermore, direct taxes (such as the capitation tax) are not subject to the uniformity requirement, though they are the very ones with respect to which some kind of "intrinsic" uniformity would often be practicable. Direct taxes are instead subject to the apportionment requirement,[19] whose purpose is manifestly to prevent certain kinds of discrimination among the states and regions.[20] Giving the uniformity clause a geographic significance is consonant with the same general purpose and thus harmonizes two related constitutional provisions.[21]

Third, the Court showed that the historical record strongly supports a geographic interpretation of the uniformity clause. An extensive review of the use of indirect taxes in England, in the American colonies and states, and in the early Congresses provided no evidence that a rule of intrinsic uniformity had ever been adopted.[22] A thorough examination of the records of the Continental Congress and the Federal Convention indicated that the purpose of the clause is to prevent Congress from favoring one state or region over another;[23] taxes with incidental nonuniform effects

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[17] *Id.* at 87.

[18] *Id.* at 87-89.

[19] U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."), *modified*, U.S. CONST. amend. XVI.

[20] *See Knowlton*, 178 U.S. at 89 ("Now, that the requirement that direct taxes should be apportioned among the several States, contemplated the protection of the States, to prevent their being called upon to contribute more than was deemed their due share of the burden, is clear."). *See also* DAVID HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 142 (1975) (purpose of the apportionment clause was to prevent property, including slaves, from being taxed at arbitrary rates, i.e., rates not corresponding to productive value).

[21] *Knowlton*, 178 U.S. at 89.

[22] *Id.* at 89-95.

[23] *Id.* at 95-106. The Court's conclusion is summarized in these passages:

> [T]he sole and the only question which was ever present and in every form was discussed, was the operation of any taxing power which might be granted to Congress upon the respective States; in other words, the discrimination as regards States which might arise from a greater or lesser proportion of any tax being paid within the geo-

were not meant to be proscribed.[24]

By firmly establishing that the uniformity clause does not require "intrinsic" uniformity, *Knowlton* is able to avoid an interpretation that would virtually eliminate the federal government's power to use indirect taxes.[25] At the same time, *Knowlton,* like *Head Money,* insists that geographic uniformity *is* required and that the clause thereby puts some limitation on Congress's power to impose indirect taxes. The constitutional provision is thus saved from being either absurdly strict or completely empty.

Like "intrinsic" uniformity, however, geographic uniformity could be interpreted so strictly that few, if any, indirect taxes could meet the constitutional test.[26] By refusing to accept the argument that every tax with geographically nonuniform *effects* is constitutionally infirm, *Head Money* and *Knowlton* preserve the uniformity clause from another interpretation that would render it absurd or perverse.[27]

The principal positive contribution of the two cases is to show that the general purpose of the uniformity clause is to prevent Congress from employing discriminatory taxes in the service of regional favoritism. *Head Money* seems to assume such a purpose tacitly, and *Knowlton* shows that this was indeed how the clause must have been understood by those who framed and ratified the

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graphical limits of a particular State.

Id. at 96 (discussing the debates in the Continental Congress).

> Considering the . . . [constitutional] convention, the same observation is pertinent which we have previously made as to the Continental Congress . . . . [N]ot a single word is found in any of the debates . . . which give the slightest intimation that any suggestion was ever made that the grant of power to tax was considered from the point of view of its operation upon the individual.

Id. at 101.

[24] The Court supported this conclusion as follows:

> The sense in which the word "uniform" was used is shown by the fact that the committee [on style], whilst adopting in a large measure the proposition of Mr. McHenry and General Pinckney, "that all duties, imposts, excises, prohibitions or restraints . . . shall be uniform and equal throughout the United States," struck out the words "and equal." Undoubtedly this was done to prevent the implication that taxes should have an equal effect in each State. As we have seen, the pith of the controversy during the Confederation was that even, although the same duty or the same impost or the same excise was laid all over the United States, it might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective States.

Id. at 104 (referring to the Federal Convention). The Court's examination of the records of the Continental Congress and of the Federal Convention led it to substantially identical conclusions. *See id.* at 95-106.

[25] *See supra* text following note 5; *supra* note 18 and accompanying text.

[26] *Cf. supra* text following note 5.

[27] *See supra* note 11 and accompanying text.

Constitution.[28] But because the Court never distinguished permissible from impermissible "subjects" of taxation, the *Head Money* rule, standing alone, could be converted into an empty formality. Both *Head Money* and *Knowlton* supplement the *Head Money* rule with discussions of the purpose of the clause, thus suggesting—without declaring—that the class of permissible "subjects" would have to be defined in light of that purpose. Neither opinion, however, formulates such a definition.

B. The Supreme Court Reconsiders the Uniformity Clause

1. *United States v. Ptasynski.* Recently, the Court was presented with an opportunity to solve the principal problem left open by *Head Money* and *Knowlton*. *United States v. Ptasynski*[29] is the first case that directly addresses the limits on Congress's discretion to choose the "subjects" of taxation. In an important dictum, the Court declared that any tax in which the "subject" is defined in nongeographic terms satisfies the uniformity clause.[30] *Ptasynski* holds that where the "subject" *is* defined in geographic terms, the tax will be scrutinized for "actual geographic discrimination";[31] apparently, however, this scrutiny will be accompanied by considerable deference toward Congress's judgment.[32]

The *Ptasynski* case arose after Congress enacted the Crude Oil Windfall Profit Tax Act of 1980,[33] which imposed an excise on the production of domestic crude oil.[34] Employing a number of criteria, the law divided oil into numerous categories, which were

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[28] *See supra* notes 23-24 and accompanying text.

[29] 103 S. Ct. 2239 (1983).

[30] *Id.* at 2245 (citing *Knowlton*, 178 U.S. at 106). This dictum is a crucial element of the Court's understanding of the meaning of the uniformity clause. For that reason, although it is not strictly necessary to the holding in the case, it contributes significantly to the analysis that appears to lead the Court to its holding; the dictum is therefore obiter only in a somewhat attenuated sense. This part of the Court's opinion is criticized *infra* notes 60-64 and accompanying text.

[31] *Ptasynski*, 103 S. Ct. at 2245.

[32] *See id.* at 2246; *infra* notes 56-59 and accompanying text. This part of the Court's opinion is criticized *infra* notes 64-67 and accompanying text.

[33] Pub. L. No. 96-223, 94 Stat. 229 (codified as amended at 26 U.S.C. §§ 4986-4998 and scattered other sections of 26 U.S.C. (1982)).

[34] The Act purports to be taxing "windfall profits," but this is somewhat inaccurate and misleading. While the Act is undoubtedly aimed generally at reducing oil producers' profits, "windfall profits" are defined in the Act without reference to either windfalls or profits: though the tax on any given barrel of oil is limited to 90% of the "net income" attributable to that barrel, the tax can be imposed even when a taxpayer has had a loss on his operation. *See* 26 U.S.C. § 4988 (1982). At the crucial point in the Act, the tax is accurately characterized as an "excise." *Id.* § 4986(a).

then taxed at various rates or exempted from the tax altogether.[35] Among the exemptions was one for oil from most areas north of the Arctic Circle,[36] where production was said to be especially difficult and expensive.[37] This provision for "exempt Alaskan oil"[38] stimulated a constitutional challenge by affected taxpayers[39] and by the states of Texas and Louisiana.[40] The United States District Court for the District of Wyoming, relying largely on *Head Money* and *Knowlton,* found that the Alaskan exemption violated the uniformity clause: "The Constitution has unequivocally set forth a limitation on indirect taxation—uniformity—which has been narrowly, but precisely defined by the judiciary. Distinctions based on geography are simply not allowed."[41] In a unanimous decision, announced in a brief opinion, the Supreme Court reversed, thus upholding the tax.[42]

The *Ptasynski* Court began its analysis by examining the intent of the framers. Noting that direct evidence from the Federal Convention is very scanty, the Court nonetheless observed that a general concern with regional discrimination clearly underlay the adoption of the uniformity clause.[43] The Court offered an extrajudicial statement by Justice Story as a fair summary of the purpose of the constitutional provision. That statement emphasizes the extreme oppression that could result if a self-serving combination of states were to get control of the federal taxing power.[44]

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[35] *Id.* §§ 4988-4994. For a brief summary of the rather complicated scheme of categories and exemptions, see Licata, *Windfall Profit Tax Declared Unconstitutional,* 31 OIL & GAS TAX Q. 637, 637-39 (1983).

[36] 26 U.S.C. §§ 4991(b), 4994(e) (1982).

[37] *See* United States v. Ptasynski, 103 S. Ct. 2239, 2242 (1983) (discussing the legislative history of the exemption for oil produced in most areas north of the Arctic Circle).

[38] 26 U.S.C. §§ 4991(b), 4994(e) (1982).

[39] The plaintiffs and intervenors included individual taxpayers (oil producers and royalty owners) and several industry associations. Ptasynski v. United States, 550 F. Supp. 549, 550 (D. Wyo. 1982).

[40] *Id.*

[41] *Id.* at 553. A challenge under the fifth amendment's takings clause was rejected by the district court. *Id.* at 555. The Supreme Court's *Ptasynski* opinion gives no indication that that rejection should be reconsidered. For an analysis supporting the fifth-amendment challenge, see Epstein, *Taxation, Regulation, and Confiscation,* 20 OSGOODE HALL L.J. 433, 433-41, 443-45 (1982).

[42] United States v. Ptasynski, 103 S. Ct. 2239 (1983).

[43] *Id.* at 2243 & n.10. This passage concisely summarizes the very detailed discussion in *Knowlton,* 178 U.S. at 101-06 (discussed *supra* notes 23-24 and accompanying text).

[44] 103 S. Ct. at 2243-44 (quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 957 (T. Cooley ed. 1873) (1st ed. Boston 1833)). The passage quoted from Story is this:

> [The purpose of the clause] was to cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests. Unless duties,

The Court then observed that this general statement of purpose does not sufficiently define the scope of the uniformity clause. After discussing the *Head Money* rule,[45] the Court declared that

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imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist. The agriculture, commerce, or manufactures of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors.

Story's central point is obscured by the Court's failure to quote the entire passage, which continues:

> The constitution, throughout all its provisions, is an instrument of checks and restraints, as well as of powers. It does not rely on confidence in the general government to preserve the interests of all the States. It is founded in a wholesome and strenuous jealousy, which, foreseeing the possibility of mischief, guards with solicitude against *any* exercise of power which *may* endanger the States, as far as it is practicable. If this provision as to uniformity of duties had been omitted, although the power might never have been abused to the injury of the feebler States of the Union, (a presumption which history does not justify us in deeming quite safe or certain,) yet it would, of itself, have been sufficient to demolish, in a practical sense, the value of most of the other restrictive clauses in the Constitution. New York and Pennsylvania might, by an easy combination with the Southern States, have destroyed the whole navigation of New England. A combination of a different character, between the New England and the Western States, might have borne down the agriculture of the South; and a combination of a yet different character might have struck at the vital interests of manufactures. So that the general propriety of this clause is established by its intrinsic political wisdom, as well as by its tendency to quiet alarms and suppress discontents.

1 J. STORY, *supra*, § 957 (citation omitted) (emphasis added). Story emphasized that the uniformity clause is one of the devices by which the Constitution puts *more* restraint on the federal government than may be absolutely necessary to protect the interests of the constituent states and regions. The Court's selective quotation conveys the impression that the uniformity clause was meant to prevent only the most egregiously discriminatory taxation, while Story's point is almost the opposite. The Court's reading of Story seems to have colored its understanding of the uniformity clause itself: the term "undue preferences" from the Story passage reappears—without the accompanying adjective "all"—in the Court's highly deferential evaluation of Congress's motives in enacting the Alaskan exemption to the windfall profit tax. *See Ptasynski*, 103 S. Ct. at 2246. For further discussion of the purpose of the uniformity clause, see *infra* notes 69-108 and accompanying text.

[45] 103 S. Ct. at 2244. The Court failed to note that the drafters of the Windfall Profit Tax Act were evidently aware of the *Head Money* rule, for they defined the "subject" of the tax as "taxable crude oil." 26 U.S.C. § 4986(a) (1982). Since this definition of the "subject" of the tax includes no geographic terms, the *Head Money* rule was not formally violated. Obviously, were the Court to permit so blatant an *ipse dixit*, the uniformity clause would be reduced to a meaningless formality. But though the *Ptasynski* Court referred to the *Head Money* rule three times, *see* 103 S. Ct. at 2242, 2244, 2245, it never pointed out how easy it is to ensure that *any* tax will formally satisfy the rule.

Although the Court either overlooked or ignored the attempt by the Act's draftsmen to evade the *Head Money* rule, the Court apparently did assume that the "subject" of the tax could properly be defined to exclude "exempt Alaskan oil." *See Ptasynski*, 103 S. Ct. at 2242 (referring to exempt oil as a "separate class of oil"). This makes it possible to reconcile the Alaskan exemption with the *Head Money* rule, for if the "subject" of the tax were "oil," the Alaskan exemption would violate the *Head Money* rule. In the same paragraph, however, the Court seems to have forgotten its assumption and reverted to a more natural

the clause does not restrict Congress's freedom to define the "subjects" of taxation, so long as the definition does not employ geographic terms.[46] Thus, had the tax challenged in *Ptasynski* provided an exemption for all oil produced from wells that cost more than $1,000,000 to drill, there would presumably not have been even a colorable objection based on the uniformity clause, although the effects of this definition might have been virtually identical to those of the geographic definition that Congress in fact used.[47] This conclusion apparently rested on the assumption that if geographic terms were avoided in defining the subjects of taxation, the abuses that the uniformity clause was intended to prevent could not be achieved.

Once the Court announced this sweeping new rule, only one question remained: when may Congress permissibly define the "subject" of a tax in overtly geographic terms?[48] In order to answer this question, the Court turned to a recent decision under the

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description of the tax: "Congress chose to exempt oil produced in the defined region from the windfall profit tax." *Id.* If this implies that Congress exempted a certain region from a tax on oil, the *Head Money* rule was violated.

These rather difficult distinctions between geographic exemptions from a tax (which violate the *Head Money* rule) and geographic exemptions from the "subject" of a tax (which may or may not violate the *Head Money* rule) suggest the need for a test that reflects more directly the purposes that the uniformity clause was meant to serve. Such a test is proposed *infra* notes 109-32 and accompanying text.

[46] 103 S. Ct. at 2244. Here, and again later in the opinion, the Court cited *Knowlton* for the proposition that *any* definition framed in nongeographic terms is permissible. *See id.* at 2244, 2245 (citing *Knowlton*, 178 U.S. at 106). This is simply wrong. The cited passage in *Knowlton* merely states that the words of the uniformity clause "do not signify an intrinsic but simply a geographical uniformity." The same passage quotes a comment from the ratification debates suggesting at most that some (unspecified) geographically nonuniform effects are compatible with the clause. *Id.* Thus, *Ptasynski*'s most sweeping and radical innovation rests on a misstatement of a prior case. Fortunately, this innovation is not part of the holding in the case. *See supra* note 30.

[47] Apparently, this definition would have had substantially the same effect as the geographic definition of "exempt Alaskan oil" used by Congress. *See Ptasynski*, 103 S. Ct. at 2242 n.7. An even more refined definition could undoubtedly be constructed by adding criteria phrased in terms of climate, availability of transport, and perhaps even proximity to Eskimos. In any event, the Court assumed that the equivalent effect could have been achieved by using *some* definition that lacked geographic terms. *See Ptasynski*, 103 S. Ct. at 2245 ("We cannot say that when Congress uses geographic terms to identify the same subject [that it could have defined in nongeographic terms], the classification is invalidated."). This assumption suggests that the Court was deliberately adopting a rule designed to make it easy for Congress to prevent uniformity clause challenges to its taxation measures. The suggestion gains further support from the Court's highly deferential treatment of Congress's motives in enacting the Alaskan exemption to the windfall profit tax. *See infra* notes 56-59, 64-67 and accompanying text.

[48] 103 S. Ct. at 2244.

bankruptcy clause.[49] This decision—*Regional Rail Reorganization Act Cases* (*"Rail Act Cases"*)[50]—had indicated that the power of Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States"[51] permitted the enactment of a special bankruptcy law for the financially troubled railroads in one region of the country.[52] The Court in the *Rail Act Cases* had cited *Head Money* for the proposition that where Congress is addressing a geographically isolated problem, a law can be uniform even though it treats different regions differently.[53] The Court concluded, on the strength of the *Rail Act Cases*' reading of the bankruptcy clause,[54] that the uniformity clause permits Congress to ad-

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[49] The Court acknowledged in a footnote that this question had already been answered in Downes v. Bidwell, 182 U.S. 244 (1901). In *Downes*, which was decided only a year after *Knowlton* and by the same Justices, the Court expressly indicated that if the "subject" of a duty were defined as "goods originating in Puerto Rico" and if Puerto Rico were a part of the United States, the duty would violate the uniformity clause. *See Downes*, 182 U.S. at 249. Though this was dictum, so, too, were virtually all the passages from *Head Money* and *Knowlton* on which *Ptasynski* relies. *See supra* note 6 and accompanying text; *supra* note 16. The *Ptasynski* Court did not explain why it chose to give so much weight to *Head Money* and *Knowlton* and none at all to *Downes*.

[50] 419 U.S. 102 (1974).

[51] U.S. CONST. art. I, § 8, cl. 4.

[52] *See* 419 U.S. at 156-61.

[53] 419 U.S. at 160-61. While emphasizing one particular fact in *Head Money* (that Congress was addressing a geographically isolated problem), the *Rail Act Cases* did not mention that the comments in *Head Money* about the uniformity clause were dicta. Nor did the *Rail Act Cases* mention the fact that under the peculiar facts of *Head Money*, no region was given any special advantage or disadvantage. The money raised by the immigration charge was to be spent to aid immigrants, and it could therefore be assumed that the revenue raised and the expenditures made with that revenue would be roughly equivalent in any given region. *See supra* note 6. On the significance of this fact, see *infra* notes 69-108 and accompanying text (arguing that the purpose of the uniformity clause is to prevent the granting of a competitive advantage to particular regions).

[54] The *Ptasynski* Court did not explain in detail why it should rely on a bankruptcy clause case to construe the uniformity clause. There appear, however, to be two possible justifications for this reliance. First, the word "uniform" occurs in both clauses. The same word, however, may have different meanings at different places in the Constitution. *Cf.* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-15 (1819) (Marshall, C.J.) (arguing that the word "necessary" has different meanings at different places in the Constitution). The Court itself acknowledged that the purposes of the two clauses are not identical. *Ptasynski*, 103 S. Ct. at 2244 n.13. Since the Court did not explain what the different purposes are or why they do not affect the meaning of the words used, one is left without a compelling reason to suppose that the language has an identical meaning in both places.

A second justification for turning to the *Rail Act Cases* is (as the Court noted in *Ptasynski*) that *Head Money* was cited in that opinion. Indeed, the Court went so far as to state that the "substance" of the decision in the *Rail Act Cases* was that the *uniformity clause* (rather than the uniformity provision of the bankruptcy clause, which is what was at issue in the *Rail Act Cases*) does not prohibit Congress from "considering geographically isolated problems." *Ptasynski*, 103 S. Ct. at 2245. This is both a misstatement of the *Rail Act Cases* holding and a gross overstatement of the authority of the *Rail Act Cases*' citation,

dress "geographically isolated problems" by framing taxes in geographic terms.[55]

In order to distinguish those cases where Congress is attempting to solve "geographically isolated problems" from those in which it is violating the uniformity clause, the Court formulated a new constitutional test: "where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination."[56] The Court then briefly discussed Congress's motives in enacting the Windfall Profit Tax Act,[57] alluded to Congress's finding that oil production is more difficult and expensive in northern Alaska than elsewhere,[58] and concluded that the challenged exemption was a reasonable attempt by Congress to address this geographically iso-

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in dictum, of dicta from *Head Money*. It should be noted that the dissent in the *Rail Act Cases* complained that *Head Money* had been misused by the majority. *See Rail Act Cases*, 419 U.S. at 184 n.22 (Douglas, J., dissenting). If the *Rail Act Cases* Court was wrong to conflate the uniformity and bankruptcy clauses, there is no reason for any later Court to repeat the error.

Even if one assumes that the word "uniform" has an identical meaning in the bankruptcy clause and in the uniformity clause, the Court may have construed the word incorrectly in the *Rail Act Cases*. *See id.* at 180-85 (Douglas, J., dissenting). The Court's misconstruction of the term "uniform" in one clause of the Constitution would not justify mechanically extending that misconstruction to other unrelated constitutional provisions. And since the Court's interpretation of one clause is not strong precedent for its later consideration of the meaning of another clause, it would be entirely proper to approach the interpretation of the uniformity clause without being unduly influenced by the prior treatment of the bankruptcy clause.

This comment explicates the meaning of the uniformity clause. *See infra* notes 69-108 and accompanying text. Bankruptcy clause decisions that interpret the word "uniform" differently are not relevant to that meaning unless it can be shown both that the word has the same meaning in both clauses and that such bankruptcy decisions correctly construed the word. *Ptasynski* does neither.

[55] 103 S. Ct. at 2245.

[56] *Id.* (citing *Rail Act Cases*, 419 U.S. at 160-61). The term "actual geographic discrimination" is not defined in *Ptasynski*. Curiously, the sentence announcing the "actual geographic discrimination" test is followed by a citation to the passage in the *Rail Act Cases*, 419 U.S. at 160-61, where *Head Money* is invoked. Neither the *Rail Act Cases* nor *Head Money* uses the phrase in question.

[57] 103 S. Ct. at 2245-46.

[58] *Id.* at 2246; *cf. id.* at 2242 n.7 (citing evidence that "the cost of developing oil in Alaska far exceeds that in other parts of the country"). The Court seems to have assumed that, because the harsh climate in northern Alaska makes drilling wells there more expensive than elsewhere, the cost of oil production must also be higher. This is a false inference, because the cost per-barrel-produced is affected by factors other than drilling costs (e.g., the number of wells that must be drilled in order to produce a given amount of oil). Furthermore, the Court was provided with specific examples of areas that have high production costs for reasons other than those that apply in Alaska: offshore fields, heavy oil fields, deep oil horizons, and fields requiring secondary and tertiary flooding. Brief of Amici Curiae, The Legal Foundation of America, et al. at 8, *United States v. Ptasynski*. *See also infra* note 142.

lated problem.[59]

2. *Defects in the Ptasynski Analysis.* The Court's opinion in *Ptasynski* reflects an overly narrow understanding of the purpose of the uniformity clause; it also reflects an unwarranted decision to defer to Congress's judgment in all but the most flagrant cases of abuse of the taxing power.

These shortcomings first become visible in the Court's dictum declaring a per se rule of validity for taxes framed in nongeographic terms.[60] Under this rule, Congress may enact blatantly discriminatory indirect taxes without risking constitutional scrutiny: it need only take care to frame the "subjects" of taxation in nongeographic terms.[61] This would permit Congress to violate the purpose of the uniformity clause as it was stated in the very quotation from Justice Story relied upon so heavily by the Court.[62] By authorizing all "preferences" that happen to be clothed in certain language, *Ptasynski* guarantees that some "undue preferences"[63] will be permissible. The Court's opinion is therefore inconsistent with its own presentation of the purpose of the clause.[64]

Moreover, *Ptasynski*'s new constitutional test for taxes framed in geographic terms—"actual geographic discrimination"—is so vague and so bereft of accompanying explanation that it must be considered essentially empty. It could be read to suggest almost any standard imaginable, from the most stringent to the most lax.[65] But the superficial remarks about congressional motives that follow the announcement of this new test suggest nothing so much as a Court substituting judicial deference to Congress for constitu-

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[59] *Ptasynski,* 103 S. Ct. at 2246 ("Where . . . Congress has exercised its considered judgment with respect to an enormously complex problem, we are reluctant to disturb its determination.").

[60] *See supra* note 46 and accompanying text.

[61] *See supra* note 47 and accompanying text.

[62] *See supra* note 44.

[63] This is Justice Story's term. *See Ptasynski,* 103 S. Ct. at 2243 (quoting Story); *cf. id.* at 2246 (discussing the possibility of an "undue preference" in the Alaskan exemption to the windfall profit tax); *supra* note 44.

[64] It is easy to imagine that the Court would use the uniformity clause to invalidate a taxation scheme as grossly oppressive as the ones Story described. But to do so, the rule announced in *Ptasynski, see supra* notes 44-47 and accompanying text, would have to be changed.

[65] "Actual geographic discrimination" might be contrasted with "illusory geographic discrimination," so that the constitutional test would focus on the actual effects of the tax. This could lead to a very strict uniformity requirement. On the other hand, the formula could be taken to suggest that the Court must be convinced beyond a reasonable doubt that Congress has acted from a malevolent intent. This would erect a virtually insurmountable barrier to uniformity clause challenges.

tional analysis.[66] Thus, even in the rare case where the congressional drafters are not ingenious or painstaking enough to avoid geographic terminology, the legislation will apparently be very likely to survive a constitutional challenge.

The root of the *Ptasynski* Court's unsatisfactory doctrine appears to be an overly narrow understanding of the purpose of the uniformity clause. By focusing on the spectacle of horrors evoked by Justice Story, the Court is apparently led to assume that the uniformity clause is *only* meant to prevent geographic discrimination so gross and oppressive that it would actually endanger the Union.[67] While the Court does not articulate this assumption, its analysis is hardly compatible with any other: the Court restricts the application of the uniformity clause to an extraordinarily narrow class of cases and signals a strong reluctance to find the clause violated even there.

The Court's narrow reading of the clause is not totally without historical support. It is true that the confederation period was

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[66] *Ptasynski*, 103 S. Ct. at 2245-46. *See supra* notes 57-58 and accompanying text. The kind of case-by-case analysis of congressional motives suggested in *Ptasynski* might incline future Courts to behave like legislatures rather than like judges. By leaving the Justices without any clear guidance about what sorts of taxes are permissible, the *Ptasynski* test leaves them free to begin with their policy preferences and then to scrutinize a challenged statute with greater or lesser intensity depending on their initial like or dislike of the tax. This would leave the status of the uniformity clause unsettled, subjecting it to whimsical and unpredictable metamorphoses. Even if a Justice wished to resist this temptation, he would still be left without guidance and might "follow" *Ptasynski* by taking refuge in an unthinking deference to Congress.

[67] *See supra* note 44 and accompanying text. It is possible that the Court was influenced by the fact that the passage of the Act was a hotly debated political issue, *see, e.g.*, N.Y. Times, July 26, 1979, at 1, col. 6 (President Carter alleges existence of "a massive struggle to gut the windfall profits tax bill"), and that the language of the challenged exemption could easily have been reworded to avoid geographic terminology, *see supra* note 47 and accompanying text. The principal briefs filed with the Court on behalf of the challengers of the Windfall Profit Tax Act lend some support to such speculations. None of those briefs offered a satisfactory interpretation of the uniformity clause. And at least two of them suggested that the same tax should be upheld if drafted a little differently. *See* Brief of Taxpayer Appellees at 12-13 (suggesting a "cold weather" exemption); Brief for the State of Texas, Appellee at 22-23 (urging that the plain-meaning rule of statutory construction be strictly applied). *But see* Brief for the State of Louisiana, Appellee at 23-24 (more is required than "mere niceties of draftsmanship"); Brief of Association Appellees at 10-15 (asserting that legislative history shows that the Act was the result of some states seeking to oppress others). Furthermore, it is possible that the challengers believed that the results of the 1980 elections would preclude the windfall profit tax from being reenacted. It is easy to imagine the Court thinking that under these circumstances it would be silly to strike down a major law merely because of a slight error in draftsmanship.

For an argument that there were more substantial reasons for invalidating the Windfall Profit Tax Act, see *infra* notes 133-42 and accompanying text.

marked by very troublesome regional conflicts[68] and that the framers probably were *most* apprehensive about exactly the sort of extreme factionalism that Story described. But to assume that the scope of the clause is confined to such evils violates one of the oldest and most authoritative canons of constitutional construction: where the framers were concerned primarily with preventing particular evils, but chose language embracing a broader class, they are presumed to have meant what they said.[69] The full meaning of what the framers of the uniformity clause said has not yet received a satisfactory exposition; the next section of this comment is devoted to presenting that exposition.

II. A New Interpretation of the Uniformity Clause

The uniformity clause is best understood as a check on the use of the federal power to promote or inhibit the commercial development of one region of the country in relation to another. It is an element of a consistent constitutional plan—implied in the text, intended by the framers, and acknowledged by the Supreme Court—to foster a national, free-market economy in which goods and services from all regions of the country are allowed to compete on an equal footing.[70]

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[68] *See, e.g.*, J. Madison, Notes of Debates in the Federal Convention of 1787, at 14 (A. Koch ed. 1966); *see also infra* notes 73-76 and accompanying text.

[69] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 644-45 (1819) (Marshall, C.J.). As Chief Justice Marshall recognized, the presumption that the Constitution employs language within the ordinary range of its meaning can be rebutted by showing, for example, that certain phrases were employed as terms of art. There is no evidence, however, that "uniform" was used by the framers to mean "sufficiently uniform to avoid only the grossest inequalities." The suggestion to this effect in the Story passage is the result only of the *Ptasynski* Court's selective quotation. *See supra* note 44.

[70] This comment uses the terms "free market" and "free-market economy" interchangeably with the eighteenth-century terms "free trade" and "free commerce." The meaning of these terms can probably not be given a universally acceptable definition, but each of them suggests an economic system in which private decisions predominate and competition is relatively uninhibited; government regulation serves mainly either to facilitate free competition or to secure public goods that a market dominated by private decision-makers cannot provide.

Although the terms "trade" and "commerce" are sometimes used in a narrower sense, meaning only the physical movement of commodities, this comment will employ the broader usage for three reasons. First, restriction of the terms to this narrow meaning seems not to have developed until long after the framing of the Constitution. *See* Roper, *The Constitution: Discovered or Discarded*, 16 Notre Dame Law. 97, 105-21 (1941). Second, since the free movement of goods is useful primarily because it fosters free competition, there would be little sense in becoming exercised about obstacles to the movement of goods unless those obstacles caused a reduction in free competition. Third, the Constitution and its history support the following syllogism: the commerce clause must have been motivated either by concerns confined to the physical movement of goods or by a broader concern with free

In order to give effect to this purpose, the *Head Money* rule should be supplemented with a new test that requires every indirect tax having geographically discriminatory effects to serve some significant purpose other than promoting such discrimination. This would discourage the evils that the clause was designed to prevent, while leaving Congress ample discretion to exercise the powers granted to it by the Constitution.

A. The Purpose of the Uniformity Clause

Knowlton convincingly demonstrated that, as the *Head Money* Court had assumed, the uniformity clause was not intended to ban all indirect taxes having geographically nonuniform effects.[71] *Ptasynski* correctly assumed that the clause should prohibit very invidious or oppressive regional discrimination but apparently also assumed that this is the limit of its purpose. Since the *Ptasynski* analysis eviscerates the uniformity clause and since all constitutional provisions should be presumed to be significant,[72] *Ptasynski* invites a reconsideration of the purpose of the clause.

1. *The Economic and Political Presuppositions of the Constitution: The Commerce Clause and Its Limitations.* Among the most pressing reasons for calling the Federal Convention was widespread dissatisfaction with the obstacles to commerce that existed under the Articles of Confederation.[73] Among the more obvious of

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competition in the economy; the uniformity clause was originally linked with a clause limiting the exercise of the commerce power, *see infra* notes 99-105 and accompanying text; the uniformity clause as finally adopted has no direct effect on the physical movement of commodities; therefore, unless the uniformity clause underwent an alteration of its general purpose, for which there is no historical evidence, the framers of the Constitution must have been concerned with "commerce" in its broader sense.

[71] *See supra* notes 13-24 and accompanying text.

[72] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) (Marshall, C.J.) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

[73] *See* THE FEDERALIST No. 22, at 143-45 (A. Hamilton) (C. Rossiter ed. 1961) (emphasizing the consensus on the need to provide the federal government with the power to regulate commerce); J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 46-48 (E. Scott ed. 1898) (treating the conflicting commercial regulations of the states as one of the chief evils for which the Federal Convention was to provide a remedy); *see also* Passenger Cases, 48 U.S. (7 How.) 283, 445 (1849) (opinion of Catron, J.) ("Before the Constitution existed, the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the Confederation and forming the Constitution,—more than all other causes it led to the result . . . ."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 224 (1824) (opinion of Johnson, J.) (noting that the states' powers over their own commerce led to a "conflict of commercial regulations," which was "the immediate cause that led to the forming of a convention."); Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 559-60 (1936) (arguing that the inability of Congress to regulate commerce led to evils

these obstacles was the hodgepodge of duties and restrictions imposed by the states on goods going over their borders.[74] These barriers to trade served to choke economic growth, raise prices, and thus leave all the states worse off than they would have been had they adopted the principle of free trade.[75] Nevertheless, no state

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whose remedy was the chief goal of the Constitutional Convention); Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337 (1934) ("The Constitutional Convention was called because the Articles of Confederation had not given the Federal Government any power to regulate commerce.").

The events leading up to the Constitutional Convention began with a conference on trade, held in Annapolis a few months before the Federal Convention in Philadelphia. *Knowlton*, 178 U.S. at 100-01. That conference had been suggested by a small group of men, led by George Washington, who were disturbed by the absence of uniformity in commercial regulations. 1 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 249-50 (1882 & photo. reprint 1983). The trade conference was unable to act because several states were unrepresented. JAMES Q. WILSON, AMERICAN GOVERNMENT 21 (2d ed. 1983); 1 G. BANCROFT, *supra*, at 267-70.

This comment does not take the position that commercial concerns provided the sole or even the most important reason for framing a new constitution. For a sharp critique of that position, see EEOC v. Wyoming, 460 U.S. 226, 265-75 (1983) (Powell, J., dissenting).

[74] D. HUTCHISON, *supra* note 20, at 99-101, 103-04. One commentator has recently argued that the problem of state-created barriers to trade was in fact not a serious one. Kitch, *Regulation and the American Common Market*, in REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 9, 11-19 (A. Tarlock ed. 1981). Even if Kitch is correct, however, restrictions on interstate commerce appear to have been *perceived* as a serious threat by leading members of the Federal Convention. *See* THE FEDERALIST Nos. 7, 11, 22 (A. Hamilton); J. MADISON, *supra* note 73, at 46-48; 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 547-48 (M. Farrand rev. ed. 1937) [hereinafter cited as CONVENTION RECORDS].

[75] The argument against economic protectionism has a general application:

> By restraining, either by high duties, or by absolute prohibitions, the importation of such goods from foreign countries as can be produced at home, the monopoly of the home market is more or less secured to the domestic industry employed in producing them. . . .
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> . . . .
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> To give the monopoly of the home-market to the produce of domestic industry, in any particular art or manufacture, is in some measure to direct private people in what manner they ought to employ their capitals, and must, in almost all cases, be either a useless or a hurtful regulation. . . .
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> . . . The industry of the country, [by such restraints on importation, is] turned away from a more, to a less advantageous employment, and the exchangeable value of its annual produce, instead of being increased, according to the intention of the lawgiver, must necessarily be diminished by every such regulation.

ADAM SMITH, THE WEALTH OF NATIONS 420-24 (Mod. Lib. reprint 1937, E. Cannan ed. 1904) (1st ed. London 1776); *see also* PAUL SAMUELSON, ECONOMICS 672-85 (4th ed. 1958).

There may, of course, be special circumstances in which economic protectionism is a sound policy. Alexander Hamilton, for example, argued forcefully that a temporary *national* policy of insulating local industry from foreign competition was needed to promote a transition from an agricultural economy to a modern commercial system. A. HAMILTON, *Report on Manufactures*, in THE REPORTS OF ALEXANDER HAMILTON 115 (J. Cooke ed. 1964). Hamilton conceded, however, that even this might not be necessary *if* "the system of perfect liberty to industry and commerce were the prevailing system of nations." *Id.* at 137-38; *see also* P. SAMUELSON, *supra*, at 683-84.

had sufficient incentives to remove these barriers and open its markets unless the others did likewise.[76] The Constitution was meant in large part to provide a firmer foundation for commercial expansion by erecting a central government with sufficient power and breadth of views to control the narrow and ultimately self-defeating jealousies of the several states.[77]

Perhaps the two greatest defects in the strength of the confederation government were its inability to regulate commerce and its weak powers of taxation.[78] These defects were cured in the new Constitution.[79] Wherever there is strength, however, there is a risk that strength will be abused. The federal government could use its extensive taxing and regulatory powers to do exactly the opposite of what the framers hoped. If Congress became dominated by a faction[80] of state delegations, it might use the federal power to set up a new system of discriminatory barriers to trade. To the extent that the federal government is stronger than the individual states, this new system would be worse, for the dominated states, than the anarchy that existed under the Articles of Confederation: these states would be subject to discriminatory taxes and regulations but would be unable to retaliate with protectionist legislation of their own.[81] This would be but one obvious example of the natural oper-

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[76] James Madison pointed to the heart of the problem:

> To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors must appear not less impolitic than it is unfair; since it would stimulate the injured party by resentment as well as interest to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.

THE FEDERALIST No. 42, at 268 (J. Madison) (C. Rossiter ed. 1961).

[77] *See* THE FEDERALIST No. 11, at 90 (A. Hamilton) (C. Rossiter ed. 1961) ("A unity of commercial, as well as political, interests can only result from a unity of government."); *id.* No. 23, at 153 (A. Hamilton) (proper regulation of commerce was one of the principal purposes for which the Union was created).

[78] *See* J. MADISON, *supra* note 73, at 46-48.

[79] *See* U.S. CONST. art. I, § 8, cl. 1 (quoted *supra* text accompanying note 1); *id.* art. I, § 8, cl. 3 ("[Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

[80] "Faction" is defined by Madison as follows: "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961).

[81] Discriminatory taxes and regulations (on the economic equivalence of which, see Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971)) can have two distinct undesirable effects. First, they always promote economic inefficiency and thereby reduce the

ation of "the violence of faction."[82]

The Constitution attempts to reduce the general danger of faction by promoting the election of competent and public-spirited men to federal office[83] and by hindering the concentration of power in the hands of a few.[84] In addition, however, the Constitution contains a number of specific restrictions on Congress's power to regulate commerce.[85] The federal government may not give preferential treatment to the ports of one state over another,[86] nor may it require shipping bound for any state to go through customs in another,[87] nor may it impose any taxes whatsoever on exports.[88] These specific constitutional provisions strengthen the general historical evidence indicating that the federal government's wide powers to regulate commerce exist primarily for the sake of removing artificial and parochial obstacles to free trade.

Thus, while all these limitations on federal power can be interpreted as antifaction devices, and while majority factions are always most to be feared in a democratic regime,[89] the limitations are designed to prevent factions from causing a specific substantive evil: regional favoritism that reduces unrestrained economic competition.

This suggestion is further confirmed by the specific restrictions that the Constitution places on the powers of the state governments.[90] Apart from matters affecting foreign policy, most of

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aggregate welfare of those affected by them; this was a major problem under the Articles of Confederation, *see supra* note 75 and accompanying text. Second, when a central government discriminates in favor of one group within its jurisdiction and against another, this effect is accompanied by a shift of economic advantage from one group to another, which can make it worthwhile for groups to seek such discrimination despite the reduction in aggregate welfare that it causes. Thus, to the extent that the uniformity clause discourages discriminatory taxation, it promotes both justice and economic efficiency.

[82] THE FEDERALIST No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961). Madison listed as one of the obstacles to the new Constitution the states' "natural jealousy" that power would be abused in hands other than their own. 3 CONVENTION RECORDS, *supra* note 74, at 542.

[83] *See* THE FEDERALIST No. 10, at 82-83 (J. Madison) (C. Rossiter ed. 1961).

[84] *See* THE FEDERALIST Nos. 10, 47, 48, 51 (J. Madison).

[85] Justice Story, in the passage quoted by *Ptasynski*, *see supra* note 44, treats the uniformity clause itself as a check on faction. For further development of this point, see *infra* notes 143-54 and accompanying text.

[86] U.S. CONST. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . .").

[87] *Id.* ("nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another").

[88] *Id.* art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

[89] *See* THE FEDERALIST No. 10, at 77-78 (J. Madison) (C. Rossiter ed. 1961).

[90] U.S. CONST. art. I, § 10; *id.* art. IV, § 2, cl. 1. U.S. CONST. art. I, § 10 provides:

> No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and

these provisions forbid the states to interfere in the operation of a national free-market economy.[91]

2. *The Supreme Court's Acknowledgement of the Free Trade Norm.* Although the Court has become extremely deferential towards Congress's exercise of its authority to regulate the economy,[92] it continues to acknowledge that the Constitution exhibits an important, though implicit, preference for the free market. This can be seen most vividly in the "dormant commerce power" doctrine. According to that doctrine, the commerce clause precludes the states from many kinds of interference with interstate commerce, even where Congress has not preempted the field.[93] The constitutional text itself gives the Court no basis for acting as Congress's surrogate in preventing the states from regu-

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silver Coin a Tender in Payment of Debts; pass any . . . Law impairing the Obligation of Contracts . . . .

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage . . . . Another important constitutional limitation on the states' powers, the privileges and immunities clause, U.S. CONST. art. IV, § 2, cl. 1, is discussed *infra* note 116. A related, inferred constitutional limitation on the power of the states to interfere with free trade, the "dormant commerce power" doctrine, is discussed *infra* notes 92-98 and accompanying text.

[91] The Constitution obviously does not enact any particular theory of laissez-faire capitalism, for the federal government is given wide discretion to affect the economy through regulation and taxation. *See* Lochner v. New York, 198 U.S. 45, 75 (Holmes, J., dissenting) (fourteenth amendment does not enact Herbert Spencer's *Social Statics*). *But see* McDonald, *The Constitution and Hamiltonian Capitalism*, in HOW CAPITALISTIC IS THE CONSTITUTION? 49 (R. Goldwin & W. Schambra eds. 1982) (arguing that while few of the framers foresaw the full development of the modern capitalist economy, their political and economic principles favored that development). But just as obviously, the Constitution is not characterized by simple economic agnosticism. Each of the restrictions on the power of government to interfere with commerce points towards a constitutional scheme in which free trade and open markets are assumed to be a desirable norm.

[92] The Court did not always interpret the commerce clause as a virtually plenary grant of authority. *See* Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 940-41 & n.380 (1982). For a demonstration that the framers had a narrower view of the meaning of the clause, see Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 451-59, 465-81 (1941).

[93] The case law under the "dormant commerce power" doctrine has put very substantial constraints on the states' powers to impede interstate commerce. Generally, the states are prohibited from any direct regulation of interstate commerce and from any incidental regulation that is excessive in relation to the state's local interests. *See* Edgar v. Mite Corp., 457 U.S. 624, 640 (1982). For reviews of the principal cases, see GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 257-342 (10th ed. 1980); Kitch, *supra* note 74, at 20-36.

lating or affecting interstate commerce;[94] the "dormant commerce power" has therefore been inferred from a general preference for free trade manifest in the purpose of the commerce clause. The Court has proclaimed that by its interpretation of "silences" in the Constitution, it has created a "federal free trade unit" in which "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any"; this task has been carried out with reference to the "vision of the Founders."[95]

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[94] *See* The License Cases, 46 U.S. (5 How.) 504, 578-79 (1847) (opinion of Taney, C.J.):

> The language in which the grant of [the commerce] power to the general government is made certainly furnishes no warrant for a . . . construction [denying the states concurrent, though subordinate, power to regulate commerce], and there is no prohibition to the States. Neither can it be inferred by comparing the provision upon this subject with those that relate to other powers granted by the constitution to the general government. On the contrary, in many instances, after the grant is made, the constitution proceeds to prohibit the exercise of the same power by the States in express terms; in some cases absolutely, in others without the consent of Congress. And if it was intended to forbid the States from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the State over the same subject was intended to be entirely excluded.

Another theory, which focuses not on the text of the Constitution but on the nature of the power to regulate, would deny to the states all power to regulate interstate commerce. For a comparison of this theory with Taney's, see Sholley, *supra* note 73, at 559-88.

[95] *See* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 534-39 (1949) (Jackson, J.):

> The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.
>
> . . . .
>
> This principle that our economic unit is the Nation . . . has as its corollary that the states are not separable economic units. . . . This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which states were so disabled. . . .
>
> The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. . . .
>
> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to

The "dormant commerce power" doctrine, unlike the uniformity clause, is a limitation on the powers of the states, not of Congress. But it rests in part on the critical assumption that the commerce clause, though seemingly a plenary grant of authority to Congress, was meant to be used to further the strong constitutional preference in favor of free trade and open markets. When determining the scope of Congress's power under the commerce clause, the Court has not required Congress to adhere to this purpose.[96] But what the Court has so clearly recognized in its "dormant commerce power" doctrine—that the Constitution is informed by a general spirit favoring free trade and uninhibited competition—it should also be willing to acknowledge when interpreting the uniformity clause.[97] This would be especially appropriate since the uniformity and commerce clauses were originally connected in a way that evinces a common purpose.[98]

3. *The Origin and Purpose of the Uniformity Clause.*[99] The uniformity clause was joined at the Federal Convention with what is now the port preference clause;[100] together, the two were

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protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

[96] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal regulation of wheat production where the wheat was grown for on-site consumption); United States v. Darby, 312 U.S. 100 (1941) (upholding the exclusion from interstate commerce of goods produced in plants where employees' wages and hours did not conform with federal standards).

[97] One might interpret the Court's dormant commerce power jurisprudence so as to emphasize its antiparochial aspects; thus, the Court's doctrine might be thought to reflect a general preference for centralized economic regulation. Justice Jackson's opinion in *H.P. Hood*, however, indicates that parochial behavior by the states is disfavored not from a preference for centralized regulation, but rather for the sake of a national free-market economy. *See also* Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049, 3056 (1984) (discussing "our free-trade policy" under the commerce clause); Welton v. Missouri, 91 U.S. 275, 282 (1876) (congressional inaction in the realm of interstate commerce "is equivalent to a declaration that inter-State commerce shall be free and untrammelled").

It should also be noted that the Court has found free-trade policy to be relevant to first amendment analysis. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (first amendment protects the free flow of commercial information in our "predominantly free enterprise economy"); Bates v. State Bar, 433 U.S. 350, 364 (1977) ("[C]ommercial speech . . . performs an indispensable role in the allocation of resources in a free enterprise system." (citation omitted)).

Evidence for the validity of the Court's free-trade policy is discussed *supra* notes 73-91 and accompanying text.

[98] *See infra* notes 99-108 and accompanying text.

[99] The history of the uniformity clause is thoroughly reviewed in *Knowlton*, 178 U.S. at 95-106, upon which the present discussion relies. Since that opinion was written, nothing new has been discovered that would require alteration of the *Knowlton* summary. The *Knowlton* discussion is summarized very briefly in *Ptasynski*, 103 S. Ct. at 2243 & n.10.

[100] U.S. CONST. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of

designed as a limitation on the powers granted to Congress in the commerce and taxing clauses.[101] For reasons that are now unknown, the two provisions were separated by the Committee on Style and assigned to the places that they now occupy.[102] The port preference clause limits both the commerce and taxing powers, while the uniformity clause applies to the taxing power alone. Their common origin, however, is a sign of their common purpose: each is meant to prevent geographic discrimination by Congress that would give one state or region a competitive advantage in its commercial relations with the others.[103] This is shown by the remarks accompanying the original introduction of the provisions[104]

Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another.").

[101] *Knowlton*, 178 U.S. at 103-04. The text of the joint version was as follows:

> "Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another or oblige Vessels bound to or from any State to enter, clear, or pay duties in another.
>
> And all tonnage, duties, imposts, and excises, laid by the Legislature shall be uniform throughout the United States."

2 CONVENTION RECORDS, *supra* note 74, at 434 (quoting the report of an ad hoc committee).

[102] *Knowlton*, 178 U.S. at 105.

[103] The *Knowlton* Court went so far as to state in dictum that the two clauses have an *identical* meaning. *Id.* at 104. The Court did not, however, base its conclusion on any port preference clause cases, and indeed the wording of the port preference clause, as well as its place in the constitutional scheme, provides the basis for clear distinctions between it and the uniformity clause.

First, the port preference clause forbids only discrimination along state lines, while the uniformity clause contains no such limitation. The *Ptasynski* Court, perhaps misled by *Knowlton*, unfortunately ignored this difference in language between the two clauses and implied repeatedly that the uniformity clause, too, may forbid only discrimination along state lines. *See Ptasynski*, 103 S. Ct. at 2241 & n.5, 2242, 2246.

The port preference clause is also different from the uniformity clause in that it applies not only to taxation but also to regulation under the commerce clause. The Supreme Court has read the port preference clause narrowly, perhaps in part because of its expansive reading of the commerce power. *See* Louisiana Pub. Serv. Comm'n v. Texas & N.O.R.R., 284 U.S. 125, 131 (1931) ("Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States."); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 435 (1855) ("[W]hat is forbidden is, not discrimination between individual ports within the same or different States, but discrimination between States . . . .").

Although the general purposes of the uniformity clause and the port preference clause are the same, the differences between them are significant. Probably because of these differences, the Court has not relied on port preference clause decisions when deciding uniformity clause cases.

[104] *See Knowlton*, 178 U.S. at 103:

> "Mr. Carroll and Mr. L. Martin expressed their apprehensions . . . that, under the power of regulating trade, the general legislature might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat . . . . They moved the following proposition:

and by the fact that much of the discussion leading up to the Convention was concerned with ensuring that the related measures of taxation and commercial regulation would be made uniform.[105] Thus, the history of the uniformity clause strengthens the case for interpreting it as part of the constitutional scheme for promoting an economy based on open markets and free competition.

This suggests the following formulation of its purpose: the uniformity clause is meant to inhibit the use of the taxing power to give any region a competitive advantage over other regions that it would not enjoy in the absence of the tax. This formulation is compatible with the notion of preventing ruinous discrimination, which was probably the danger most vividly present in the imaginations of the framers.[106] It goes beyond that notion, however, because the language of the clause demands it[107] and because the framers intended the Constitution to do more than save the country from disaster. They wished, as the Court has acknowledged, to ensure that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."[108]

B. A New Supplement to the *Head Money* Rule

The *Head Money* rule is consistent with the purpose of the uniformity clause, but it needs to be supplemented with a rule that distinguishes permissible from impermissible "subjects" of taxation. This section of the comment proposes such a rule, explains its application, and demonstrates its superiority to the rules adopted

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> " 'The legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, *or paying duties or imposts in one State in preference to another.*' "
>
> On the same day Mr. McHenry and General Pinckney submitted a proposition . . . relating to the establishment of new ports in the States for the collection of duties or imposts, which concluded as follows:
>
> "All duties, imposts and excises, prohibitions or restraints, laid or made by the legislature of the United States, *shall be uniform and equal* throughout the United States."

(quoting 5 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 478, 479 (Washington 1845)) (citations omitted) (emphasis in original).

[105] *See Knowlton*, 178 U.S. at 101-03; *see also* 1 G. BANCROFT, *supra* note 73, at 249-51; sources cited *supra* note 73.

[106] *See supra* note 68 and accompanying text.

[107] *See supra* note 69 and accompanying text.

[108] H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 539 (1949).

in *Ptasynski.*

1. *A Proposed Method of Analyzing Challenged Statutes.* The *Head Money, Knowlton,* and *Ptasynski* Courts all supplemented the *Head Money* rule by examining the challenged statute in light of the purpose of the uniformity clause.[109] The defects of the *Head Money* rule make this approach necessary. But the Court has never explained precisely what characteristics of a statute should cause it to be invalidated.[110]

Since the principal purpose of the uniformity clause is to discourage Congress from engaging in commercial discrimination against one region of the country in favor of another,[111] a test must be devised that will further this purpose. Inquiries into legislative motives, however, are notoriously difficult and embarrassing exercises for the courts to conduct.[112] Yet, it would simply be impracticable to require that taxes be framed so that all discriminatory *effects* are avoided.[113] This dilemma is inherent in the nature of the uniformity clause. The difficulties can best be avoided by a test that tolerates discriminatory (i.e., nonuniform) effects, but only so long as there is good reason to suppose that they are not driven by discriminatory intent. The perils of subjective speculation about legislative motives can be minimized by requiring that some legitimate purpose in the design of the tax be shown. This inquiry would entail a reasonably objective analysis of the terms of a statute and its legislative history.[114]

The new test can be formulated as follows: *if the definition of the subject of a tax is tailored to serve some significant purpose*

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[109] *See Head Money,* 112 U.S. at 595; *Knowlton,* 178 U.S. at 86-106; *Ptasynski,* 103 S. Ct. at 2243-44.

[110] *See supra* note 12; *supra* text following note 28; *supra* text following note 64.

[111] *See supra* text following note 105.

[112] *See, e.g.,* Palmer v. Thompson, 403 U.S. 217, 224-25 (1971); United States v. O'Brien, 391 U.S. 367, 382-84 (1968); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810). The Court, however, frequently finds itself compelled to engage in such inquiries despite the well-recognized hazards of doing so. *See, e.g.,* Washington v. Davis, 426 U.S. 229, 239-48 (1976); *cf.* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (requiring inquiries into legislative purpose).

Ptasynski's analysis of legislative motives, *see supra* notes 65-66 and accompanying text, is less sensitive to the hazards of the undertaking than is the analysis proposed in this comment.

[113] For example, Congress must be supposed free to tax tobacco without also taxing corn, even though this would somewhat damage the competitive position of one regional economy in relation to another. *See supra* text following note 5. Even if corn growers and tobacco growers do not compete for the same consumer dollar, they compete to some extent for capital and labor. For further discussion, see *infra* note 115.

[114] For a further elaboration of this point, see *infra* notes 116-32 and accompanying text.

other than to promote the competitive advantage of goods or services produced in one region over those of another region, the tax should be upheld despite any incidental geographically discriminatory effects that may result from the definition.[115] This kind of test, which allows legislation to have discriminatory effects provided that some other important and legitimate purpose is also being served, is a familiar one in other areas of constitutional jurisprudence.[116]

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[115] A more elegant rule would simply forbid nonuniform taxes on any goods or services that are functionally equivalent in the sense that they compete against each other in the market. If goods and activities could be divided according to this simple criterion, one would have a clean and satisfying solution to the problem that has so bedeviled the Court's uniformity clause jurisprudence. Moreover, it would avoid the necessity of the Court's engaging in the difficult and unpleasant task of examining congressional purposes and motives.

Unfortunately, standard economic theory holds that all goods are part of an interconnected system, so that any increase in the price of one good will cause consumers to begin substituting others in its place. GEORGE J. STIGLER, THE THEORY OF PRICE 31-33 (3d ed. 1966). This "substitution effect," or "cross-elasticity of demand," pervades commercial life, and no way has been devised to divide goods into categories across whose lines the substitution effect can reliably be presumed to be insignificant. *Id.* at 33; F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 59-64 (2d ed. 1980).

Rough approximations of such categories have been found useful in certain areas of antitrust law. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 323-28 (1962); United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 393-96 (1956). In antitrust law, however, the Court is faced with the need to find tools with which to enforce a vague *statutory* mandate; Congress may be presumed to have deferred to the Court's judgment in adopting the tools that it has. But to use such unreliable tools to *invalidate* acts of Congress would be a far more questionable undertaking.

[116] The closest analogy is in the jurisprudence of the privileges and immunities clause, U.S. CONST. art. IV, § 2, cl. 1. This constitutional provision, like the uniformity clause, serves the same general purpose as the commerce clause. *See* Hicklin v. Orbeck, 437 U.S. 518, 531-33 (1978). The privileges and immunities, uniformity, and commerce clauses are all meant to reduce commercial preferences among the states and regions, though the Court has recognized the impossibility of simply eliminating all discrimination. The constitutional test under the privileges and immunities clause is set forth in *Toomer v. Witsell:*

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them.

334 U.S. 385, 396 (1948) (citation omitted), *cited with approval in Hicklin*, 437 U.S. at 525-26.

A similar test has been employed in first-amendment jurisprudence. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (restrictions on free expression are valid if narrowly tailored to serve a substantial government interest unrelated to the suppression of free expression). Even racially discriminatory legislation, against which the Court has found the deepest constitutional prejudice, is permitted when racially discriminatory effects are an incident of otherwise legitimate programs. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise

2. *Applying the New Test.* In order to apply this new rule, the sorts of goals Congress may legitimately pursue in defining the "subjects" of indirect taxes must be determined. Generally, they would include any that are not forbidden by the uniformity clause or by some other constitutional provision. Certainly, the traditional purposes that have underlain these taxes must be presumed legitimate.

In the case of customs duties, the most important purpose (besides raising revenue[117]) is almost always to procure a commercial advantage for the constituents of the jurisdiction erecting the barrier. Congress, which was given the power to impose these duties[118] largely to help the nation compete effectively in the world market,[119] apparently has never been tempted to apply a tax with so obvious a discriminatory purpose against any American state or region.[120] Internal indirect taxes (herein referred to generically as "excises"), however, are typically used to penalize the consumption of some article or service in order to promote the general welfare. So-called "sin taxes," such as those on tobacco and liquor, are conspicuous examples of excises designed to promote the health and perhaps the morals of the populace. "Luxury taxes" on such items as jewelry are probably also designed, at least in part, as an expression of moral sentiments.[121] As traditional practice suggests, and as *The Federalist* confirms, such "subjects" of taxation should be permitted under the uniformity clause despite *incidental* geographically discriminatory effects.[122]

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within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.").

[117] Obviously, procuring revenue is a valid purpose. But so general a purpose as raising revenue would rarely dictate the precise *way* in which the subject of an indirect tax was defined. If in some case it did, the tax should be upheld.

[118] U.S. CONST. art. I, § 8, cl. 1.

[119] *See* THE FEDERALIST No. 11, at 85-86 (A. Hamilton) (C. Rossiter ed. 1961).

[120] One uniformity clause case involved customs duties. In Downes v. Bidwell, 182 U.S. 244, 249 (1901), the Court indicated that duties on merchandise imported from Puerto Rico would certainly have been invalid under the uniformity clause if Puerto Rico had been part of the United States. *Cf. Ptasynski,* 103 S. Ct. at 2244 n.12 (discussing *Downes*).

[121] According to public finance theory, "sin taxes" may be economically efficient where demand for the subject of taxation is relatively inelastic (i.e., where consumption remains fairly constant even when the price to the consumer rises because of the tax). Taxing a good with this characteristic may be an effective way of raising revenue without distorting consumption decisions. *See* R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 448-49 (1980). This insight, however, does not change the analysis that permits taxing such goods in an *attempt* to reduce consumption, especially since it is unlikely that demand for any of the subjects of the sin taxes is perfectly inelastic. *See id.*

[122] The Court in *Head Money* took traditional practice to be decisive. *See supra* note 11. *The Federalist* recommended a duty on imported liquor, partly in order to discourage its

To illustrate, suppose that Congress enacts a liquor tax that applies to distilled spirits and exempts beer and wine. This would cause consumers to engage in some substitution of beer and wine for distilled liquors, which in turn would discriminate against the prime whiskey-producing areas of Kentucky and Tennessee in favor of regions where wineries and breweries are more important. If Congress had grounds for believing that hard liquor is more prone to abuse or more damaging to health, the tax should be upheld. But if Congress were attempting to eliminate a natural competitive advantage in one region—for example, the presence of cheap labor in the whiskey-producing regions—the tax should be invalidated.[123]

Similarly, "benign" geographic discrimination, i.e., "fashion[ing] legislation to resolve geographically isolated problems,"[124] should be prohibited if its purpose is to alter the relative competitive positions of two regions: discrimination against one region does not become legitimate simply because it also helps another.[125] Thus, for example, the uniformity clause should be read to proscribe a tax levied on Maryland tobacco at a time when most of the tobacco-growing region, save that state, was suffering from a yield-reducing blight.[126]

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consumption, which was considered injurious to the morals and health of the society. *See* THE FEDERALIST No. 12, at 95-96 (A. Hamilton) (C. Rossiter ed. 1961).

[123] For a discussion of the proper allocation of the burden of proof when Congress's true aims are difficult to discern, or where both permissible and impermissible aims exist, see *infra* notes 130-32 and accompanying text.

[124] *Ptasynski*, 103 S. Ct. at 2245 (quoting *Rail Act Cases*, 419 U.S. at 159).

[125] The Supreme Court, in applying the "dormant commerce power" doctrine, has recognized that there is no meaningful distinction between "benign" and "malevolent" discrimination.

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other. Consequently, it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers.

Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049, 3057 (1984).

[126] *See supra* text accompanying note 12. This application of the uniformity clause would leave Congress with sufficient powers to address itself to "geographically isolated problems." For example, a federal program to combat the tobacco blight directly, or to lend financial assistance to those affected by the blight, could be established under the spending power. These devices would have several advantages over discriminatory taxation. First, because they would be financed by money taken from the general revenues, the burden would not fall arbitrarily on those who happened to be competitors of the afflicted tobacco farm-

3. *The Practicability of the New Test.* The approach developed in this comment has one disadvantage compared with that adopted in *Ptasynski.* Because almost all indirect taxes have geographically discriminatory effects,[127] there is a danger of administrative inconvenience in subjecting every new statute imposing such a tax to judicial review. This problem is avoided by *Ptasynski*'s per se rule of validity for taxes in which the "subject" is defined without geographic terminology.

This advantage in the *Ptasynski* approach, however, is not great enough to justify sapping the uniformity clause of all oforce. Indeed, the administrative inconvenience of the approach advocated by this comment should not be overestimated. Since the new test distinguishes clearly between the factors that Congress may and may not consider in framing the "subject" of a tax, the doctrine proposed here should not require a protracted series of cases to establish with tolerable certainty the boundaries of the proposed categories.[128] Furthermore, since indirect taxes are but a minor element of the modern federal taxation arsenal, there is little reason to anticipate a flood of litigation in response to whatever ambiguities may be present in the proposed approach.[129]

Nevertheless, it would be proper to establish different levels of scrutiny depending on whether the "subject" of the tax is defined in expressly geographic terms or not.[130] Where Congress has avoided geographic terminology in defining the "subject" of a tax,

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ers. Furthermore, because such alternative programs would be more directly addressed to the underlying problem, they would be likely to be more precisely tailored to that problem. For the same reason, such programs would be less likely than a discriminatory tax to outlive the problem that Congress was seeking to solve. For further discussion of this point, see *infra* notes 143-56 and accompanying text.

[127] *See supra* text following note 5; *supra* note 11 and accompanying text.

[128] The Court's privileges and immunities clause jurisprudence, in which one finds a test very similar to the one proposed in this comment, see *supra* note 116, has not produced any unmanageable theoretical problems. *See* G. GUNTHER, *supra* note 93, at 374-79.

[129] In 1965, most federal excise taxes were eliminated. J. PECHMAN, FEDERAL TAX POLICY 185 (4th ed. 1983). These taxes now account for less than 6% of the federal revenue, *id.* at 2, and over half of this 6% is attributable to the crude oil windfall profit tax, *id.* at 186. Thus, the situation here compares favorably with that in related areas of constitutional law. Under the "dormant commerce power" doctrine, for example, where the Court has used categories similar to, but more complicated than, those proposed in this comment, *see, e.g.,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-1 to 6-13 (1978), innumerable health and welfare laws in each of the fifty states are at least theoretically subject to judicial review.

[130] The *Ptasynski* Court essentially adopted two levels of scrutiny in its approach to the uniformity clause: none at all where the statute defines the "subject" of the tax in nongeographic terms, *see supra* notes 45-47 and accompanying text, and highly deferential review where Congress has employed geographic terms, *see supra* notes 48-59 and accompanying text.

it should be presumed that it had a legitimate purpose in mind; the burden should be on the challenger to show that no significant nondiscriminatory purpose is served by the tax. Where, however, Congress chooses to define the "subject" of a tax in geographic terms, the burden should be on the government to show that a legitimate purpose was in fact intended.[131] An approach that allocates the burden of proof according to the language of the statute preserves *Ptasynski*'s virtue—discouraging frivolous antitax litigation—without also preserving its excessively narrow reading of the uniformity clause.[132]

4. *A Reconsideration of the Ptasynski Decision. Ptasynski*'s per se rule of validity for taxes in which the "subject" is defined in nongeographic terms is dictum and therefore not binding on future Courts.[133] The rule on which the holding of the case rests—"actual geographic discrimination" is forbidden in taxes framed in geographic terms[134]—is vague enough that future Courts could read it to permit the interpretation of the uniformity clause developed in this comment.[135] In order to provide a further illustration of the proper application of the uniformity clause, however, it will be use-

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[131] One may assume that, where the "subject" of the tax is phrased in geographic terms, it is more likely than not that Congress had in mind the economic welfare of a particular region, rather than a specific problem to be resolved on a nationwide basis.

[132] This approach is analogous to the familiar technique of applying especially intense judicial scrutiny to facially discriminatory laws. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (gender-based discrimination); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (discrimination on the basis of alienage); Korematsu v. United States, 323 U.S. 214, 216 (1944) (racial discrimination).

Cases might arise in which Congress had both permissible and impermissible aims. In such circumstances, the Court should require that the legislation be reasonably tailored to its permissible ends. *Cf.* Toomer v. Witsell, 334 U.S. 385, 396 (1948) ("[T]he inquiry in each case must be concerned with whether [valid independent] reasons [for disparate treatment] do exist and whether the degree of discrimination bears a close relation to them."); *supra* note 116. Note, however, that the degree of discrimination should not by itself affect the question of a statute's validity. *Cf.* Maryland v. Louisiana, 451 U.S. 725, 760 (1981) (under the commerce clause, "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.").

It might be argued that the allocation of the burden of proof proposed in this comment would make it impracticable, even if not theoretically impossible, for a tax that used exclusively nongeographic terms to be successfully challenged: the rule could be underprotective because of the difficulty of detecting cases in which a facially neutral law is indeed motivated by regional favoritism. *See supra* note 112 and accompanying text. If this were true, *Ptasynski*'s per se rule of validity for such taxes, *see supra* notes 30, 45-47, 60-64 and accompanying text, would in effect be retained. Even if the Court's application of the proposed rule led to this result, however, there are other reasons, discussed *infra* notes 148-54, for adopting the approach advocated in this comment.

[133] *See supra* note 30.

[134] *Ptasynski*, 103 S. Ct. at 2245; *see supra* note 56 and accompanying text.

[135] *See supra* notes 65-66 and accompanying text.

ful to show why the *Ptasynski* Court might have found that the Windfall Profit Tax Act's provision for "exempt Alaskan oil" violated the Constitution.

Oil from the exempt region competes directly with oil from other regions, and the exemption thus improves the competitive position of one region over that of others. The principal problem, therefore, is to decide whether the challenged provision in the statute had any reasonable purpose other than geographic discrimination. So far as one can tell from the *Ptasynski* opinion, the legislative history,[136] and the briefs filed in the Supreme Court,[137] the Alaskan exemption must be given one of the following three interpretations.

First, the tax as a whole may have been the instrument by which an oppressive faction of non-oil-producing states sought to redistribute wealth from the few states where oil is a significant industry. The Alaskan exemption, it was suggested to the Court, could have resulted from the need that this faction had for the help of a powerful Alaskan Senator.[138] The Court's opinion does not discuss this possibility, but such a log-rolling rationale clearly would not justify the nonuniformity of the tax, even under *Ptasynski*'s highly deferential approach to congressional motives.[139]

Second, the exemption may have been an instance of "benign" discrimination, in which Congress was attempting to ameliorate

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[136] H.R. REP. No. 304, 96th Cong., 1st Sess. (1979), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587; S. REP. No. 394, 96th Cong., 1st Sess. (1979), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 410; H.R. REP. No. 817, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 642.

[137] Brief for the United States of America, Appellant; Brief of Taxpayer Appellees; Brief of Association Appellees; Brief for The State of Texas, Appellee; Brief for The State of Louisiana, Appellee; Brief of Amici Curiae, The Legal Foundation of America, et al.; Brief of Amicus Curiae, The Standard Oil Company; Brief of Amici Curiae, Gulf & Great Plains Legal Foundation of America, et al.; Brief of Amici Curiae, Senator Don Nickles, et al.; Brief of Amici Curiae, American Farm Bureau Federation, et al.; Brief of Amicus Curiae, Atlantic Richfield Company; Brief of Amicus Curiae, United States Representative Silvio O. Conte; Brief of Amicus Curiae, The State of Alaska; Reply Brief for the United States of America, Appellant.

[138] Briefs filed with the Supreme Court on behalf of the tax's challengers alleged that the Alaskan exemption was included in the Act in order to induce a powerful Alaskan Senator to join a congressional faction composed primarily of representatives from states where little or no oil is produced. Brief of Association Appellees at 10-12; Brief of Amici Curiae, The Legal Foundation of America, et al. at 11-13 & n.13. For further discussion of this point, see Norton, *The Limitless Federal Taxing Power*, 8 HARV. J.L. & PUB. POL'Y (forthcoming).

[139] If the challengers' allegations, *see supra* note 138, were true, the Windfall Profit Tax Act as a whole would be an oppressive device of exactly the sort that the framers were most worried about. *See supra* notes 43-44 and accompanying text; *supra* notes 67-69 and accompanying text.

the special difficulties that impede oil production in northern Alaska. At several points, *Ptasynski* seems to rest its analysis on this assumption.[140] But, as was demonstrated above,[141] deliberate geographic discrimination should not be considered permissible under the uniformity clause simply because it helps one region in addition to hurting others.

Finally, the Alaskan exemption might be considered justifiable on the ground that oil from northern Alaska is *uniquely* expensive to produce. If there were evidence to show that Congress was acting on this supposition, the exemption would be defensible as an attempt to increase the country's aggregate production of oil—a legitimate, nondiscriminatory aim, especially in light of the national-security implications of dependence on foreign sources of oil. This would be a plausible interpretation of the Court's reading of the facts in *Ptasynski,*[142] and such an interpretation would permit the Court to apply the test suggested in this comment, while leav-

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[140] The decision in the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), cited repeatedly in *Ptasynski,* is relevant primarily for the following proposition: " '[t]he uniformity provision [of the bankruptcy clause] does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems.' " *Ptasynski,* 103 S. Ct. at 2245 (quoting *Rail Act Cases,* 419 U.S. at 159). Accordingly, the Court stressed that "unique climactic [sic] and geographic conditions" in the exempt region provided the exemption with a rational basis. *Ptasynski,* 103 S. Ct. at 2242.

[141] *See supra* notes 117-22 and accompanying text; *supra* notes 124-26 and accompanying text.

[142] The Court assumed that Congress "gave more favorable treatment to those classes [of oil] that would be responsive to increased [after tax] prices" and that exempt Alaskan oil was a "unique class" by virtue of the "disproportionate costs" of developing it. *Ptasynski,* 103 S. Ct. at 2245-46; *see also id.* at 2242 n.7.

This supposition, however, is not correct. While the cost of producing oil in Alaska is very high, mainly because of the area's harsh climate and remoteness from the principal oil markets, there is no reason to suppose that other areas of the country are not laboring under other handicaps that would cause their costs per-barrel-produced to be as great or greater than Alaska's. For example, if a region has oil occurring in small pools spread rather far from one another, the cost of drilling dry wells in search of oil might make the final cost per-barrel-extracted extremely high. Similarly, as the Court was told, the costs associated with certain kinds of specialized wells in other areas of the country are very high. Brief of Amici Curiae, The Legal Foundation of America, et al. at 8. Obviously, *direct* evidence of production costs in the most economically unfavorable areas of the country does not exist: incentives have not been provided for exploration and production in those areas. *Cf. supra* note 58 (discussing factors that affect the cost of oil production).

If Congress were simply attempting to encourage exploration and production in economically unfavorable areas, it could have considered drafting an exemption that did so directly. But Congress could not have had a reasonable basis for imagining that northern Alaska is the only such area in the nation. Unless a rationale can be found for the Alaskan exemption that is compatible with the purpose of the uniformity clause, *see supra* notes 99-108 and accompanying text, the Supreme Court must have erred in declaring that exemption constitutional.

ing the actual decision, though not the reasoning, in *Ptasynski* intact.

C. The Importance of the Uniformity Clause

This comment has shown that the uniformity clause is best understood as a limit on Congress's power to promote the commercial success of any region of the country at the expense of others. It may be argued, however, that the Supreme Court has given Congress such wide discretion under other clauses of the Constitution that any limitations imposed by the uniformity clause would be practically insignificant.

It is true that current Supreme Court interpretations of the spending power[143] and of the commerce clause[144] would allow Congress to carry out, by other means, many geographically discriminatory programs forbidden by the uniformity clause. For example, Congress is permitted to raise revenue through nondiscriminatory tax mechanisms and then redistribute the money so that one region benefits at the expense of others.[145] Similarly, Congress may provide for regulations of commerce that confer disproportionate benefits on one region or another.[146] In such cases, Congress can

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[143] The textual basis for the spending power is U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."). Because of the procedural obstacles to taxpayers' suits, cases directly construing the clause are rare. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 101-03 (1968) (standing to sue requires a "logical nexus" between the challenger's status as a taxpayer and the substantive claim on which he seeks adjudication). But what authority there is suggests that Congress may spend money in any way that it sees fit, so long as it does not violate some *other* specific constitutional provision. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (general welfare clause puts no limitation on congressional discretion); *see also Flast*, 392 U.S. at 105-06 (article III jurisdiction exists for taxpayers' suits only when the challenged law is alleged to be "in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power"); Steward Machine Co. v. Davis, 301 U.S. 548, 586-87 (1937) (use of federal money for payments to unemployed persons is comprehended in "promotion of the general welfare"). *But cf.* THE FEDERALIST No. 41, at 262 (J. Madison) (C. Rossiter ed. 1961):

> It has been urged and echoed that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

[144] U.S. CONST. art. I, § 8, cl. 3. The breadth of congressional discretion under the Court's reading of this clause is well known. *See generally* G. GUNTHER, *supra* note 93, at 153-211.

[145] The "spending" may take the form of simple cash transfers or of capital improvements.

[146] For example, the price controls for which the windfall profit tax was a replacement

achieve indirectly exactly the sort of regional favoritism that the uniformity clause should prevent it from accomplishing by means of nonuniform taxation.[147]

Nevertheless, a sound jurisprudence of the uniformity clause would be likely to prevent some congressional abuses. Nonuniform taxation is a relatively blunt and indirect instrument for enhancing or undermining the competitive position of one or another region of the country. A spending or regulatory program would require Congress to address itself more directly and forthrightly to the goals being pursued. This would have two advantages.

First, because spending and regulatory schemes tend to display more clearly than discriminatory taxes what is being done and who is paying for it, they provide fewer opportunities for a faction in Congress to conceal its self-serving purposes. This in turn reduces the likelihood that a discriminatory scheme would succeed. Two situations can be distinguished. In one, a minority faction might be prevented from deceiving other members of Congress

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included special provisions for oil produced in northern Alaska. *See Ptasynski*, 103 S. Ct. at 2240 & n.1. No uniformity requirement restricts congressional power under the commerce clause. *See* Hodel v. Indiana, 452 U.S. 314, 323-24 (1981).

[147] This anomaly could be eliminated if the spending power and the commerce clause were interpreted in light of the constitutional purposes emphasized in this comment. *See supra* notes 73-98 and accompanying text. This could be justified on the grounds that the uniformity clause is closely linked with the text on which the spending power is based, *see* U.S. CONST. art. I, § 8, cl. 1, and also closely linked in its origins with the commerce clause, *see supra* notes 99-105 and accompanying text. One would argue that Congress's spending and commerce powers should be confined within the same kinds of limits as the taxing power, and for the same reasons. Such an attempt to recover the original meaning of those clauses would, however, require a thorough reformation of current constitutional doctrine—a task that is beyond the scope of this comment.

Another approach to limiting congressional discretion under the spending and commerce powers would begin with the willingness of the Court to proscribe the exercise of those powers when some other specific constitutional provision is thereby violated. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) (spending power is limited by due process clause of the fifth amendment); National League of Cities v. Usery, 426 U.S. 833, 840-52 (1976) (tenth amendment limits the commerce power); Leary v. United States, 395 U.S. 6, 29-53 (1969) (commerce power is limited by the due process clause of the fifth amendment); United States v. Jackson, 390 U.S. 570, 581-83 (1968) (commerce power is limited by the sixth amendment trial-by-jury clause); Flemming v. Nestor, 363 U.S. 603, 611 (1960) (dictum) (fifth amendment due process clause limits the spending power). The fifth amendment, U.S. CONST. amend. V, prohibits the federal government from taking private property for public use without just compensation. Were the just-compensation requirement applied literally, many geographically discriminatory spending and regulatory schemes could be held invalid under the fifth amendment. (Such an argument is developed in Epstein, *supra* note 41.) Here again, however, the solution would depart dramatically from the Supreme Court's current practice, *see, e.g.*, the discussion *supra* note 41, and would require a more detailed elaboration than is possible in this comment.

whose acquiescence is needed for the bill to pass.[148] In the other, a majority faction would be exposed to a greater risk of embarrassment in the court of public opinion.[149]

Second, the opportunities for congressional inadvertence would be diminished.[150] This is clearest in the case of "benign geographic discrimination," where Congress is seeking to aid a region that suffers from some special handicap. If Congress spends money from the general revenues to ameliorate the problem, the resulting burden will be spread widely through the population because the vast bulk of the general revenue is derived from the income tax. A geographically discriminatory excise or excise exemption, however, places the burden on the relatively narrow category of persons subject to that excise.[151] When Congress honestly believes that region-specific aid is a way of providing for the general welfare, it should also want the costs of providing that aid to be borne generally.[152] Discriminatory excises can conceal the true victims of the discrimination and thus increase the likelihood that they will be victimized inadvertently.[153] Similarly, spending and regulatory programs aimed at correcting region-specific handicaps are more likely than discriminatory taxes to be narrowly tailored to the problems Con-

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[148] Members of Congress, like all human beings, have limited time and energy. Any rule that increases their access to information about the effects of their votes reduces their vulnerability to manipulation by their colleagues or by special-interest groups.

[149] Public opinion would probably be a greater obstacle to majority factions today than in earlier periods of our history, since regional loyalties have diminished. This same factor, of course, reduces the chance that majority factions would be organized along geographic lines in the first place. Nevertheless, special interests in one region may still have the opportunity and motive to capture a majority faction in Congress and promote discriminatory schemes; some of these schemes might be rejected if the captured legislators' constituents were alerted to them.

[150] As this comment has shown, the uniformity clause goes beyond the desire to prevent the effects of self-serving factions in Congress. It also embodies the constitutional preference for a free and open national economy in which goods and services from all regions compete on an equal footing. *See supra* notes 71-108 and accompanying text. Accordingly, inadvertently discriminatory taxes, unless they serve a legitimate, nondiscriminatory purpose, *see supra* notes 124-26 and accompanying text, are no less invalid under the clause than those that are the product of factional self-interest.

[151] In place of the challenged exemption to the windfall profit tax, for example, Congress could have provided a direct cash subsidy to the producers of each barrel of oil from northern Alaska. Since this subsidy would be paid out of the general revenues, Congress would have been forced to ask itself whether it really believed that there was some general national interest in promoting oil production in this particular region.

[152] This is strongly suggested by Congress's heavy reliance on the geographically uniform income tax as a source of revenue. *See* J. PECHMAN, *supra* note 129, at 2 (income and payroll taxes accounted for over 90% of federal revenue in 1982).

[153] The immediate victims of discriminatory excises are those who happen to be competitors of the favored class. It is easy to forget this fact when one's attention is focused on those who want or seem to need special tax breaks.

gress is seeking to solve.[154]

Suppose, finally, that Congress could and would use its spending and regulatory powers to evade *all* the restraints that the uniformity clause is meant to place on its discretion. Even this possibility would not justify the Supreme Court in disregarding the true meaning of the uniformity clause and refusing to enforce it.[155] If "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[156] the possibility of congressional evasions can neither extinguish that judicial duty nor obligate the Court to facilitate congressional evasions of the law.

CONCLUSION

The uniformity clause is an important constitutional check on the taxing power of the federal government. The Supreme Court has struggled—unsuccessfully—to develop a jurisprudence with which that check can be enforced. The chief reason for the Court's lack of success has been its failure to appreciate the role of the uniformity clause in the Constitution's strategy for promoting a free-market economy.

The Court's most recent opinion is a confession of either despair or indifference. On the basis of an inadequate analysis, it guts the uniformity clause and invents an empty and unexplained constitutional test. At the next opportunity, the Court should modify its present approach along the lines suggested in this comment. The uniformity clause would thereby be restored to its proper place in the American system of limited government.

Nelson Lund

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[154] For example, one might imagine a government-sponsored program to develop more efficient means of producing oil in harsh climates or a change in the restrictive environmental regulations that apply in northern Alaska. Such solutions to the problem of high development costs in Alaska would directly address the causes of those high costs. Unlike the Alaskan exemption from the windfall profit tax, they would also encourage Congress to confront the costs of solving the problem; for that reason they would be easier to evaluate on their merits.

[155] It would be anomalous to argue that, because the Supreme Court has broadly interpreted the commerce clause and the spending power—themselves positive *grants* of power to Congress—the Court is now justified in narrowly interpreting the uniformity clause—a *limitation* on a third grant of power. Although the commerce power was originally intended to be used for a narrower purpose that comported with that served by the uniformity clause, *see supra* note 92 and accompanying text, there is no textual limitation on Congress's commerce and spending powers so broadly phrased as that which the uniformity clause places on the taxing power.

[156] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.).