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CIRCUIT-SPECIFIC APPLICATION OF THE INTERNAL REVENUE CODE: AN UNCONSTITUTIONAL TAX

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INTRODUCTION

The federal government's power to tax is omnipotent. It can assess taxes in any amount on anything or anyone for any reason.[1] For all practical purposes, the Constitution prescribes only one limit on the federal government's power to tax: the Uniformity Clause, which requires that indirect taxes, such as income and excise taxes, be "uniform throughout the United States . . . ."[2] Uniformity should not be confused, however, with fairness or equality. There is no requirement that rich people pay the same tax as poor, or that oil companies pay the same tax as pharmaceutical companies, or that married couples pay the same tax as singles. The Uniformity Clause merely requires geographic uniformity.[3] It is violated, therefore, only if the federal government imposes a different tax on the residents of one state than it imposes on the residents of another.

It is exceedingly rare for a federal tax law to violate the Uniformity Clause.[4] The Internal Revenue Code does not fix different taxes for different states, as Congress has carefully crafted the tax laws to avoid geographical distinctions.[5] Unfortunately, the Internal Revenue Service ("IRS") has not always been so careful. In recent years, the IRS has adopted a practice of applying different tax laws to different states. This

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1. *See, e.g.*, Penn Mut. Indem. Co. v. Commissioner, 277 F.2d 16, 19 (3d Cir. 1960) (noting that Congress' taxing power "is exhaustive and embraces every conceivable power of taxation" (quoting Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 12 (1916))); United States v. Robinson, 107 F. Supp. 38, 39 (E.D. Mich. 1952) ("Congress may select any object, occupation or transaction as the subject matter of an indirect tax.").

2. U.S. CONST. art. I, § 8, cl. 1. The Constitution also requires that direct taxes be apportioned among the states, but this limitation has little practical significance and was largely repealed by the Sixteenth Amendment. *See* discussion *infra* Part I.B. In addition, the federal government is barred from taxing exports, but this limitation has a very limited scope. U.S. CONST. art. I, § 9, cl. 5; *see* discussion *infra* Part I.A.

3. Fernandez v. Wiener, 326 U.S. 340, 359 (1945) ("[T]he uniformity in excise taxes exacted by the Constitution is geographical uniformity, not uniformity of intrinsic equality and operation.").

4. In fact, the Supreme Court has never used the Uniformity Clause to invalidate a tax law. Thomson Multimedia, Inc. v. United States, 219 F. Supp. 2d 1322, 1325 (Ct. Int'l Trade 2002).

5. *But see* United States v. Ptasynski, 462 U.S. 74, 77 (1983) (upholding tax on domestic oil despite the fact that it exempted oil produced "from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System" (quoting 26 U.S.C. § 4994(e))); Amoco Oil Co. v. United States, 63 F. Supp. 2d 1332, 1340-41 (Ct. Int'l Trade 1999) (upholding Harbor Maintenance Tax despite exemptions for Alaska and Hawaii, where exemptions were not discriminatory in nature).

occurs when the IRS issues a formal opinion declaring that it will not enforce certain provisions of the Internal Revenue Code in states located within certain federal circuits.[6]

This Article submits that the IRS's non-uniform application of the tax law violates the Uniformity Clause of the U.S. Constitution. In an endeavor to substantiate this hypothesis, Part I will analyze the constitutional restrictions on the federal government's power to tax and the effect of the Sixteenth Amendment on those restrictions. Part II will offer examples of the IRS's practice of applying tax laws in a non-uniform manner. Part III will demonstrate why the IRS's practice violates the Uniformity Clause. Part IV will propose a practical and constitutional solution to the IRS's arguably unconstitutional practice.

The IRS is not totally to blame for its circuit-specific application of the tax law. The true culprit is a judicial system in which the Internal Revenue Code is interpreted, often finally, by thirteen different federal circuit courts. As a result of this structure, the IRS is often forced to apply different tax laws in different circuits in violation of the spirit, if not the letter, of the Uniformity Clause of the Constitution.

There is a simple, practical, and constitutional solution to this problem. This Article proposes that Congress amend 28 U.S.C.A. § 1295(a) (2000), by adding a provision granting exclusive jurisdiction of federal tax appeals to the Court of Appeals for the Federal Circuit. Such an amendment would not only unify and stabilize the tax law, it would permanently solve the Uniformity Clause problem identified in this Article.

Whether the IRS's circuit-specific application of the tax law violates the Uniformity Clause is an issue of first impression. It has not been addressed by courts, except for an oblique reference in *Peony Park, Inc. v. O'Malley*,[7] but that court sidestepped the issue by refusing to assume, despite unambiguous evidence, that the IRS was applying different tax laws in different states.[8] It also has been largely ignored by scholars, but that is not altogether surprising since tax scholars, as Professor Bittker explains, generally pay little attention to constitutional law. "[I]n law school courses, once the instructor has finished flogging *Eisner v. Macomber*, [252 U.S. 189 (1920),] the class usually moves on to the 'real' issues of federal income taxation, leaving the Constitution, including the sixteen [sic] amendment, behind."[9]

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6. *See* discussion *infra* Part II.

7. 121 F. Supp. 690, 695 (D. Neb. 1954), *aff'd*, 223 F.2d 668 (8th Cir. 1955).

8. *Peony Park*, 121 F. Supp. at 695 ("Insofar as the Commissioner adopted an enforcement policy contrary to the statute, the enforcement policy was unlawful.").

9. Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW. 3, 4 (1987). Professor Bittker, Professor of Law Emeritus at Yale Law School, is one of the leading tax scholars in America. *See also* Leo P. Martinez, *"To Lay and Collect Taxes": The*

I. THE CONSTITUTION'S TAXATION PROVISIONS

Under the Articles of Confederation, the federal government did not possess the power to tax individuals or property.[10] Rather, the federal government was forced to rely exclusively upon state governments for revenue, a mechanism that quickly proved ineffectual.

> Congress could not, under the old confederation, raise money by taxes, be the public exigencies ever so pressing and great. They had no coercive authority—if they had, it must have been exercised against the delinquent states, which would be ineffectual, or terminate in a separation. Requisitions were a dead letter, unless the state legislatures could be brought into action; and when they were, the sums raised were very disproportional. Unequal contributions or payments engendered discontent, and fomented state-jealousy.[11]

The inability of the federal government to raise revenue was one of the reasons for the Constitutional Convention of 1787.[12] At that convention, the Framers of our current Constitution vested in Congress broad, general powers to lay and collect taxes.[13] These powers are contained in the first clause of Article I, Section 8 of the Constitution, which provides: "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 . . . ."[14]

Constitutional Case for Progressive Taxation, 18 YALE L. & POL'Y REV. 111, 114 (1999) (noting "the existence of an uneasy relationship between constitutional law scholars and tax scholars").

10. EEOC v. Wyoming, 460 U.S. 226, 268 n.4 (1983) (Powell, J., dissenting) ("A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. Remedying this defect was thus one of the most important purposes of the Constitutional Convention." (citations omitted)). In the Articles of Confederation, the power to tax was conferred upon the states.

> All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled . . . .

ARTICLES OF CONFEDERATION art. VIII, (U.S. 1781).

11. Hylton v. United States, 3 U.S. (3 Dall.) 171, 178 (1796) (seriatim opinions) (upholding federal tax on carriages as a uniform indirect tax).

12. Springer v. United States, 102 U.S. 586, 595-96 (1880) ("Many of the provisions of the Articles of Confederation of 1777 were embodied in the existing organic law. They provided for a common treasury and the mode of supplying it with funds. The latter was by requisitions upon the several States. The delays and difficulties in procuring the compliance of the States, it is known, was one of the causes that led to the adoption of the present Constitution.").

13. U.S. CONST. art. I, § 8, cl. 1.

14. *Id.* The Supreme Court has held that Congress' power to tax is not limited to the other enumerated powers in Article I, Section 8, but extends to any tax that is in the general welfare of the nation. United States v. Butler, 297 U.S. 1, 65-66 (1936). In *Veazie Bank v. Fenno*, the Court held that the Framers intended to give Congress the power to tax in "its fullest extent." 75 U.S. (8 Wall.) 533, 540 (1868). The Court continued:

The federal government's authority to tax "is exhaustive and embraces every conceivable power of taxation . . . ."[15] The expansive nature of this power was acknowledged by the Supreme Court as early as 1796 when Justice Paterson observed that it was "obviously the intention of the framers of the Constitution, that Congress should possess full power over every species of taxable property, except exports."[16] More than a century later, Justice Cardozo, elaborating on the breadth of the federal government's power to tax, stated: "The subject-matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. . . . [It] include[s] every form of tax appropriate to sovereignty."[17]

The Taxing Clause is construed liberally and flexibly in favor of the federal government.[18] Any tax designed to promote the general welfare of the nation is constitutional, and it is for Congress, not the courts, to decide which taxes promote the general welfare. "The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."[19] Specifically, the power to choose "one welfare over another," or a particular welfare over a general one, lies with Congress.[20] Accordingly, Congress has broad powers to tax for

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> The comprehensiveness of the power, thus given to Congress, may serve to explain, at least, the absence of any attempt by members of the Convention to define, even in debate, the terms of the grant. The words used certainly describe the whole power, and it was the intention of the Convention that the whole power should be conferred. The definition of particular words, therefore, became unimportant.

Veazie Bank, 75 U.S. (8 Wall.) at 541.

15. Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 12 (1916) (upholding 1913 federal income tax act, the Revenue Act of 1913, ch. 16, 38 Stat. 166).

16. *Hylton*, 3 U.S. (3 Dall.) at 176. Justice Paterson continued:

> The term taxes, is generical, and was made use of to vest in Congress plenary authority in all cases of taxation. The general division of taxes is into direct and indirect. Although the latter term is not to be found in the Constitution, yet the former necessarily implies it. Indirect stands opposed to direct.

Id.

17. Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 581 (1937) (upholding taxes on employers pursuant to Social Security Act, ch. 531, 49 Stat. 620 (1935)).

18. La Croix v. United States, 11 F. Supp. 817, 821 (W.D. Tenn. 1935) ("It is the opinion of this court that it was the purpose of the framers of the Constitution that this clause, giving the right to levy taxes to pay the public debts, provide for the common defense and general welfare, was to be applied as a liberal and flexible means of providing for the welfare of the United States in times of disaster; provided, of course, that no other and restraining clause was violated.").

19. Helvering v. Davis, 301 U.S. 619, 640 (1937) (upholding Social Security Act, ch. 531, 49 Stat. 620 (1935)); Mathews v. de Castro, 429 U.S. 181, 185 (1976) ("The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" (quoting *Helvering*, 301 U.S. at 640)).

20. *Helvering*, 301 U.S. at 640 ("The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress,

the general welfare so long as it does not violate other constitutional provisions.

> [A]s this court repeatedly has held, the power to tax carries with it 'the power to embarrass and destroy'; may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one calling and omit another, to tax one class of property and to forbear to tax another'; and may be applied in different ways to different objects . . . .[21]

The federal government's power to tax, however, is not without limits. According to a common reading of the Constitution, "Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity."[22] Thus, the Constitution prescribes three limits on the federal government's power to tax.[23] The first limitation prevents Congress from taxing exports.[24] The second limitation mandates that capitation taxes and other direct taxes be apportioned among the several states based on population.[25] The third limitation guarantees that duties, imposts, excises, and other indirect taxes be uniform throughout the United States.[26] In order to provide a

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unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law.").

21. Evans v. Gore, 253 U.S. 245, 256 (1920) (upholding federal income tax despite the fact that it effectively reduced the salaries of Article III judges, which the Constitution generally prohibits) (citations omitted).

22. Kelly v. Lewellyn, 274 F. 108, 110 (W.D. Pa. 1921); *accord Hylton*, 3 U.S. (3 Dall.) at 174 ("[T]wo rules are prescribed for [the power to tax], namely, uniformity and apportionment: Three kinds of taxes, to wit, duties, imposts, and excises by the first rule, and capitation, or other direct taxes, by the second rule.").

23. Tax laws are also subject to the Due Process and Equal Protection Clauses. Such clauses are rarely used, however, to invalidate tax laws. *See, e.g.*, *Mathews*, 429 U.S. at 189 (finding that Social Security Act, which treats divorced males differently than females, does not violate the Equal Protection Clause); *Brushaber*, 240 U.S. at 20 (holding that 1913 income tax act, which was retroactive, did not violate the Due Process Clause).

24. U.S. CONST. art. I, § 9, cl. 5.

25. *Id.* art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4.

26. *Id.* art. I, § 8, cl. 1. In 1916, the Supreme Court observed that the requirements of apportionment and uniformity are not so much limitations "upon the complete and all-embracing authority to tax," but "simply regulations concerning the mode" by which the plenary power is to be exerted. *Brushaber*, 240 U.S. at 13. Later decisions have called this liberal interpretation of the Uniformity Clause into question.

> The fact that the Supreme Court in 1916 categorized the Uniformity Clause as a regulation does not convince this Court that the Uniformity Clause is not also a limitation as the Supreme Court used the word in *Flast* [*v. Cohen*, 392 U.S. 83 (1968)]. The Uniformity Clause restricts the method by which the Congress can assess taxes. Thus, it is a limitation on the means by which Congress can tax. This view of the Uniformity Clause is consistent with other Supreme Court decisions. *United States v. Ptasynski*, 462 U.S. 74, 80, 103 S.Ct. 2239, 2242, 76 L.Ed.2d 427 (1983) ("The Uniformity Clause conditions Congress' power to impose indirect taxes."); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 150, 31 S. Ct. 342, 348, 55 L.Ed. 389 (1911) (the Uniformity Clause allows Congress "to lay and collect . . . taxes, duties, imposts, and excises, upon which the limitation is that they shall be uniform throughout the United States."); *Knowlton v. Moore*, 178 U.S. 41, 85[-86], 20 S.Ct. 747, 765, 44 L.Ed. 969 (1900) ("The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be 'uniform throughout the United States.'").

complete picture of the constitutional limits on Congress's power to tax, all three of these limitations are examined in the next sections. The Uniformity Clause, however, is the primary focus of this Article.

A. The Export Clause

The Export Clause plainly states: "No Tax or Duty shall be laid on Articles exported from any State."[27] It categorically bars Congress from imposing taxes on exports.[28] "[T]he Export Clause was originally proposed by delegates to the Federal Convention from the Southern States, who feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South."[29] To allay such fears, the Framers couched the Export Clause in unconditional language that protects all exports from federal tax burdens.[30] Along with the Import-Export Clause,[31] which prohibits states, without the consent of Congress, from laying "any Imposts or Duties on Imports or Exports,"[32] the Export Clause was "one of the compromises which . . . made possible the adoption of the Constitution."[33]

The Export Clause "specifically prohibits Congress from regulating international commerce through export taxes, [and] disallows any attempt to raise federal revenue from exports, . . . [but] has no direct effect on the way the States treat imports and exports."[34] In other words:

> [The Constitution] left to the states a greater power over exports than congress had; for, by the ninth section of the first article, they were

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Apache Bend Apartments, Ltd. v. United States, 702 F. Supp. 1285, 1292 (N.D. Tex. 1988) (footnotes omitted), *aff'd, reh'g granted, aff'd in part, rev'd in part*, 987 F.2d 1174 (5th Cir. 1993).

27. U.S. CONST. art. I, § 9, cl. 5.

28. United States v. United States Shoe Corp., 523 U.S. 360, 363 (1998). "The Clause, however, does not rule out a 'user fee,' provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for Government-supplied services, facilities, or benefits." *United States Shoe*, 523 U.S. at 363 (citing Pace v. Burgess, 92 U.S. 372, 375-76 (1876)).

29. United States v. IBM Corp., 517 U.S. 843, 859 (1996) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 95, 305-08, 359-63 (Max Farrand ed., 1966)). Mr. Gerry, a delegate from Massachusetts, thought the legislature would ruin the country if entrusted with the power to tax exports, by exercising the power partially, raising one part of the country and depressing another. RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 307. Mr. Mason, a delegate from Virginia, "urged the necessity of connecting with the power of levying taxes . . . [so] that no tax should be laid on exports." *Id.* at 305.

30. *IBM*, 517 U.S. at 859-60; Fairbank v. United States, 181 U.S. 283, 292-93 (1901) ("So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires, not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation; and, as we have shown, a stamp tax on a bill of lading, which evidences the export, is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export.").

31. U.S. CONST. art. I, § 10, cl. 2.

32. *Id.*

33. *Fairbank*, 181 U.S. at 290.

34. *IBM*, 517 U.S. at 859.

> prohibited from taxing exports, without any qualification, even by the consent of the states; whereas, with the consent of congress, any state can impose such a tax by a law, subject to the conditions prescribed.[35]

The Export Clause is not limited to taxes imposed exclusively on exports. It also applies to "the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit."[36] That is, the Export Clause exempts "from federal taxation not only export goods, but also services and activities closely related to the export process."[37] Accordingly, even those taxes that are imposed equally on exports and imports or other articles of commerce may be prohibited by the Export Clause,[38] for exports are not to be obstructed by the burdens of federal taxation.[39]

The Export Clause does not, however, preclude federal taxation of pre-export goods and services.[40] Thus, general excise taxes on property, such as a tax on all distilled spirits, and income taxes derived from the exporting business, are not prohibited by the Export Clause,[41] as that Clause applies only to taxes laid on exports, or matters related to exports, and not on taxes laid generally on the manufacture or handling of products.[42]

Although the Export Clause is a genuine limitation on the federal government's power to tax, its scope is quite limited.[43] The Export Clause applies only to international commerce,[44] and is limited to goods,

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35. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 153 (1837) (Baldwin, J., concurring); *see also* Williams v. Fears, 179 U.S. 270, 276 (1900).

36. *IBM*, 517 U.S. at 845.

37. *Id.* at 846.

38. *Id.* at 860 ("The better reading [of the Export Clause], that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all."). To determine whether a tax is an export tax, as compared to a general tax on property, a "court must examine the immediacy of exportation" and the "proximity of the tax imposed to the value of the articles exported." United States Shoe Corp. v. United States, 19 Ct. Int'l Trade 1284, 1294 (1995), *aff'd*, 114 F.3d 1564 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998).

39. R.J. Reynolds Tobacco Co. v. Robertson, 14 F. Supp. 463, 464 (M.D.N.C. 1935). Although the Supreme Court has allowed states to impose nondiscriminatory taxes under the Import-Export Clause and the Commerce Clause, it has consistently barred all federal taxes, discriminatory and nondiscriminatory, under the Export Clause. *IBM*, 517 U.S. at 850-62.

40. Cornell v. Coyne, 192 U.S. 418, 427 (1904) ("The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated.").

41. Thompson v. United States, 142 U.S. 471, 478 (1892) (upholding tax on distilled spirits, some of which are exported); William E. Peck & Co. v. Lowe, 247 U.S. 165, 174 (1918) (upholding income tax on profits derived from exporting goods).

42. United States v. W. Tex. Cottonoil Co., 155 F.2d 463, 466 (5th Cir. 1946) (upholding penalty on excess cotton, regardless of whether such cotton was sold in the United States or abroad).

43. The Sixteenth Amendment had no effect on the Export Clause. Metcalf & Eddy v. Mitchell, 269 U.S. 514, 521 (1926) ("[T]he Sixteenth Amendment did not extend the taxing power to any new class of subjects . . . .").

44. Fla. Sugar Mktg. & Terminal Ass'n, Inc. v. United States, 220 F.3d 1331, 1335-37 (Fed. Cir. 2000) (finding Export Clause does not bar tax on interstate shipments). Exports destined for

services, and "activities closely related to the export process."[45] It does not apply to passengers.[46] It applies exclusively to taxes on the international exportation of goods. As such, it plays no significant role in the IRS's circuit-specific application of the tax law which, of course, is the focus this Article.

B. The Apportionment Clauses

The Constitution provides that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers"[47] and that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[48] These clauses are designed to ensure that the citizens of each state pay no more than their proportional share of direct taxes.[49]

The apportionment clauses were proposed by southern states to prevent the federal government from imposing a tax on land or slaves, which would disproportionately burden southerners.

> [The southern states] possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern states, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars, was the reason of introducing the clause in the Constitution . . . .[50]

As a result, the Framers insisted that direct taxes be apportioned among the states based on population.[51] Assume Congress, for example, enacts a direct tax, such as a federal property tax, to raise $50 million.

U.S. territories are not subject to the Export Clause. *See, e.g.*, Hooven & Allison Co. v. Evatt, 324 U.S. 652, 685-86 (1945) (exports to Philippines); Dooley v. United States, 183 U.S. 151, 155-57 (1901) (exports to Puerto Rico).

45. *IBM*, 517 U.S. at 846; *United States Shoe*, 523 U.S. at 367 ("[T]he Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit.").

46. Carnival Cruise Lines, Inc. v. United States, 200 F.3d 1361, 1364 (Fed. Cir. 2000) ("The passengers on Carnival's cruise ships are neither 'articles' nor 'goods.' They are people. The application of the Harbor Tax to them would not involve the laying of any tax upon 'Articles' exported from any state. 'Articles' and 'goods' relate to items of commerce, not people. To apply the Export Clause to people would be inconsistent with the basic purpose of the Clause.").

47. U.S. CONST. art. I, § 2, cl. 3.

48. *Id.* art. I, § 9, cl. 4.

49. *See* Knowlton v. Moore, 178 U.S. 41, 96 (1900); *see also Hylton*, 3 U.S. (3 Dall.) at 178 ("[E]ach state will be debited for the amount of its quota of the tax, and credited for its payments.").

50. *Hylton*, 3 U.S. (3 Dall.) at 177.

51. *Id.* at 174.

For this tax to be constitutional, its burden must be apportioned among the fifty states based on population.[52] A sparsely populated state like South Dakota cannot be required to pay the same amount (e.g., $1 million) as a densely populated state like California. Rather, the citizens of each state must pay only a proportional amount of the federal tax burden based on that state's population.[53]

Not long after the Constitutional Convention, it became apparent that compliance with the apportionment clauses would be difficult, if not impossible, to achieve:

> It appears to me, that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example: Suppose two States, equal in census, to pay 80,000 dollars each, by a tax on carriages, of 8 dollars on every carriage; and in one State there are 100 carriages, and in the other 1000. The owners of carriages in one State, would pay ten times the tax of owners in the other. A. in one State, would pay for his carriage 8 dollars, but B. in the other state [sic], would pay for his carriage, 80 dollars.[54]

Compliance with the apportionment clauses, therefore, was a formidable obstacle to direct federal taxes, ultimately prompting the Sixteenth Amendment.

1. What Are Direct Taxes?

Originally, direct taxes were defined to include only capitation taxes (e.g., poll taxes)[55] and taxes on real property imposed solely by reason of ownership by the taxpayer.[56] Later, the Supreme Court in *Polock v. Farmers' Loan and Trust Co.*,[57] held that taxes on personal property, and taxes on the income from both real and personal property, such as rents and interest on bonds, were direct taxes.[58]

Direct taxes are levied upon persons and their possession or enjoyment of rights, whereas indirect taxes are levied upon events, such as

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52. U.S. CONST. art. I, §§ 2, cl. 3 & 9, cl. 4.
53. *See Hylton*, 3 U.S. (3 Dall.) at 174.
54. *Id.*
55. Even if a poll tax were to pass muster under the apportionment clauses, it is highly unlikely that a poll tax could survive an equal protection challenge. *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that Virginia's poll tax violated the Equal Protection Clause).
56. THE FEDERALIST NO. 21 (Alexander Hamilton) ("Those of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of land, or the number of the people, may serve as a standard."); *Hylton*, 3 U.S. (3 Dall.) at 176 (concluding that direct taxes are limited to capitations and taxes on land); Simmons v. United States, 308 F.2d 160, 166 (4th Cir. 1962) ("A direct tax is a tax on real or personal property, imposed solely by reason of its being owned by the taxpayer.").
57. 157 U.S. 429 (1895).
58. *Pollock*, 157 U.S. at 583.

transferring, exchanging, or using property.[59] Indirect taxes are not subject to the apportionment clauses.[60] Examples of direct taxes include local property taxes, state *ad valorem* taxes, and, presumably, European-style wealth taxes.[61] These taxes are imposed directly on the taxpayer or his or her property, but they are not imposed on transfers or exchanges of property.[62]

For all practical purposes, there are only two types of direct taxes: capitation taxes, such as poll taxes, and taxes on real and personal property ownership, such as real estate or *ad valorem* taxes.[63] As a result, the apportionment clauses have little relevance to modern federal taxation because there are no federal poll taxes or federal property taxes.[64] Instead, the federal government raises most, if not all, of its internal revenue via indirect taxes, such as excise taxes, death taxes, and income taxes.[65] The Supreme Court has consistently held that excise and death taxes are not direct taxes and, therefore, are not subject to the apportionment clauses.[66] The law has been less certain, however, with regard to income taxes.

Prior to the passage of the Sixteenth Amendment, there was considerable uncertainty over whether income taxes were direct or indirect.[67] As early as 1874, a federal court held that a tax upon income was a duty rather than a direct tax, and thus, federal income taxes were not required to be apportioned among the states.[68] The Supreme Court affirmed this

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59. *Id.* at 558 ("[A]ll taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."); *Knowlton*, 178 U.S. at 47 ("Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange.").

60. David F. Shores, *Rethinking Deferential Review of Tax Court Decisions*, 53 TAX LAW. 35, 35 n.1 (1999) ("Indirect taxes are subject to the uniformity clause, but not to the apportionment clauses.").

61. *Hylton*, 3 U.S. (3 Dall.) at 176 (finding direct taxes limited to capitations and taxes on land).

62. Kohl v. United States, 226 F.2d 381, 384 (7th Cir. 1955) ("Such taxes bear directly upon persons, upon their possession and enjoyment of rights, whereas indirect taxes are levied upon the happening of an event such as an exchange or transmission of property.").

63. *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J., seriatim opinion) (stating direct taxes "contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on LAND.").

64. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 200 (Aspen Publishers, Inc. 1997).

65. Howard Schragin, U.S. Shoe Corp. v. United States*: A Victory for U.S.-Canada Maritime Trade*, 19 FORDHAM INT'L L.J. 1764, 1771 (1996).

66. *See, e.g.*, *Knowlton*, 178 U.S. at 54-55 (upholding 1898 inheritance tax as a valid excise tax and not a direct tax).

67. *See* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1070-71 (2001).

68. Smedberg v. Bentley, 22 F. Cas. 368, 370 (C.C.D.N.J. 1874) ("Under the constitutional designation of the different kinds of taxation to which resort might be made by congress, a tax upon incomes must be classed among the duties authorized, rather than among the direct taxes. No apportionment is necessary when it is laid, and there is nothing to be done here but to sustain the demurrer to the first count of the plaintiff's declaration, and it is ordered accordingly."). In 1868, the Supreme

conclusion in 1880, when it held that a tax levied on personal income, gains, and profits is an excise or duty and not a direct tax.[69] From 1880 to 1895, there appeared to be a consensus that income taxes were indirect excise taxes not subject to the apportionment clauses.[70]

In 1895, however, the Supreme Court changed course, holding that taxes on the income derived from real property (e.g., rent) was the legal equivalent of a direct tax on the property itself and thus must be apportioned.[71] As a result, the Court invalidated an income tax on rents that was not apportioned among the states.[72] In the same case, the Court ruled that a tax on income derived from personal property was also a direct tax and that the law imposing such a tax was unconstitutional for failure to comply with the apportionment clauses.[73] In so doing, the Court stated:

> The tax imposed by sections 27 to 37, inclusive, of the act of 1894, so far as it falls on the income of real estate, and of personal property, being a direct tax, within the meaning of the constitution, and therefore unconstitutional and void, because not apportioned according to representation . . . are necessarily invalid.[74]

Moreover, the Court found that those provisions of the Revenue Act of 1894 taxing income derived from real and personal property were inseparable from the remainder of the Act.[75] Consequently, the Court invalidated the entire 1894 federal income tax scheme:

> We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act, and the scheme must be considered as a whole. Being invalid as to the greater part, and following, as the tax would, if any part were held valid, in a direction which could not have been contemplated, except in connection with the taxation considered as an entirety, we are constrained to conclude that [the Act is] . . . wholly inoperative and void.[76]

Court held that a gross receipts tax on the amounts insured, renewed, or continued by insurance companies was a duty or excise and not a direct tax. Pac. Ins. Co. v. Soule, 74 U.S. 433, 445-46 (1868); *see also Veazie Bank* 75 U.S. (8 Wall.) at 546-47 (upholding a ten percent tax on notes state banks paid to other banks).

69. Springer v. United States, 102 U.S. 586, 602 (1880) (holding income tax to be an indirect tax).

70. 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE & PROCEDURE § 5.3 (3d ed. 1999) ("Prior to the decision in *Pollock* in 1895, it had been the general consensus that the term 'direct' tax employed in the Constitution embraced only taxes on land (real property) and poll or capitation taxes. This consensus was firmly founded.").

71. *Pollock*, 158 U.S. at 637.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 635-37.

76. *Id.* at 637.

The Court thus concluded that a tax on a taxpayer's entire income, if it included income derived from property, is a direct tax and, therefore, must be apportioned among the states based on population.[77]

2. The Sixteenth Amendment

Pollock raised serious questions about whether income taxes were direct or indirect taxes.[78] It also continued a heated debate over whether a federal income tax could be imposed consistent with the Constitution.[79] The Sixteenth Amendment, however, rendered this debate academic. Ratified in 1913, the Sixteenth Amendment provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[80] The purpose of the Sixteenth Amendment was to relieve Congress of the obligation to apportion any tax on classes of income which would require apportionment due to its source.[81] Under the Sixteenth Amendment, Congress has the power to tax income from whatever source derived—labor, real estate, personal property, etc.—without concern for apportionment.[82] Thus, the apportionment clauses no longer present a barrier to federal income taxes.[83]

In sum, the apportionment clauses are not a barrier to federal income, death, or excise taxes, and these taxes comprise most, if not all, of the federal government's internal revenue.[84] Today, the apportionment

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77. *Id.*

78. Subsequent decisions have generally held that taxes on income are not direct taxes. *See, e.g.*, Richardson v. United States, 294 F.2d 593, 597-98 (6th Cir. 1961) (holding that a tax on accrued interest of notes passing to certain legatees is not a direct tax); Jones v. United States, 551 F. Supp. 578, 579 (N.D.N.Y. 1982) (holding that a tax on wages is not a direct tax); Krzyske v. Commissioner, 548 F. Supp 101, 104 (E.D. Mich. 1982) (holding that social security taxes are not direct taxes).

79. Jensen, *supra* note 67, at 1106-07.

80. U.S. CONST. amend. XVI.

81. *Brushaber*, 240 U.S. at 18.

82. *Id.* at 17-18.

83. The apportionment clauses would still inhibit the federal government's imposition of property or wealth taxes. Of course,

> [t]here is no federal property tax. Imposition of a federal property tax would be politically impractical because the Constitution requires that "direct" taxes be proportional to the population of each state. Thus, if a federal property tax were imposed, people living in a state with 50% of the country's population but only 20% of the country's property value would still be required to pay 50% of the total federal property tax bill. The federal government has levied property taxes twice: in 1798 and in 1813. The taxes were apportioned among the states as constitutionally required.

John A. Swain, *The Taxation of Private Interests in Public Property: Toward a Unified Theory of Property Taxation*, 2000 UTAH L. REV. 421, 421 n.2; *see also* Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 269, 270 n.14 (2000) (noting that many scholars believe that a federal wealth tax should be subject to apportionment).

84. The Supreme Court has generally assumed that once a tax is found to be outside the reach of the apportionment clauses, it is an indirect tax subject to the Uniformity Clause. *See Knowlton*, 178 U.S. at 83.

clauses would pose a barrier only to a federal property or wealth tax, both of which are unlikely to be invoked.[85]

C. The Uniformity Clause

The Uniformity Clause limits the federal government's power to impose indirect taxes.[86] It provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, . . . but all Duties, Imposts and Excises shall be *uniform* throughout the United States . . . ."[87] But what does the term "uniform" mean?

The Framers of the Constitution furnished little guidance on the meaning of "uniform."[88] The concerns giving rise to the Uniformity Clause, however, provide some insight into its purpose. Under the Articles of Confederation, the federal government lacked the power to regulate interstate commerce, resulting in interstate trade barriers and regionalism.[89] Prior to the Constitutional Convention of 1787, Americans were accustomed to putting their respective states' interests over the interests of the nation.[90] In an effort to remedy this situation and unify the nation,

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85. *See* Swain, *supra* note 83, at 421 n.2; Rakowski, *supra* note 83, at 265.

86. United States v. Ptasynski, 462 U.S. 74, 80 (1983). By contrast, the apportionment clauses limit the federal government's power to impose direct taxes. *See* discussion *supra* Part I.B.

87. U.S. CONST. art. I, § 8, cl. 1 (emphasis added). The Uniformity Clause applies only to the 50 states and not to Puerto Rico or other U.S. territories. Downs v. Bidwell, 182 U.S. 244, 287 (1901) (upholding duty on merchandise imported from Puerto Rico). The Uniformity Clause has received little attention from the courts. Indeed, the Supreme Court has never invalidated a tax law on the basis of the Uniformity Clause. As Professor Bittker aptly states, the Uniformity Clause "might have dramatically influenced the structure of the federal income tax, but . . . has shriveled away to a mere flyspeck." Bittker, *supra* note 9, at 9.

88. There are two other uniformity clauses in the Constitution: the Bankruptcy Clause and the Naturalization Clause. U.S. CONST. art. I, § 8, cl. 4. Reference to either of these clauses is unhelpful in defining "uniform." The Bankruptcy Clause vests in Congress the power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ." *Id.* Unlike the narrow construction it has given to the Taxation Uniformity Clause, the Supreme Court, in *Ry. Labor Executives' Ass'n v. Gibbons*, held that the Bankruptcy Uniformity Clause requires all similarly situated individuals to be treated the same. 455 U.S. 457, 473 (1982). The Court acknowledged that it construed the two Uniformity Clauses differently, despite the fact that they are both contained in Article I, Section 8. The Court based this distinction, however, on the intent of the Framers. The Naturalization Uniformity Clause was intended, not as an anti-discrimination provision, but rather as a grant of exclusive power to the federal government over immigration matters. *See In re* Hood, 319 F.3d 755, 763-66 (6th Cir. 2003).

89. JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 46-47 (E. Scott ed., Books For Libraries 1970) (1840). The sole power to regulate commerce was vested in the states. ARTICLES OF CONFEDERATION art. IV, (U.S. 1787) ("[T]he people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.").

90. DAVID MCCULLOUGH, JOHN ADAMS 397 (Simon & Schuster 2001); *see also* PAUL C. NAGEL, JOHN QUINCY ADAMS: A PUBLIC LIFE, A PRIVATE LIFE 50 (Alfred A. Knopf, Inc. 1997) ("[T]he Congress of the United States, operating under the severe restrictions contained in the Articles of Confederation . . . , seemed unable to cope with the young republic's growth. This was especially apparent in interstate and foreign commerce. The national economy had become sorely depressed."). Not surprisingly, the economic woes of the nation led to social unrest, the most notable event being the short-lived Shay's Rebellion, in which a group of debt-ridden farmers banded to-

the Framers of the Constitution vested the power to regulate interstate commerce in the federal government.[91] Some states remained concerned, however, that the regionalism that marked the Articles of Confederation would continue.[92] These states were worried that the federal government would use its power over interstate commerce to favor certain states.[93] Some of the delegates at the Convention were fearful of conspiracies by large states or regional combinations.[94] According to Justice Story, the Uniformity Clause was promulgated to

> cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests. Unless duties, 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.[95]

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gether and closed courthouses in order to forestall creditors. Robert A. Gross, *The Uninvited Guest: Daniel Shays and the Constitution*, *in* IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION 1-2 (Robert A. Gross ed., 1993).

91. *See* RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29 at 308; *see also* New York v. United States, 505 U.S. 144, 180 (1992) ("[T]he Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation . . . ."); Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992) ("Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills.").

92. *See* RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 308.

93. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 586-87 (2d ed. 1929). The Clause was proposed on August 25 and adopted on August 31 without discussion. The origins of the Uniformity Clause are linked to those of the Port Preference Clause. The Port Preference Clause provides: "No Preference shall be given by any Regulation of 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." U.S. CONST. art. I, § 9, cl. 6. The purpose of the Port Preference Clause is to give "small states protection against deliberate discrimination . . . by other, more powerful states." Cramer v. Skinner, 931 F.2d 1020, 1032 n.14 (5th Cir. 1991) (quoting City of Houston v. FAA, 679 F.2d 1184, 1198 (5th Cir. 1982)). The Port Preference Clause does not prohibit legislation that incidentally prefers some ports over others. Nevada v. Watkins, 914 F.2d 1545, 1558 (9th Cir. 1990). Rather, its purpose is to prevent the federal government from discriminating between states. Pennsylvania v. The Wheeling & Belmont Bridge Co., 59 U.S. 421, 435 (1855). Like the Tax Uniformity Clause, the Port Preference Clause is a limit on the federal government, and not state governments. Munn v. Illinois, 94 U.S. 113, 135 (1876). The Port Preference Clause and the Tax Uniformity Clause "were proposed together and reported out of a special committee as an interrelated limitation on the national government's commerce power." *Ptasynski*, 462 U.S. at 81 n.10 (citing RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 437). They were separated without explanation when James Madison remedied the omission from the Tax Uniformity Clause. *Id.*

94. *See* RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 307-08.

95. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 683 (T. Cooley ed., 4th ed. 1873).

The Uniformity Clause, therefore, is designed to ensure that Congress does not impose an indirect tax on the citizens of one state different than that imposed on the citizens of another state.[96]

The Uniformity Clause was proposed on August 25, 1787, and adopted by the Framers on August 31, 1787, without discussion.[97] As adopted, the language provided that all taxes shall be "uniform and equal" throughout the United States.[98] This clause was proposed by delegates from Maryland.[99] But when the Committee on Style reported the final draft of the Constitution to the Framers, it failed to include the tax uniformity clause.[100] Two days later, however, this omission was noticed and corrected by James Madison, who handwrote the term "uniform" into Article I, Section 8, but omitted the term "equal."[101]

1. What is "Uniformity?"

Following the ratification of the Constitution, a debate ensued as to the scope of the Uniformity Clause.[102] Some argued that the Uniformity Clause required intrinsic fairness and equality among taxpayers.[103] According to this view, a federal tax must be levied in precisely the same manner and amount upon all *individuals*.[104] Thus, a tax that treats two people differently would not be uniform. This view found support in *Hylton v. United States*,[105] a case in which the Supreme Court was asked to determine the constitutionality of a federal tax on carriages.[106] In that case, Justice Paterson stated that "[u]niformity is an instant operation on individuals, without the intervention of assessments, or any regard to states . . . ."[107] Similarly, Justice Iredell, voting to uphold the carriage tax, opined that "the tax ought to be uniform; because the present Constitution was particularly intended to affect individuals, and not states . . . ."[108]

A few years later, the Supreme Court, upholding a federal excise tax on distillers, again lent support to the argument that the Uniformity Clause required equality among taxpayers:

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96. Apache Bend Apartments, Ltd. v. United States, 702 F. Supp. 1285, 1296 (1988), *aff'd, reh'g granted, aff'd in part, rev'd in part*, 987 F.2d 1174 (5th Cir. 1993).

97. *Ptasynski*, 462 U.S. at 81 n.10.

98. RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 418.

99. Luther Martin, *Genuine Information*, *in* RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 172, 205.

100. RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 594.

101. CHARLES ADAMS, FOR GOOD AND EVIL: THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION 310 (Madison Books 1993).

102. *Knowlton*, 178 U.S. at 84-85.

103. *Id.* at 84.

104. *Id.*

105. 3 U.S. (3 Dall.) 171 (1796).

106. *Hylton*, 3 U.S. (3 Dall.) at 172.

107. *Id.* at 180.

108. *Id.* at 181.

> The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be 'uniform throughout the United States.' The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike.[109]

The view that the Uniformity Clause required intrinsic fairness and equality was short-lived. In the late nineteenth century, the Supreme Court declared once and for all that the Uniformity Clause simply requires geographic uniformity.[110] That is, an indirect tax "is uniform when it operates with the same force and effect in every place where the subject of it is found."[111] There is no requirement that the tax apply equally to all taxpayers.[112] This view was first pronounced in the *Head Money Cases*,[113] in which the Supreme Court upheld a federal head tax on persons immigrating through port cities such as New York.[114] Challengers of the head tax argued that it was not uniform because it applied to persons immigrating at port cities but not to those immigrating at inland cities.[115] The Court, however, sustained the tax, concluding that because the tax applies to all port cities alike "there is substantial uniformity within the meaning and purpose of the constitution."[116]

"Subsequent cases have confirmed that the Framers did not intend to restrict Congress' ability to define the class of objects to be taxed. They intended only that the tax apply wherever the classification is found."[117] Thus, Congress may distinguish between similar classes in selecting the subject of a tax. For example, in *Knowlton v. Moore*,[118] the Supreme Court upheld a federal inheritance tax despite the fact that the law imposed a progressive tax on legacies and varied the rate of tax among classes of legatees. [119] In so doing, the Court reaffirmed that the Uniformity Clause simply requires geographic uniformity and not intrinsic equality.

The *Knowlton* court gave three reasons for rejecting an intrinsic equality interpretation of the Uniformity Clause.[120] First, if the Framers had intended something more than geographic uniformity, there would

109. United States v. Singer, 82 U.S. (15 Wall.) 111, 121 (1872) (mem.).
110. The Head Money Cases, 112 U.S. 580, 594 (1884).
111. *The Head Money Cases*, 112 U.S. at 594.
112. *Id.* at 594-95.
113. 112 U.S. 580, 594 (1884).
114. *The Head Money Cases*, 112 U.S. at 596.
115. *Id.* at 594-95.
116. *Id.* at 595.
117. *Ptasynski*, 462 U.S. at 82.
118. 178 U.S. 41 (1900).
119. *Knowlton*, 178 U.S. at 109-10.
120. *Id.* at 87-89.

have been no reason to add the phrase "throughout the United States" to Article I, Section 8.[121] That phrase clearly denotes a geographic limitation and would be redundant if the Uniformity Clause required intrinsic equality among individual taxpayers.[122] To interpret that phrase otherwise would "lead to a disregard of the elementary canon of construction which requires that effect be given to each word of the Constitution."[123] Second, the Framers imposed two limits on Congress's power to tax: direct taxes must be apportioned among the states based on population, and indirect taxes must be uniform throughout the United States.[124] The purpose of the apportionment clauses is to protect individual taxpayers from paying disproportionate shares of federal taxes.[125] The apportionment clauses, therefore, impose a form of intrinsic equality.[126] However, this intrinsic equality applies only to direct taxes.[127] If the Framers had intended to extend this intrinsic equality to indirect taxes, they would not have distinguished the two.[128] As such, for indirect taxes, the Framers must have intended only geographic uniformity.[129] Third, the experience in England and the American states and colonies provided no evidence that indirect taxes must be imposed in an intrinsically equal manner.[130] To the contrary, the experience in those jurisdictions, and the records of the Continental Congress and Constitution Convention of 1787, made clear that the Uniformity Clause mandates nothing more than geographic uniformity.[131]

Ever since *Knowlton*, it has been clear that "the uniformity in excise taxes exacted by the Constitution is geographical uniformity, not uniformity of intrinsic equality and operation. The Constitution does not command that a tax 'have an equal effect in each State.'"[132] Rather, geographic uniformity simply precludes the federal government from imposing "a different tax in one state or states than was levied in another state or states."[133] A "tax is uniform when it operates with the same force and effect in every place where the subject of it is found."[134] Thus, a tax law may not be "drawn on state political lines."[135]

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121. *Id.* at 87.
122. *Id.*
123. *Id.*
124. *Id.* at 88-89.
125. *Id.* at 89.
126. *Id.* at 88.
127. *Id.*
128. *Id.* at 89.
129. *Id.*
130. *Id.*
131. *See generally id.* at 89-106.
132. Fernandez v. Wiener, 326 U.S. 340, 359 (1945) (upholding federal estate tax (quoting *Knowlton*, 178 U.S. at 104) (citations omitted)).
133. *Brushaber*, 240 U.S. at 12.
134. *The Head Money Cases*, 112 U.S. at 594.
135. *Ptasynski*, 462 U.S. at 78.

There is no lack of uniformity, however, simply because the subject of the tax is not found in some states[136] or because "differences of state law . . . may bring a person within or without the category designated by Congress as taxable . . . ."[137] An indirect tax may affect citizens of different states differently, as long as the *purpose* of the tax is not to favor the citizens of one state over the citizens of another state.[138] "The Uniformity Clause does not require a tax to be intrinsically uniform–that is, it is not necessary that the tax operate upon one individual in precisely the same manner as on all individuals."[139] Indeed, "[i]ndirect taxes necessarily will effect [sic] taxpayers in various states differently since states will have different quantities of the subject being taxed."[140] "Perfect uniformity and perfect equality of taxation . . . is a baseless dream . . . ."[141] Accordingly, a tax law is uniform if the same rates apply generally throughout the United States.[142]

2. What Are Indirect Taxes?

The Uniformity Clause identifies three categories of indirect taxes: duties, imposts, and excises.[143] For all practical purposes, however, the Uniformity Clause applies to any tax that is not a direct tax.[144]

> The 'terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution.' Therefore, if a tax is not a direct tax, it falls within the general

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136. *Fernandez*, 326 U.S. at 359.

137. Poe v. Seaborn, 282 U.S. 101, 117-18 (1930) ("[D]ifferences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity."); Florida v. Mellon, 273 U.S. 12, 17-18 (1927) (holding that a federal estate tax credit for state inheritance taxes paid is uniform despite the fact that Florida does not have an inheritance tax).

138. *Ptasynski*, 462 U.S. at 85-86.

139. Chiles v. United States, 61 A.F.T.R.2d (PH) 88-1378, 88-1384 (D. Or. 1985).

140. *Apache Bend Apartments*, 702 F. Supp. at 1296. "This created the possibility of most of the revenue from the tax on this activity coming from a few states where the activity is widely conducted, and very little revenue from those states where the activity is relatively unimportant." *Chiles*, 61 A.F.T.R.2d at 88-1384. Congress is not even prohibited from using geographic terms to define a class of objects to be taxed. *Ptasynski*, 462 U.S. at 84 (upholding taxation of "Alaskan oil" where the tax was applied at the same rate in all portions of the United States where the subject of the tax was found).

141. *The Head Money Cases*, 112 U.S. at 595. "Is the tax on tobacco void because in many of the state [sic] 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?" *Id.* at 594.

142. Heitsch v. Kavanagh, 200 F.2d 178, 180 (6th Cir. 1952) (upholding estate tax despite the fact that some taxpayers settle with the government for less than the full rate); R.C. Tway Coal Co. v. Glenn, 12 F. Supp. 570, 595 (W.D. Ky. 1935) (upholding a tax which was uniform within a particular class as a uniform tax).

143. U.S. CONST. art. I, § 8, cl. 1.

144. The Framers themselves were uncertain as to the meaning of indirect taxes:

> What is the distinction between *direct* and *indirect* taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point.

Springer, 102 U.S. at 597-98 (quoting Alexander Hamilton).

> category of indirect taxes, and it is a matter of no moment whether its classification be further refined as a duty, or an impost, or an excise.[145]

Whether a tax is direct or indirect depends upon what is being taxed.[146] "Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange."[147] For example, a tax imposed upon a particular use of property incidental to ownership is an excise tax.[148] An excise tax is an indirect tax, one not directly imposed upon persons or property, and is one that is "'imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.'"[149]

Another example of an indirect tax is the federal estate and gift tax, which is imposed on the transfer of property and not the property itself.[150]

> Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, . . . estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested.[151]

Income taxes[152] and corporate taxes[153] are also indirect taxes because they are imposed on the earning of money and not directly on individuals or property.[154] The list of taxes found to be indirect by the Supreme Court is extensive.[155] Indeed, in response to the contention that the

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145. Penn Mut. Indem. Co. v. Commissioner, 32 T.C. 653, 660-61 (1959) (quoting Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911) (citation omitted)).

146. Alexander Hamilton, *The Defence of the Funding System*, July 1795, *in* 19 THE PAPERS OF ALEXANDER HAMILTON 22, 25 (Harold C. Syrett ed., 1973) ("In all but direct taxes the Constitution enjoins *uniformity*.").

147. *Knowlton*, 178 U.S. at 47.

148. Bromley v. McCaughn, 280 U.S. 124, 136 (1929) (finding that an estate tax, which included gross estate transfers made in contemplation of death, is an indirect tax not subject to apportionment).

149. *In re* Tri-Manufacturing & Sales Co., 82 B.R. 58, 60 (Bankr. S.D. Ohio 1988) (quoting BLACK'S LAW DICTIONARY (5th ed.)).

150. *See Knowlton*, 178 U.S. at 56.

151. *Id.*; *see also* Tyler v. United States, 281 U.S. 497, 502-03 (1930).

152. *Brushaber*, 240 U.S. at 15 (upholding personal income tax).

153. *Flint*, 220 U.S. at 151-52 (upholding corporate income tax), *overruled on other grounds as noted by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 542 (1985).

154. *See generally* Calvin H. Johnson, *The Illegitimate "Earned" Requirement in Tax and Nontax Accounting*, 50 TAX. L. REV. 373, 412 (1995) ("Viewed as a tax on earnings, the income tax is an indirect tax . . . .").

155. Among these indirect taxes are: (1) a "license" or "special" tax upon dealers in certain commodities, License Tax Cases, 72 U.S. 462, 471-74 (1866); South Carolina v. United States, 199 U.S. 437, 459, 463 (1905), *overruled as stated in Garcia*, 469 U.S. at 528; (2) a tax on sales at commodity exchanges, Nicol v. Ames, 173 U.S. 509, 519-20 (1899); (3) a tax on the transfer or sale

estate tax is a direct tax, the Supreme Court swept away all logical arguments with Justice Holmes's infamous statement: "Upon this point a page of history is worth a volume of logic."[156] The category of indirect taxes, therefore, is "wide and comprehensive . . . in striking contrast to the very narrow range within which 'direct' taxes have been limited . . ."[157]

3. The Sixteenth Amendment

The Sixteenth Amendment had no effect on the Uniformity Clause,[158] so federal income tax laws are still required to be "uniform throughout the United States . . . ."[159] This, of course, calls into question the necessity of the Sixteenth Amendment. The federal government had the power to tax income prior to the Sixteenth Amendment.[160] The sole purpose of the Sixteenth Amendment was to relieve Congress of the obligation to apportion income taxes.[161] However, only direct taxes are subject to apportionment.[162] There is no dispute today—and arguably no dispute prior to the ratification of the Sixteenth Amendment—that income taxes are indirect taxes and, as such, are not subject to the apportionment clauses.[163] Ultimately, the Sixteenth Amendment serves no real purpose.

II. CIRCUIT-SPECIFIC APPLICATION OF THE INTERNAL REVENUE CODE

In recent years, the IRS has instituted an official practice of applying various parts of the Internal Revenue Code in only some states. This occurs when the IRS disagrees with a federal circuit court's interpretation of the Code. In such cases, the IRS issues a formal opinion stating

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of securities, Provost v. United States, 269 U.S. 443, 457 (1926); Thomas v. United States, 192 U.S. 363, 370-71 (1904); Treat v. White, 181 U.S. 264, 269 (1901); (4) a tax on the issuance of state bank notes, *Veazie Bank*, 75 U.S. (8 Wall.) at 546-47; (5) a tax on manufactured tobacco having reference to its origin and intended use, Patton v. Brady, 184 U.S. 608, 615-16 (1902); (6) a tax on the manufacture and sale of oleomargarine, McCray v. United States, 195 U.S. 27, 50 (1904); (7) a tax on devolutions of title to real estate, Scholey v. Rew, 90 U.S. 331, 348-49 (1874); (8) a tax on the receipt of legacies, *Knowlton*, 178 U.S. at 83; (9) a tax on transfers at death, N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921); and (10) a tax on transfers *inter vivos*, *Bromley*, 280 U.S. at 138.

156. *N.Y. Trust*, 256 U.S. at 349 (holding that the federal estate tax is an indirect tax).

157. *Penn Mut. Indem.*, 32 T.C. at 661. As Woodrow Wilson proclaimed in 1885, direct taxes are not favored in America: "All direct taxes are heartily disliked . . . ." WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 132 (Legal Classics Library special ed.) (1993).

158. The Sixteenth Amendment says nothing about uniformity: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

159. U.S. CONST. art. I, § 8, cl. 1; *Brushaber*, 240 U.S. at 24 (upholding that the federal income tax is subject to the Uniformity Clause after the Sixteenth Amendment).

160. *Flint*, 220 U.S. at 151-52; *Penn Mut. Indem.*, 32 T.C. at 662 ("Among the numerous indirect taxes imposed by Congress under article I, section 8, of the Constitution were the various income taxes levied for a period of nearly 10 years at about the time of the Civil War.").

161. *Brushaber*, 240 U.S. at 17-19.

162. U.S. CONST. art. I, § 8, cl. 1.

163. *Flint*, 220 U.S. at 150-51.

that it will adhere to the circuit court's interpretation of the tax law in the states within that circuit, but not in other states. As a result, different tax laws are being applied in different states in direct contravention of the spirit, if not the letter, of the Uniformity Clause.

Three examples of the IRS's circuit-specific application of the tax law should suffice. In a Field Service Advisory dated August 7, 1992, the IRS was asked to opine on whether a taxpayer is entitled to interest for the period when the taxpayer's refund checks were initially issued until the time when they were reissued, on checks that were mailed to the wrong address.[164] The IRS declared that the taxpayer was not entitled to the interest, but made clear that the outcome would have been different had the taxpayer resided in New York, Connecticut, or Vermont.[165] The geographical distinction was due to the fact that the Second Circuit had previously ruled, in *Doolin v. United States*,[166] that a similarly situated taxpayer was entitled to interest.[167] The IRS, however, refused to apply *Doolin* outside the Second Circuit.[168] By doing so, the IRS is applying federal tax law differently in some states than it is in others. As a result, residents of New York are entitled to interest but residents of California are not.

The second example is found in *Zabolotny v. Commissioner*,[169] which involved the correction of a prohibited transfer under I.R.C. § 4975.[170] The Eighth Circuit held that corrections under § 4975(f)(5) are automatic and thus no additional tax was owed by the taxpayers.[171] The IRS disagreed, opining that the taxpayers had failed to take the proper actions to correct a prohibited sale or exchange under § 4975(c)(1)(a),

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164. I.R.S. Field Serv. Advisory, TL-N-7623-92, 1992 WL 1355759 (Aug. 7, 1992).

165. *Id.* The federal circuits follow state political boundaries. MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 4.01 (3d ed. 1999). The Second Circuit, for instance, is comprised of New York, Connecticut, and Vermont. *Id.* at § 4.04.

166. 918 F.2d 15 (2d Cir. 1990).

167. *Doolin*, 918 F.2d at 19 ("Under all the circumstances, we cannot agree that there was a proper tender of the March 1986 check to plaintiffs; that check was therefore not a 'refund check' within the meaning of 26 U.S.C. § 6611(b)(2). Accordingly, the first check that was properly tendered was the March 1990 check, and plaintiffs are entitled to appropriate interest for the period between March 18, 1986 and a date within 30 days of March 9, 1990, the date of the 'refund check.'").

168. I.R.S. Field Serv. Advisory, TL-N-7623-92,1992 WL 1355759 (Aug. 7, 1992) ("The Service does not intend to follow the decision in any circuit, except in the Second Circuit . . . .").

169. 7 F.3d 774 (8th Cir. 1993).

170. *Zabolotny*, 7 F.3d at 776. I.R.C. § 4975 imposes additional taxes on certain prohibited transfers from qualified pension plans. I.R.C. § 4975 (2000).

171. *Zabolotny*, 7 F.3d at 778 n.3 ("The IRS also asserts that, because § 4975(a) imposes a blanket prohibition on certain types of transaction regardless of the transaction's financial success and demands a 5% of the value of the transaction from the disqualified person involved whether or not the transaction turned out to be a 'good deal,' the same standards should apply to § 4975(b). We disagree. Congress created a two-tier, not a one-tier, tax liability scheme, and one of the distinguishing features of the second-tier tax is that instead of being imposed automatically it is avoidable through correction. The mandatory nature of the first-tier excise tax simply does not require us to hold that the financial consequences of the transaction to the plan are irrelevant for the purposes determining the propriety of a second-tier excise tax liability." (citations omitted)).

and thus, a 100 percent tax was due under § 4975(b).[172] Despite the fact that no other circuit court had ruled on this issue, the IRS issued a nonacquiescence and declared that it would continue to apply § 4975(f)(5) in a manner inconsistent with the Eighth Circuit's opinion, but only for taxpayers living outside the Eighth Circuit.[173] Thus, taxpayers residing in Arkansas,[174] for example, are treated differently than those residing in Colorado.

Finally, in Revenue Ruling 72-583, the IRS declared two rules for gifts to political campaigns.[175] If the taxpayer resides in Virginia, or any other state outside the Fifth Circuit,[176] gifts to political campaigns are considered taxable gifts under the federal gift tax.[177] For taxpayers residing in Texas, or any other state within the Fifth Circuit, such gifts are not taxable. The only reason for this is that the Fifth Circuit had so held.[178]

In all three examples, the IRS is applying the tax laws one way in some states and another way in other states. The IRS's distinction is based solely on geography, as the federal circuits are drawn on state political boundaries. The IRS's distinction is not based on state law or the taxpayers themselves. Accordingly, this is nothing more than a nonuniform application of the tax law by the federal government.

III. APPLICATION OF THE UNIFORMITY CLAUSE TO THE IRS

"[T]he Uniformity Clause requires that an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found."[179] If Congress passed a law that applied different taxes to different circuits, the law would undoubtedly violate the Uniformity Clause.

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172. Zabolotny v. Commissioner, 7 F.3d 774 (8th Cir. 1993), *action on dec.*, 1994-004, 1994 WL 805237 (May 31, 1994).

173. *Zabolotny, action on dec.*, 1994-004, 1994 WL 805237.

174. The Eighth Circuit is comprised of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. TIGAR, *supra* note 165, at § 4.10.

175. Rev. Rul. 72-583, 1972-2 C.B. 534. Revenue Ruling 72-583 was subsequently superseded by statute. *See* I.R.C. § 2501(a)(5).

176. The Fifth Circuit is comprised of Louisiana, Mississippi, and Texas. TIGAR, *supra* note 165, at § 4.07.

177. Rev. Rul. 72-583, 1972-2 C.B. 534.

178. Stern v. United States, 436 F.2d 1327, 1330 (5th Cir. 1971). The Fifth Circuit reasoned:

> The transactions in controversy were permeated with commercial and economic factors. The contributions were motivated by appellee's desire to promote a slate of candidates that would protect and advance her personal and property interests. To assure that the funds would be spent in a manner consonant with the attainment of that goal, appellee and her group retained control over the disbursement of their contributions. In a very real sense, then, Mrs. Stern was making an economic investment that she believed would have a direct and favorable effect upon her property holdings and business interests in New Orleans and Louisiana. These factors, in conjunction with the undisputed findings of the lower court that the expenditures were bona fide, at arms length and free from donative intent, lead us, in light of what we have said above, to the conclusion that the expenditures satisfy the spirit of the Regulations and are to be considered as made for an adequate and full consideration.

Stern, 436 F.2d at 1330.

179. United States v. Ptasynski, 462 U.S. 74, 84 (1983).

Therefore, the IRS's circuit-specific application of the tax laws clearly violates the spirit of the Uniformity Clause as the IRS is applying tax laws differently to different states. However, does the IRS's circuit-specific application of the tax law violate the letter of the Uniformity Clause?

The Uniformity Clause is contained in Article I of the Constitution.[180] By its terms, therefore, it does not limit the actions of the IRS; it applies only to Congress.[181] As a consequence, it may be argued that only Congress, and not the IRS, can violate the Uniformity Clause. Such an argument, however, would render the Uniformity Clause meaningless.

There are two ways of viewing the IRS's circuit-specific application of the tax law. First, it could be argued that the Uniformity Clause applies only to the legislative process, and the IRS is not making law, but simply choosing not to enforce an otherwise uniform law in some states. The problem with this argument is that the "power to alter or repeal laws is a legislative power and executive officers may not by means of construction, rules and regulations, orders or otherwise, extend, alter, repeal, set at naught or disregard laws enacted by the legislature."[182] This is particularly true in the area of tax law, where courts have held that it is unlawful for the IRS to adopt different enforcement policies for different circuits: "The letter of the Commissioner [setting forth a different enforcement policy for the Eighth Circuit] could not have the effect of changing the law. Insofar as the Commissioner adopted an enforcement policy contrary to the statute, the enforcement policy was unlawful."[183]

Alternatively, it could be argued that the IRS is involved in the legislative process by virtue of the fact that Congress has delegated its power to make tax law to the IRS.[184] It is well settled that the executive branch lacks the independent power to impose taxation; only Congress has that authority.[185] Accordingly, any power the IRS has to impose tax

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180. U.S. CONST. art. I, § 8, cl. 1.

181. As part of the executive branch, the IRS is governed by Article II of the Constitution. U.S. CONST. art. II, § 1, cl. 1.

182. Peony Park, Inc. v. United States, 121 F. Supp. 690, 695 (D. Neb. 1954); *see also* Inv. Annuity, Inc. v. Blumenthal, 442 F. Supp. 681, 693 (D.D.C. 1997) ("Congress, not the Internal Revenue Service, is the appropriate body to consider . . . substantive changes in the tax laws."); Lopez v. Heckler, 713 F.2d 1432, 1441 (9th Cir. 1983) (Pregerson, J., concurring) (opining that an agency's refusal to adhere to circuit court's decision is "akin to the repudiated pre-Civil War doctrine of nullification"); Stieberger v. Heckler, 615 F. Supp. 1315, 1357 (S.D.N.Y. 1985) (Nonacquiescence renders "[t]he judiciary's duty and authority . . . to say what the law is . . . a virtual nullity . . . ." (citations and internal quotation marks omitted)).

183. *Peony Park*, 121 F. Supp. at 695.

184. *See generally* Treas. Dept. Order No. 150-2, *printed in* I.R.C. § 7452 (1954) (granting revenue and taxing authority to the Commissioner of Internal Revenue). Congress' delegation powers are virtually unlimited. *See, e.g.*, Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457, 472-73 (2001).

185. Inland Prods. Co. v. Blair, 31 F.2d 867, 868 (4th Cir. 1929) ("The Revenue Acts in force in 1918 and 1919 did not impose the soft drink tax upon sweet cider, and the regulations of the Revenue Department attempting to impose it were void."); *Inv. Annuity*, 442 F. Supp. at 693 ("Con-

law must have been delegated to it by Congress.[186] When Congress delegates powers to the executive branch, however, the executive branch assumes those powers subject to the same constitutional restrictions that limited Congress' power.[187] For example, the First Amendment provides that "*Congress* shall make no law . . . abridging the freedom of speech . . . ."[188] By its terms, only Congress, not the executive branch, is subject to the First Amendment. If applied literally, the executive branch could promulgate regulations that abridge free speech with impunity. Such a construction would, of course, render the First Amendment meaningless, and courts have so held:

> Petitioner argues that the [FCC's] regulations . . . violate the First Amendment. The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech." Although the text of the First Amendment refers to legislative enactments by Congress, it is actually much broader in scope and encompasses, among other things, regulations promulgated by administrative agencies.[189]

The same holds true for restrictions on Congress contained in Article I of the Constitution.[190] Congress may delegate, under Article I, § 8, cl. 17, its "full legislative power subject of course to constitutional limitations to which all lawmaking is subservient . . . ."[191] Obviously, Congress cannot delegate more power than it has.[192] Otherwise, Congress could easily avoid constitutional restrictions like the Uniformity Clause by simply delegating authority to the executive branch. Accordingly, if the IRS is imposing tax law— rather than enforcing it—it must do so in compliance with the Uniformity Clause.[193]

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gress, not the Internal Revenue Service, is the appropriate body to consider . . . substantive changes in the law."); *Peony Park*, 121 F. Supp. at 695 ("The executive branch of the government has no power to raise revenue. That power is in the Congress by Article I, § 8 of the Constitution.").

186. Congress has the authority to delegate its Article I, § 8 powers to the executive branch. *See* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 59 (1974) ("The plenary authority of Congress to regulate foreign commerce, and to delegate significant portions of this power to the Executive, is well established."); District of Columbia v. Thompson Co., 346 U.S. 100, 109 (1953) (Congress may delegate its "full legislative power subject of course to constitutional limitations to which all lawmaking is subservient . . . .").

187. *See, e.g.*, U.S. West, Inc. v. FCC, 182 F.3d 1224, 1231 (10th Cir. 1999) (noting that an agency's interpretation of the delegating statute is subject to constitutional review).

188. U.S. CONST. amend. I (emphasis added).

189. *U.S. West*, 182 F.3d at 1231-32 (citations omitted).

190. *Thompson*, 346 U.S. at 109.

191. *Id.*

192. Neinast v. Texas, 217 F.3d 275, 281 (5th Cir. 2000) ("[O]ur operating premise must be that an agency, or as here, an executive office with delegated power to promulgate rules, cannot have greater power to regulate . . . conduct than does Congress.").

193. *See generally* Margaret L. Thum, *Confusion in the Courts: The Failure to Tax Punitive Damages Uniformly in Personal Injury Cases*, 23 HASTINGS CONST. L.Q. 591 (1996) (arguing that inconsistent circuit court decisions violate the Uniformity Clause); Gary L. Rodgers, *The Commissioner "Does Not Acquiesce,"* 59 NEB. L. REV. 1001, 1030 (1980) (suggesting that inconsistent interpretation of tax laws by courts could violate the Uniformity Clause).

In sum, when the IRS applies tax law in a circuit-specific manner, it is either unlawfully refusing to enforce a tax statute in certain states or imposing a non-uniform tax law in violation of the Uniformity Clause. In either case, the IRS's actions are unconstitutional.

IV. PROPOSAL

The IRS's circuit-specific application of the tax law violates the spirit, if not the letter, of the Uniformity Clause. The IRS, however, is not totally to blame. The real culprit is a judicial system in which thirteen different circuit courts independently interpret federal tax law.[194] When the IRS disagrees with a circuit court's interpretation of the Internal Revenue Code, the IRS has three unappealing choices. First, it can apply the tax law in accordance with the circuit court's interpretation in that circuit, but not in other circuits. This is the IRS's current practice, which arguably violates the Uniformity Clause.[195] Alternatively, the IRS could apply the tax law in accordance with the circuit court's interpretation in all circuits. Under this approach, each circuit court would effectively speak for the entire nation, raising the circuit court's prominence to that of the United States Supreme Court. This approach is not followed in other areas of federal law,[196] and, of course, is not feasible where there are contradictory circuit court interpretations.[197] Finally, the IRS could, theoretically, ignore the circuit court's interpretation altogether.[198] However, this alternative violates one of the first principles of judicial review: a federal court's interpretation of federal law is final and controlling.[199] Accordingly, any proposal to reform the IRS's circuit-specific application of the tax law must start with a change in the appellate process.

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194. ROSWELL MAGILL, THE IMPACT OF FEDERAL TAXES 209 (1943) ("If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than to provide for 87 Courts [as of 1943] with original jurisdiction, 11 appellate bodies [now 13] of coordinate rank, and only a discretionary review of relatively few cases by the Supreme Court."). Appeals from district courts are heard by the circuit court in which that district is located. *See* 28 U.S.C. § 1294 (2000). Appeals from the Tax Court are heard by the circuit court in which the taxpayer resides. I.R.C. § 7482 (2000). Appeals from the Court of Federal Clams are heard by the Federal Circuit. 28 U.S.C. § 1295 (2000). In all, thirteen different circuit courts hear tax appeals.

195. *See supra* Part II.

196. *See, e.g.*, Hopwood v. Texas, 84 F.3d 720 (5th Cir. 1996) (invalidating affirmative action programs in Fifth Circuit only), *cert. denied*, 116 S. Ct. 2581 (1996).

197. If there were a split in circuits, the IRS, under this alternative, would have no choice but to apply different laws in different states. Circuit splits are not uncommon in tax law. For example, the circuits are split on whether a contingent fee is a part of the client's taxable income. *Compare* Foster v. United States, 249 F.3d 1275, 1279-80 (11th Cir. 2001), Srivastava v. Commissioner, 220 F.3d 353, 364-65 (5th Cir. 2000), Davis v. Commissioner, 210 F.3d 1346, 1347-48 (11th Cir. 2000) (per curium), Estate of Clarks v. United States, 202 F.3d 854, 858 (6th Cir. 2000), *and* Cotnam v. Commissioner, 263 F.2d 119, 125-26 (5th Cir. 1959), *with* Young v. Commissioner, 240 F.3d 369, 376-79 (4th Cir. 2001), Coady v. Commissioner, 213 F.3d 1187, 1190-91 (9th Cir. 2000), *and* Baylin v. United States, 43 F.3d 1451, 1454-55 (Fed. Cir. 1995).

198. This practice has been condemned by the courts. *See supra* note 182 and accompanying text.

199. Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law . . . ."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

The simplest and best solution would be to require all federal tax appeals to be heard in a single forum. This Article, therefore, proposes that Congress amend 28 U.S.C. § 1295(a) by adding a provision granting exclusive jurisdiction over federal tax appeals to the Court of Appeals for the Federal Circuit.[200] The Federal Circuit was created to provide "a forum for appeals from throughout the country in areas of the law where Congress determines that there is special need for . . . uniformity."[201] For example, in an effort to unify and stabilize the law of patents, Congress assigned jurisdiction over virtually all federal patent appeals to the Federal Circuit.[202] Many argue this exclusive jurisdiction has added a needed stability and unity to the law of patents.[203] There is no reason the Federal Circuit could not do the same for tax law.[204] Uniformity is needed in tax

200. Such an amendment could read:

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

. . .

(15) of an appeal from a final decision of the United States Court of Federal Claims, the United States Tax Court, or a United States District Court involving claims under Title 26 (the Internal Revenue Code).

201. S. REP. NO. 97-275, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 11, 14. "[T]here are areas of the law in which the appellate courts reach inconsistent decisions on the same issue, or in which—although the rule of law may be fairly clear—courts apply the law unevenly when faced with the facts of individual cases." *Id.* at 13. The Federal Circuit was designed to provide "a prompt, definitive answer to legal questions" in these areas. *Id.* at 11.

202. *Id.* at 11-17. According to 28 U.S.C. § 1295 (2000):

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a decision of—(A) the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35; (B) the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or (C) a district court to which a case was directed pursuant to section 145, 146, or 154(b) of title 35.

Id. § 2195 (a).

203. *See, e.g.*, F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 754 (2001); Howard T. Markey, *The Federal Circuit and Congressional Intent*, 41 AM. U. L. REV. 577, 577 (1992) (discussing the Federal Circuit's success in fulfilling Congress' desire to create uniformity in patent law); Allan M. Soobert, *Breaking New Grounds in Administrative Revocation of U.S. Patents: A Proposition for Opposition—and Beyond*, 14 SANTA CLARA COMPUTER & HIGH TECH. L.J. 63, 104 (1998) ("The Federal Circuit has, for the most part, been successful in achieving its primary goal of providing uniformity in patent law."); Harry F. Manbeck, Jr., *The Federal Circuit—First Ten Years of Patentability Decisions*, 14 GEO. MASON L. REV. 499, 504 (1992) (The Commissioner of Patents and Trademarks opining that "[t]he first ten years of Federal Circuit jurisprudence has restored efficiency and reliability to the patent law.").

204. *See generally* COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 73 (Dec. 18, 1998), *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf (last visited Nov. 22, 2003) [hereinafter COMMISSION ON STRUCTURAL ALTERNATIVES] (suggesting that a specialized court of tax appeals is unnecessary and that the tax appeals should be centralized in the Federal Circuit). Alternatively, Congress should create a new appellate court to hear all tax appeals. Various tax jurists, practitioners, and academics have proposed the creation of a court of tax appeals. None of these proposals however, were prompted by the IRS's circuit-specific application of the tax law. *See, e.g.*, H. Todd Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228 (1975); Oscar E. Bland, *Federal Tax Appeals*, 25 COLUM. L. REV. 1013 (1925); MAGILL, *supra* note 194, at 209; Roger J. Traynor, *Administrative and Judicial Procedure*

law every bit as much as patent law.[205] Indeed, as this Article illustrates, uniformity of tax law is not only desirable, it is constitutionally prescribed.

Congress has nearly unlimited authority to modify or expand the appellate jurisdiction of federal courts, thus, the proposed amendment would be constitutional.[206] Moreover, the Federal Circuit's interpretation of the tax law would be final and binding on the IRS, subject only to review by the United States Supreme Court or, in some instances, a Congressional amendment to the tax law.

This proposal offers several advantages compared to the current state of the law. Appeals from final decisions of the district courts, the Court of Federal Claims, and the Tax Court would be heard by a single circuit court.[207] This would eliminate inconsistent circuit court decisions, as all tax appeals would be decided by the Federal Circuit.[208] In the event of inconsistent decisions by different panels of the Federal Circuit, the Federal Circuit could resolve such inconsistencies *en banc*.[209] The Tax Court has adhered to a similar policy for years.[210]

Also, since the Federal Circuit's decision would be final, binding, and not subject to inconsistent circuit court interpretations, non-

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for Federal Income, Estate and Gift Taxes-A Criticism and a Proposal, 38 COLUM. L. REV. 1393 (1938); Charles L. B. Lowndes, *Taxation and the Supreme Court, 1937 Term*, 87 U. PA. L. REV. 165 (1938); Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); Gary W. Carter, *The Commissioner's Nonacquiescence: A Case for a National Court of Tax Appeals*, 59 TEMP. L.Q. 879 (1986).

205. Wash. Energy Co. v. United States, 94 F.3d 1557, 1561 (Fed. Cir. 1996) ("[U]niformity among the circuits is particularly desirable in tax cases to ensure equal application of the tax system to our citizenry . . . ." (quoting Gibraltar Fin. Corp. Cal. v. United States, 825 F.2d 1568, 1572 (Fed. Cir. 1987))); First Charter Fin. Corp. v. United States, 669 F.2d 1342, 1345 (9th Cir. 1982); Keasler v. United States, 766 F.2d 1227, 1233 (8th Cir. 1985).

206. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (upholding statute removing Supreme Court's appellate jurisdiction over habeas corpus petitions). *But see* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (suggesting that Congress' power over the court's appellate jurisdiction is not unlimited).

207. Under current law, the Federal Circuit has appellate jurisdiction over tax cases arising out of the Court of Federal Claims. 28 U.S.C. § 1295(a)(3) (2000) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of Federal Claims; . . . .").

208. Appeals would continue to be as a matter of right. *See, e.g.*, McDonald v. United States, 13 Cl. Ct. 255, 265 n.3 (1987) (parties have a "right to appeal to the United States Court of Appeals for the Federal Circuit"). Thus, the IRS could appeal any trial court decision with which it disagrees. This would prevent the trial courts from becoming the new bastion of non-uniformity.

209. FED. CIR. R. 35(a) states:

> A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Id. The Federal Circuit also has the power to stay enforcement, pending appeal, or any trial court decision. FED. CIR. R. 8(a).

210. In the Tax Court, every proposed decision of a trial judge must be referred to the chief judge before release to assure consistency with the court's existing position. The chief judge may refer the case to the full Tax Court for possible change. I.R.C. § 7460 (2000).

acquiescence would not be an option for the IRS. Under the proposal, the IRS must apply the tax law as interpreted by the Federal Circuit until such time as the Federal Circuit's interpretation is modified or overruled by the Supreme Court or the tax law is amended by Congress.[211] As a result, the IRS would no longer have any reason to apply the tax law in a circuit-specific manner because there would be only one circuit court interpretation of the Internal Revenue Code, thereby eliminating any Uniformity Clause problems.

Another advantage over the current state of the law is that if the Federal Circuit hears all tax appeals, that court may develop an expertise in tax matters, as it has in patent cases. Scholars have recognized that:

> Clearly, the Federal Circuit has developed patent expertise of a higher average level than that previously found in the regional circuits, as a result of deciding over 200 patent appeals per year. The fact that the Federal Circuit has a principal responsibility for the patent system, rather than for deciding the odd case, contributes to the development of that expertise.[212]

The same should hold true for tax appeals.[213] Tax law is just as intricate and incoherent as patent law, particularly to generalized judges who rarely encounter tax appeals.[214] Expertise alone may well reduce the number of inconsistent tax law interpretations.[215]

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211. *See generally* Questions and Answers, The First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 100 F.R.D. 499, 572 (1983) [hereinafter Judicial Conference] ("A single court of tax appeals, insulated as a practical matter from any but the rarest Supreme Court review, but always subject to correction through the legislative process, inevitably would promote uniformity and coherence. Things would not always be settled "right," as losing litigants and the similarly situated will assert with fervor, but subject to congressional review they will be settled. That seems to me worth a great deal.").

212. John B. Pegram, *Should There be a U.S. Trial Court with a Specialization in Patent Litigation?*, 82 J. PAT. & TRADEMARK OFF. SOC'Y 766, 788 (2000); *see also* Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co., 520 U.S. 17, 40 (1997); Micro Motion Inc. v. Exac Corp., 741 F. Supp. 1426, 1434 (N.D. Cal. 1990) (noting the special expertise of the Federal Circuit in patent cases).

213. Judicial Conference, *supra* note 211, at 572. ("A court of tax appeals would be a specialist's tribunal. Sensibly, I think, it would be a tax specialist tribunal, its jurisdiction limited to and exclusive . . . over appeals of cases arising under the federal tax laws. Sacrificed in the process, necessarily, is the leavening influence of the generalist appellate judge. Taking account of what our Internal Revenue Code and regulations have become, and likely will remain, I think it a price worth paying.").

214. Laing v. United States, 423 U.S. 161, 188 (1976) (Blackmun, J., dissenting) ("Every experienced tax practitioner also knows that our Internal Revenue Code is a structured and complicated instrument perhaps too complex that deserves careful and historical analysis when, as here, longstanding provisions of that Code are challenged."); Koss v. United States, 69 F.3d 705, 712 (3d Cir. 1995) ("We cannot close this opinion without making an additional observation. It is, of course, commonplace to note that the Internal Revenue Code is remarkably complicated. In this case, these complications have cost the Kosses dearly. Indeed, at oral argument we were told that their debt to the IRS now exceeds $300,000 because of the inclusion of interest. Yet it is very possible that, but for the operation of the non-substantive, highly technical procedural provisions that have been applied, they would not owe this money. We are disturbed by the harsh result.").

215. Congress created the Federal Circuit to achieve consistency in patent cases by avoiding the "contradictory decisions often issued by the 12 existing Courts of Appeal and seldom untangled

Finally, there is no reason to believe that the Federal Circuit would become a tool of the IRS. "No tax venue restrains the IRS's aggression and power better than the Federal Circuit Court of Appeals. Other tax venues lack the Federal Circuit's history and monetary-claim expertise. The Federal Circuit specializes in bringing uniform justice to disputes between the United States and its citizens."[216]

CONCLUSION

The Internal Revenue Code is interpreted by thirteen different circuit courts. The circuit courts' interpretations are not always in accord, but they are usually final, as the Supreme Court rarely hears tax appeals.[217] As a result, the IRS is often forced to apply different tax laws in different circuits in violation of the spirit, if not the letter, of the Uniformity Clause of the Constitution. There is, however, a simple, practical, and constitutional solution to this problem. This Article proposes that Congress amend 28 U.S.C. § 1295(a) by adding a provision granting exclusive jurisdiction of federal tax appeals to the Court of Appeals for the Federal Circuit. Such an amendment would not only unify and stabilize the tax law, it would permanently solve the Uniformity Clause issue identified in this Article.

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by the Supreme Court." Paula Dwyer et al., *The Battle Raging Over "Intellectual Property,"* BUS. WK., May 22, 1989, at 79.

216. Christopher R. Egan, *Checking the Beast: Why the Federal Circuit Court of Appeals Is Good for the Federal System of Tax Litigation*, 56 SMU L. REV. 721, 743-44 (2003).

217. "'This is a tax case. Deny.' This was [Justice] Brennan's normal reaction to a cert request in a tax case." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 362 (1979); *see also* COMMISSION ON STRUCTURAL ALTERNATIVES, *supra* note 204 (infrequent Supreme Court review of tax cases often leaves the interpretation of the tax law unsettled for years).