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AFFORDABLE CARE ACT FAILS FOR LACK OF UNIFORMITY

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I. INTRODUCTION

With the dust settled over hotly contested Commerce Clause,[1] apportionment,[2] origination,[3] and ambiguity[4] challenges to the Affordable Care Act [ACA],[5] sober analysis reveals a remaining flaw: the lack of uniformity.[6] Whether by deliberate design or intuitive happenstance, Justice Roberts—writing both in *National Federation of Independent Business v. Sebelius*[7] (*NFIB*) and in *King v. Burwell*[8]—paved the way for a successful uniformity challenge. The Act's downfall is not inevitable, as the lack of uniformity is reparable through legislative, administrative, or state action.

We focus on one part of the Act[9]:

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1. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2584-93 (2012).

2. *Id.* at 2598-99.

3. Sissel v. HHS, U.S. Dep't of Health & Human Servs., 760 F.3d 1, 10 (D.C. Cir. 2014) (upholding the ACA under an origination challenge). *But see* Steven J. Willis & Hans G. Tanzler IV, *Reversed the Wrong House: Why 'Obamacare' Violates the U.S. Constitution's Origination Clause* 34–35) (Wash. Legal Found. Working Paper Series, Paper No. 189, 2015), http://www.wlf.org/upload/legalstudies/workingpaper/WillisWPfinal.pdf.

4. King v. Burwell, 135 S. Ct. 2480, 2496 (2015) (holding the I.R.C. section 36B credits apply both in state and federally created exchanges).

5. For prior treatment of ACA challenges, see Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, TAX NOTES (Tax Analysts, Falls Church, Va.), July 12, 2010, at 169, 170; Erik M. Jensen, *The Individual Mandate and the Taxing Power*, TAX NOTES Jan. (Tax Analysts, Falls Church, Va.), Jan. 2, 2012, 96 at 97; *see* Erik M. Jensen, *Post-NFIB: Does the Taxing Clause Give Congress Unlimited Power?*, TAX NOTES Sept.(Tax Analysts, Falls Church, Va.), Sept. 10, 2012, at 1310; Timothy Sandefur, *So It's a Tax, Now What??: Some of the Problems Remaining After* NFIB v. Sebelius, 17 TEX. REV. L. & POL. 203, 205 (2013); *see also* Jeffrey S. Kinsler, *Circuit-Specific Application of the Internal Revenue Code: An Unconstitutional Tax*, 81 DENV. U.L. REV. 113, 113 (2003) (not dealing with the Affordable Care Act, but providing useful background).

6. David B. Rivkin, Jr. & Lee A. Casey, *The Opening for a Fresh ObamaCare Challenge*, WALL ST. J. 113 (Dec. 5, 2012), http://www.wsj.com/articles/SB10001424127887324705104578151164101375482.

7. *Sebelius NFIB*, 132 S. Ct. 2566, at 2577.

8. *Burwell*, 135 S. Ct. at 248.

9. Section 36B—the credit for lower income purchasers in state exchanges—also lacks uniformity because it is a function of state-exchange silver-plan prices, which vary by state. *See* I.R.C. § 36B(b) (2012). Further, eligibility for the credit is a function of the poverty line, which varies among the states. *See infra* text accompanying note 13. Section 4980H—the employer mandate—lacks uniformity because it is a function of section 36B credits, which themselves are

> Subsection 5000A(e)[10]—
>
> the individual mandate exception for low-income persons—lacks uniformity in two respects. First, it is a function of state-exchange bronze-plan prices, which vary from state to state. Second, it is a function of the federally determined poverty level which varies among Alaska, Hawaii, and the lower 48 states.[11]

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non-uniform. *See* I.R.C. § 4980H(c)(3) (2012). Similarly section 4980D—*inter alia*, the contraceptive mandate—was originally uniform when viewed in isolation. *See* I.R.C. § 4980D (2012). But, starting in 2015, it works in conjunction with the employer mandate, which is not uniform. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (2014) (showing the interaction between § 4980H and § 4980D). Thus, as applied, the 4980D excise is not uniform beginning in 2015.

10. I.R.C. § 5000A(e) (2012).

11. The Department of Health and Human Services annually issues poverty *guidelines*. The Bureau of the Census annually issues a poverty *threshold*. Liability for the tax is a function of section 36B credit eligibility. I.R.C. § 5000A(e)(1)(B)(ii). Per I.R.C. section 36B, credit eligibility for "applicable taxpayers" is a function of the HHS guidelines. I.R.C. § 36B(c)(1)(A) (2012). The term "applicable taxpayer" means, with respect to any taxable year, a taxpayer whose household income for the taxable year equals or exceeds 100% but does not exceed 400% of an amount equal to the poverty line for a family of the size involved. *Id.* Per section 36B(d)(3)(A): "The term 'poverty line' has the meaning given that term in section 2110(c)(5) of the Social Security Act (42 U.S.C. 1397jj(c)(5))." *Id.* The Social Security Act, in turn, provides: "The term 'poverty line' has the meaning given such term in section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)), including any revision required by such section." 42 U.S.C. § 1397jj(c)(5) (2012). The Block Grant Act, in turn, provides:

> The term "poverty line" means the official poverty line defined by the Office of Management and Budget based on the most recent data available from the Bureau of the Census. The Secretary shall revise annually (or at any shorter interval the Secretary determines to be feasible and desirable) the poverty line, which shall be used as a criterion of eligibility in the community services block grant program established under this subtitle. The required revision shall be accomplished by multiplying the official poverty line by the percentage change in the Consumer Price Index for All Urban Consumers during the annual or other interval immediately preceding the time at which the revision is made. Whenever a State determines that it serves the objectives of the block grant program established under this subtitle, the *State may revise* the poverty line to not to exceed 125 percent of the *official poverty line* otherwise applicable under this paragraph.

42 U.S.C. § 9902(2) (2012) (emphasis added). Whether the section 36B credit is a function of the "official" poverty line or of the state-revised line is unclear. For uniformity analysis, each varies among the states. Since 1966, the government has issued an "official" poverty line for Alaska, another for Hawaii, and a third for the lower 48 states and the District. U.S. DEP'T OF HEALTH & HUMAN SERVS., U.S. FEDERAL POVERTY GUIDELINES TO DETERMINE FINANCIAL ELIGIBILITY FOR CERTAIN FEDERAL PROGRAMS 2–4 (2015). Thus, regardless which line the Exchanges use to determine credit availability, the credit is a function of state lines and thus is geographically suspect.

II. WHAT IS UNIFORMITY?

A. *Generally*

Per Article I, Section 8[12]:

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

Uniformity is a geographic limitation.[13] Uniform taxes need not apply to each person the same; thus, varying rates are acceptable. For example, Congress constitutionally taxes large estates at a higher rate than small estates, and it excludes some altogether.[14]

The rate *structure*, however, must be the same in each state.[15] For example, Congress may tax truck tires differently than bicycle tires; but, however it taxes truck tires, the specific truck tire rates must be the same in every state. Hence, states with an abundance of bicycles might legitimately receive favorable treatment as compared to states with an abundance of trucks.

During the constitutional convention, states with much land and many people worried that smaller states might impose capitations and land taxes—both direct—and thus disadvantage them; hence, the *direct* tax apportionment[16] requirement arose. Similarly, states worried about being singled out by others, either individually or as groups; hence, the *indirect* tax uniformity[17] requirement arose.

Whether Congress might tax an item that exists solely in one state but not in another is uncertain. Congress can tax umbrellas—or the use of umbrellas—even though they are more commonly used in Seattle than in Phoenix. But, whether Congress may tax the use of snowmobiles—perhaps common in Maine but non-existent in Florida—is less clear. Certainly, Congress can tax specific products differently, even if the

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12. U.S. CONST. art. I, § 8, cl. 1.

13. Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 583 (1937); Flint v. Stone Tracy Co., 220 U.S. 107, 158 (1911); Knowlton v. Moore, 178 U.S. 41, 86 (1900).

14. *Knowlton*, 178 U.S. at 110 (upholding the estate tax with varying rates).

15. Arguably uniformity must exist *among* the States, but not the District of Columbia. *See Knowlton*, 178 U.S. at 107. That issue depends upon whether the reference to "the United States" refers to the nation as a unit or to the various States as separate sovereigns. *Id.* The *Knowlton* Court considered the issue but did not decide it because the statute in question applied uniformly to all the states as well as to the District. *Id.*

16. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 4.

17. Kinsler, *supra* note 5, at 126–27.

state-by-state impact is non-uniform.[18]

In contrast, direct tax apportionment commands a state-by-state[19] uniform *result per capita*, as opposed to a uniform *rate*. The section 5000A tax on the lack of health insurance fails the apportionment test;[20] however the Supreme Court decided the provision is not "any recognized [category] . . . of direct tax."[21] As a result it need not be apportioned. Whether it must be uniform is a separate issue.

Facially, the Constitution applies uniformity to duties, excises, and imposts. The distinctions between duties, excises, and imposts are not clear. Generally imposts are levies on imports.[22] But, in many instances, so are duties, such as a duty on imported goods. The Supreme Court has referred to the estate tax—generally thought to be an excise—as a death *duty*.[23] Similarly, the Court's *Hylton*[24] decision held a tax on the use of carriages—what would seem to be an excise—to be a duty. More recently, the D.C. Circuit spoke of excises as applying to transactions, the use of property, or to the exercise of a privilege.[25] For the discussion herein, however, the distinctions are not important.[26]

The Federalist Papers spoke of taxes as being either direct or indirect.[27] That distinction, however, does not appear in the Constitution.

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18. United States v. Ptasynski, 462 U.S. 74, 85–86 (1983) (taxing profits from the sale of Arctic oil differently from profits derived from the sale of other types of oil). Significantly, the *Ptasynski* statute did not tax the Arctic oil differently from oil produced in other states; instead, it taxed the sale of the Arctic oil differently. *See id.* at 76-78. The sales could occur in any state. *See id.*

19. Apportionment applies to states, omitting the District of Columbia. *See* U.S. CONST. art. I, § 2, cl. 3. Uniformity, in contrast, applies throughout the "United States," which arguably would include the District of Columbia. *See Knowlton*, 178 U.S. at 107.

20. Willis & Chung, *supra* note 5, at 193.

21. NFIB v. Sebelius, 132 S. Ct. 2566, 2599 (2012).

22. 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 582 (1910).

23. Knowlton v. Moore, 178 U.S. 41, 47 (1900); Young Men's Christian Ass'n of Columbus, Ohio v. Davis, 264 U.S. 47, 50 (1924).

24. Hylton v. United States, 3 U.S. 171, 175 (1796).

25. Murphy v. I.R.S., 493 F.3d 170, 184-85 (D.C. Cir. 2007) (discussing Bromley v. McCaughn, 280 U.S. 124 (1929)).

26. "Whether the tax is to be classified as an 'excise' is in truth not of critical importance. If not that, it is an 'impost'" "or a 'duty. . . .'" Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 581-82 (1937) (citations omitted).

27. THE FEDERALIST NO. 36, at 485 (Alexander Hamilton) (1788).

> The taxes intended to be comprised under the general denomination of internal taxes, may be subdivided into those of the *direct* and those of the *indirect* kind. Though the objection be made to both, yet the reasoning upon it seems to be confined to the former branch. And indeed, as to the latter, by which must be understood duties and excises on articles of consumption . . . .

Instead the Constitution twice speaks of direct taxes, which must be apportioned.[28] It broadly speaks of the taxing power, along with the spending power, which must be "for . . . the general [we]lfare."[29] It then requires duties, imposts, and excises to be uniform. Arguably, while duties, imposts and excises are all indirect, they do not comprise the universe of indirect taxes.[30] *Arguably*, Congress may impose a tax that is subject neither to uniformity nor apportionment. While that view may be rarely held, it is worth considering as it impacts the relevance of uniformity to section 5000A.

The Constitution is substantially about the taxing power: the Articles of Confederation failed, at least in part, because Congress had no power to tax. States naturally focused on that new power. Initially, the Constitution's drafts required "uniformuniform[ity] and equal[ity]" for excises, duties and imposts.[31] Later, that changed merely to "uniform."[32] Equality was not required as the cases correctly note.[33] Nevertheless, the central importance of the taxing power to the Constitution suggests modern analysis not simply ignore apportionment and uniformity as antiquated restrictions.

B. *Specifically*

Although many cases have dealt with uniformity, several stand out.

1. *Hylton v. United States*, 3 U.S. 1 (3 Dall.) (1796)

Hylton primarily dealt with the direct tax apportionment requirement. It held a tax on the use of carriages to be indirect[34] and thus subject to uniformity, which it satisfied,[35] rather than apportionment. The decision provided little guidance on the meaning of "uniform"; however, each of the justices speculated on the reach of the restriction. The Constitution, unlike the Federalist Papers, spoke of a general power to tax and then imposed apportionment on direct taxes and uniformity on excises, duties, and imposts. Could that mean some other type of tax—not direct, but also not a duty, excise or impost—be imposed by Congress?

Id.

28. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 4.

29. U.S. CONST. art. I, § 8, cl. 1.

30. Hylton v. United States, 3 U.S. 171, 173 (1796).

31. Jeffrey S. Kinsler, *Circuit-Specific Application of the Internal Revenue Code: An Unconstitutional Tax*, 81 DENV. U. L. REV. 113, 127 (2003).

32. Apparently James Madison handwrote the word "uniform" into a draft after the prior phrase "equal and uniform" had been omitted. *Id.*

33. Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 595 (1895).

34. *Hylton*, 3 U.S. at 175 (Chase, J.).

35. *Id.* at 7177–78 (Paterson, J.).

Yes, answered all three Justices who participated significantly.[36] Two concluded such a tax would have to be uniform. The third essentially punted, remarking that it might or might not be subject to the rule.[37]

Hylton is important for the ACA analysis because:

- NFIB held the 5000A penalty to be a tax.[38]
- NFIC held the 5000A tax not to be "any [kind] . . . of direct tax,"[39] which suggests it is indirect.
- Per *Hylton*, an indirect tax must be uniform.
- Thus, the 5000A tax must be uniform.

2. *Edye v. Robertson*, 112 U.S. 580 (1884) [Head Money Cases]

Edye did not involve a tax,[40] but the Court nevertheless considered the taxing power's "uniformity" limitation seriously. Congress enacted a charge on ships carrying immigrants to ports. It treated all ports the same, as required by the Constitution's ports clause.[41] The charge, however, only applied to immigration through ports and not to inland immigration methods such as rail; hence, it affected coastal states differently from how

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36. *Id.* (at 4, 8, 10 (174, 180, 183 (Chase, J., Paterson, J., & Iredell, J. respectively). Justice Wilson wrote a two-sentence opinion agreeing with the others and Justice Cushing declined to write an opinion. *Id.* at 183–84.

37. *Id.* at 4175 (Chase, J.).

38. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2598, 2601 (2012).

39. *Id.* at 2599.

40. The Court had three significant statements regarding the ultimate nature of the charge: "The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation" Edye v. Robertson, 112 U.S. 580, 594 (1884); "But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce" *Id.* at 595.

> The sum demanded of him is not, therefore, strictly speaking, a tax or duty within the meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government.

Id. at 595-96. The third point—about the funds not accruing to the general treasury—foreshadowed the "dedication test" later adopted in *Twin City Nat'l Bank v. Nebeker*, 167 U.S. 196, 203 (1897) (holding that a bill to raise dedicated funds was not a bill for raising revenue for purposes of the Constitution's origination clause). "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. CONST. art. I, § 7, cl. 1.

41. U.S. CONST. art. I, § 9, cl. 6 "no preference("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another. . . ."); *Edye*, 112 U.S. at 594-95.

it affected land-locked states. The Court approved the charge as an appropriate and essential power belonging to Congress: somebody needed to regulate the large number of often poor and ill persons arriving through ports.[42] The states did not have the power;[43] hence, it must belong to Congress. The Court also found it consistent with the regulation of commerce[44] as well as with numerous treaties.[45]

Although *Eyde* held the charge not to be a tax, it nevertheless found it to be sufficiently uniform, stressing how the tax treated all ports uniformly and how the problems addressed did not exist in states without ports. The Court, in detail, described how the problems associated with immigration via ships differed substantially from other immigration.[46]

The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.[47]

The Court also explained that "perfect" uniformity is unnecessary:

> Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. *State Railroad Tax Cases*, 92 U.S. 575, 612. Here there is substantial uniformity within the meaning and purpose of the [C]onstitution.[48]

Thus "substantial" uniformity is sufficient, which suggests widespread non-uniformity would be fatal. Also, taxes are uniform even if the object of the tax is found or occurs only in some states.[49]

Edye is important for the ACA analysis because:

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42. *Edye*, 112 U.S. at 595 (considering that if neither the states nor Congress had the power to impose the port charge, then the power "does not exist at all,"—a result the Court ridiculed.).

43. Henderson v. Mayor of N.Y., 92 U.S. 259, 270 (1875).

44. *Edye*, 112 U.S. at 595.

45. *Id.* at 597.

46. *Id.* at 591 (describing how ship passengers might arrive diseased and starving). The Court explained:, "[T]he evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation." *Id.* at 595.

47. *Id.* at 594.

48. *Id.* at 595. The *State Railroad Tax Cases* involved the uniformity requirement of the Illinois Constitution. State Railroad Tax Cases, 92 U.S. 575 (1875).

49. The Court in *Edye* did not resolve whether a tax could be uniform if the object of tax existed in a single state, especially if the state were "targeted" by the tax. *See Edye*, 112 U.S. 580; Willis & Chung, *supra* note 5. *Edye* involved a naturally-occurring aspect of the affected states—a coastline with ports. *See Edye*, 112 U.S. 580. Arguably, the Court could reach a different conclusion with regard to taxes affecting state decisions. *See id.*

- The object of the section 5000A tax – the failure of a taxpayer to purchase "minimum essential coverage" for health care – can occur in all states.
- Section 5000A appears to lack "substantial uniformity" because two of its functions vary widely: the price of bronze plans vary from exchange to exchange and from state to state (as the requirement of community rating[50] essentially commands) and the poverty line varies from Alaska to Hawaii and from those states to the "lower 48."[51]

3. *Knowlton v. Moore*, 178 U.S. 41 (1900)

Knowlton found the estate tax constitutional as a uniform duty or excise, although it had varying rates.[52] The decision, at great length, discussed the differences between intrinsic uniformity and geographic uniformity.[53] It held the U.S. Constitution merely requires geographic uniformity. Many states had requirements of taxes being "equal" as well as uniform. The Court distinguished these laws, finding no constitutional requirement of "equality," which it described as "intrinsic."[54] Some important statements in the case were:

> [W]hat the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several states.[55]

> The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States.[56]

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50. 42 U.S.C. § 300gg-1(a) requires a modified community rating, which varies by state. King v. Burwell, 483135135 S. Ct. 2480, 2486 (2015).); Kyle Pomerleau, *A Redistributional Effect of Obamacare*, TAX FOUNDATION (May 30, 2013), http://taxfoundation.org/blog/redistributional-effect-obamacare.

51. *See supra* text accompanying note 13. Steward Mach. Co. v. Davis, 301 U.S. 548, 583 (1937); Flint v. Stone Tracy Co., 220 U.S. 107, 158 (1920); Knowlton v. Moore, 178 U.S. 41, 85-86 (1900).

52. *Knowlton*, 178 U.S. at 110.

53. *Id.* at 84-85.

54. *Id.* at 84, 88, 98. Intrinsic uniformity would require each person be subject to the same amounts, somewhat akin to apportionment. *Id.* at 84-85.

55. *Id.* at 108 (emphasizing geographic uniformity).

56. *Id.* at 82-83 (quoting Nicol v. Ames, 173 U.S. 509, 515 (1898)). *Nicol* held: "Whether the word 'uniform' is to be understood in what has been termed its 'geographical' sense, or as meaning uniformity as to all the taxpayers similarly situated with regard to the subject-matter of the tax, we think this tax is valid, within either meaning of the term." *Nicol*, 173 U.S. at 521. Of significance, *Knowlton* referred to indirect taxes in relation to uniformity, not merely duties,

> That the words "uniform throughout the United States" do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate.[57]

> Giving to the term uniformity as applied to duties, imposts and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the states, by the levying of duties, imposts, or excises upon a particular subject in one state and a different duty, impost, or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes.[58]

Knowlton is important for the ACA analysis for two main reasons:

- First, it emphasizes that indirect taxes – such as the section 5000A tax – must be uniform.
- Second, it not only emphasizes geographic uniformity, but also the importance that similarly situated taxpayers be treated similarly. Yet, as shown below, the ACA treats very similar taxpayers differently in cases where the only important distinction is a state political boundary.

4. *Florida v. Mellon*, 273 U.S. 12 (1927)

Florida objected to an estate tax that strongly favored states with an inheritance tax, which Florida forbade in its constitution.[59] Florida asserted two claims. First, the state would lose revenue because the law would cause wealthy citizens to leave. Second, the state asserted, on behalf of its citizens, the lack of uniformity in the tax. The Court ruled

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imposts, and excises. *Knowlton*, 178 U.S. at 83.

57. *Knowlton*, 178 U.S. at 84. Thus, the tax can impact people differently, but the rate structure must be the same everywhere. As explained below, the ACA rate structure varies by the local bronze plan costs and state-specific poverty lines.

58. *Id.* at 89. The ACA violates this language. The subject of the tax does not vary from state to state, but the tax does because it varies by state-specific factors: bronze plan prices and poverty lines.

59. Florida v. Mellon, 271 U.S. 12, 15 (1927).

against both claims on procedural grounds rather than on the merits. The Court held Florida had yet to suffer any harm, essentially finding its facial challenge premature, but held out the possibility of an as applied challenge. The Court also held Florida lacked standing to represent the interests of its citizens on their uniformity claim.[60] Significant *dicta* stated:

> The contention that the federal tax is not uniform, because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states, nor control the diverse conditions to be found in the various states, which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (article 1, s 8, cl. 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States.[61]

Mellon is important for the ACA analysis because it approves of taxes that lack uniformity because of "diverse conditions" in the states. This aspect is inapplicable to the two issues discussed herein: the ACA taxing differences are due to arbitrary state boundaries and differing federal poverty measurement levels rather than diverse or changing conditions.[62]

5. *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102 (1974) [Regional Rail Reorganization Act Cases]

The *Regional Rail* cases arose from a series of railroad company bankruptcies. The uniformity challenge was ancillary to the underlying cause of action and derived from a separate section of the Constitution dealing with bankruptcies.[63]

The analysis the Court gave was the same later enunciated in *Ptasynski*: the Constitution is inherently flexible and does not deny Congress the ability "to fashion legislation to resolve geographically isolated problems."[64] Furthermore the railroad industry in and of itself

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60. *Id.* at 16-17.

61. *Id.* at 19.

62. The poverty rule results from an arbitrary federal decision to classify Hawaii and Alaska separately. *See* U.S. Gov't Accountability Office, GAO-10-240R, Opinion Letter on Poverty Determination in U.S. Insular Areas (Nov. 10, 2009). Silver and Bronze plan prices may result from diverse conditions between rural and urban, low cost and high cost areas; however, the exchanges draw those lines at state borders rather than in actually changed conditions areas. *See Mellon*, 273 U.S. at 17.

63. U.S. CONST. art. I, § 8, cl. 4 ("To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").

64. Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 159 (1974).

presents its own challenges, which require flexibility.

The case is important to the ACA analysis precisely because of its carved-out exception to the uniformity limitation: for "geographically isolated problems." As shown below, the ACA taxes residents of neighboring counties differently, despite the utter lack of any noticeable geographic differences.

6. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937)

Steward Machine was a broad attack on the Social Security tax which the Court upheld 5-4.[65] While it did not add anything new to the uniformity picture it confirmed previous jurisprudence, notably *Knowlton* and *Mellon*. First, it confirmed from *Knowlton* that uniformity is geographic and not intrinsic: the tax must have the same possible force and effect geographically rather than resulting in the same amount everywhere.[66] Second, it confirmed the *Mellon* language that the "rule of liability shall be alike in all parts of the United States."[67]

7. *United States v. Ptasynski*, 462 U.S. 74 (1983)

Ptasynski is a difficult yet important decision. It was a uniformity challenge on the Crude Oil Windfall Profit Tax Act,[68] which taxed "windfall" gains on oil from "old" oil production sites. Congress passed the Act following the deregulation of domestic oil prices. The goal of deregulation was to encourage new domestic oil exploration; in response, Congress sought to cap revenues in excess of pre price-control levels. The Act exempted oil produced in commercial quantities north of the Arctic Circle or at least 75 miles from the nearest Trans-Alaskan Pipeline System. Most of the exempted oil was from Alaska, but much taxable oil was also from Alaska.

Unanimously, the Supreme Court held that the tax passed a uniformity challenge. According to the Court, the exemption was not drawn on state

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65. Chas C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937). Neither of the dissents found the tax non-uniform. *Id.* at 610–18.

66. *Id.* at 583. The Court cited seven cases supporting the requirement of geographic uniformity: "The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this requirement. According to the settled doctrine, the uniformity exacted is geographical, not intrinsic." Knowlton v. Moore, 178 U.S. 41, 83 (1900); Flint v. Stone Tracy Co., 220 U.S. 107, 158 (1911); Billings v. United States, 232 U.S. 261, 282; Stellwagen v. Clum, 245 U.S. 605, 613; LaBelle Iron Works v. United States, 256 U.S. 377, 392; Poe v. Seaborn, 282 U.S. 101, 117; Wright v. Vinton Branch of Mountain Trust Bank (Mar. 29, 1937) 300 U.S. 440.

67. *Id.*

68. *See* I.R.C. §§ 4986-91 (1980), repealed 1988. P.L. 100-418, tit. I, § 1941a), 102 Stat. 1322; United States v. Ptasynski, 462 U.S. 74 (1983).

political lines but rather reflected Congress's consideration of the harsh climate and geographic conditions in northern Alaska, which greatly increased production costs. The Court noted that some offshore oil with similar conditions was also exempt; hence, the distinction was not purely on state boundaries. The Court also emphasized the tax was a function of the "type" of oil, which is consistent with Congress' ability to tax different products differently.

Although not emphasized by the Court, an important issue involved placement of the tax. It was not a tax on the oil; instead, it was a tax on the first sale of the oil, which applied whether the seller was in any of the fifty states.[69] In contrast, the section 5000A tax applies to persons who lack health insurance and is a function of where those taxpayers reside.

Much of the opinion traced the history of the uniformity requirement and the cases construing it, with the Court emphasizing the need for geographic uniformity, "substantial uniformity" and the ability of Congress to deal with "isolated" problems. The Court framed the question as whether Congress could define the object of a tax using geographic terms. The Court held such a definition to be permissible because Congress could have defined the oil classes based on intrinsic qualities rather than geographic.

In relation to the section 5000A tax, that explanation is critical. The artic oil differed from other oil because of its nature, not simply its geographic source.

The Court made two important additions to the uniformity puzzle. When Congress uses geographic terms to address the subject of the tax, the Court will examine the tax "closely" to see if actual geographic discrimination results. The Court also emphasized "indirect" taxes—as opposed with excises, duties, and imposts—must be uniform.[70]

C. *Summary of Uniformity Factors for a Close Examination*

Uniformity analysis is not easily reducible to black-letter rules; nevertheless, some such rules emerge. They are:

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69. INTERNAL REVENUE SERVICE, CRUDE OIL WINDFALL PROFITS TAX ACT OF 1980, H.R. REP. NO 96-304, at 39 (1980).

> The Act generally imposes the windfall profit tax on the first sale of taxable crude oil and requires payment of the tax by the producer. The tax is to be withheld by the first purchaser of the oil and deposited with the Treasury by him. The Act generally defines the producer as the owner of the economic interest in the oil and thus places the burden of the windfall tax on the persons who will receive the increased income resulting from decontrol and OPEC price increases.

Id.

70. United States v. Ptasynski, 462 U.S. 74, 80 n.9 (1983).

1. Tax rates may vary by the object's value or the taxpayer's income so long as the rates are nationally uniform.

2. Taxes may apply differently to different transactions or objects so long as the transaction or object is subject to the same rates nationally. They may apply to specific transactions/objects that occur or exist in varying amounts – or not at all – in different states. For example, port immigration only occurs in states with ports.

3. Taxes and rates may vary if based on physical geography, such as coastlines and frigid conditions; however, such variations necessitate a particularly close examination.

4. Taxes and rates may vary because of isolated problems or conditions. How isolated the problem must be and what level of justification must exist for non-uniformity is unclear.

5. Taxes and rates may vary because of "diverse conditions." What constitutes "diverse conditions" is unclear. This rule is mere *dicta* and has never formed the holding of any appellate decision.

In summary, taxes and rates may not vary solely because of state boundaries, unless accompanied by isolated problems, diverse conditions, or material physical geographical differences (such as a coastline or frigid, harsh conditions).

III. DOES UNIFORMITY APPLY TO THE ACA?

The general provisions of section 5000A are facially uniform. The low income exception, however, is not. Before a court can reach that issue it must first resolve *whether* the uniformity requirement is relevant. For this analysis, Justice Roberts' *NFIB* opinion is particularly instructive.

A. *Why the Court Did Not Already Decide This?*

Why the Court did not already resolve this issue: after all, it already litigated the constitutionality of section 5000A, did it not? The answer is no, not fully: it appropriately did not consider uniformity because the issue was not then ripe. The Commerce Clause and apportionment challenges—both unsuccessful—were *facial* challenges. In contrast, the question of uniformity is an *as applied* challenge. Facially, subsection 5000A(e) appears non-uniform because it varies as a function of state-

exchange bronze-plan prices.[71] Because those prices differ,[72] the section is not uniform. That, however, requires a factual finding regarding the prices, which did not exist until October 1, 2013, the launch date of the exchanges.[73] Further, state exchanges—or federally created exchanges for states that opt out of creating exchanges—first sold insurance to be effective in 2014;[74] the factual finding required further delay. The tax on individuals who lack insurance accrues monthly, but requires a three-month period of no insurance.[75] Thus it could not apply until April 2014. Further, individuals must report and pay the tax annually,[76] which further delayed the facts needed to demonstrate uniformity or lack thereof: jurisdiction over a refund claim, notice of deficiency, or civil suit regarding the tax was not available until after the filing of 2014 tax returns, which would be during 2015.[77]

Congress designed the exchanges to use community rating and thus area-based pricing.[78] It also imposed a tax that varies as the area pricing varies.[79] The lack of uniformity appears intentional. Nevertheless, it was not *inevitable*; the 2011 Court properly could not decide the issue without facts, and the critical facts showing a lack of uniformity could not exist until 2015.[80]

Also, Congress might have amended the statute to eliminate the apparent lack of uniformity: it could make the section 5000A(e)

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71. *See* I.R.C. § 5000A(e)(1)(b)(ii) (2012).

72. The federal government operates a web site that determines the "lowest cost bronze plan" available for each state. *See 2015 Health Coverage & Your Federal Taxes*, HEALTHCARE.GOV, https://www.healthcare.gov/taxes/ (last visited Feb. 8, 2016) [hereinafter *Health Coverage Tax Tool*].

73. Patrick Mortiere, *Timeline of Botched ObamaCare Rollout*, THE HILL (Nov. 15, 2013, 9:53 PM), http://thehill.com/blogs/blog-briefing-room/news/190485-timeline-of-botched-implementation-of-obamacare.

74. Julie Rovner, *So What's the Real Deadline for Obamacare Sign-Up?*, NPR (Oct. 14, 2013, 3:22 AM), http://www.npr.org/sections/ health-shots/2013/10/14/231462087/so-whats-the-real-deadline-for-obamacare-sign-up.

75. I.R.C. § 5000A(e)(4)(A) (2012).

76. I.R.C. § 5000A(b)(2) (2012).

77. Per I.R.C. § 5000A(c)(2)(B)(i)(2012), the 2014 penalty was a function of the taxpayer's income for the year beginning in 2014; hence, that function could not be known until December 31, 2014 at the earliest, or later for taxpayers with a fiscal year. The tax would then not be paid until the taxpayer filed the 2014 income tax return, which would normally be by April 15, 2015.

78. 42 U.S.C. § 300gg(a)(1), (2) (2012).

79. I.R.C. § 5000A(e)(1)(b)(ii) (2012).

80. *See* King v. Burwell, 135 S. Ct. 2480 (2015). All bronze plans could have had the same prices. As of October 1, 2013, they did not; however, the Court would have required a crystal ball to know that in 2011. Or, all fifty states could have formed a compact for uniform pricing. Insurance companies, in a massive anti-trust violation, could have priced their products uniformly in each exchange. Further still, the federal government could have created a single national exchange with uniform pricing; after all, it ultimately created 36 exchanges, though it used different pricing.

exception a function of the national average for bronze plans. However unlikely such an amendment may appear, it would cure much of the uniformity problem. In 2011, the Court had no way of knowing whether Congress might consider such an amendment. Indeed, Congress amended and repealed parts of section 5000A in March 2010.[81] Those parts originally caused the tax to be a direct function of the poverty line in the state in which the taxpayer resided. Because those lines vary between Alaska, Hawaii, and the lower forty-eight states, the original tax contained an additional uniformity violation. The 2010 amendment changed section 5000A(e) function to the more general taxpayer "filing requirement," which is uniform throughout the country. Thus the original tax appeared to lack uniformity for three reasons: the poverty line variation, the bronze plan variation, and the credit availability variation. After the amendment, it lacks uniformity for only the latter two reasons. At the time of the 2011 *NFIB* facial challenge, the Court had no way of knowing whether Congress might also repeal or amend the other two problems before a facial challenge with non-uniform facts became ripe in 2015.

B. *How Chief Justice Roberts Showed Uniformity Applies to Section 5000A*

Although the Roberts *NFIB* opinion properly did not deal with uniformity directly, it referred to the requirement indirectly. Several parts of the opinion demonstrate this point. Collectively, they appear to be a roadmap for an as-applied uniformity challenge.

1. The Reference to Constitutional Requirements

After determining the section 5000A penalty to be a "tax" for constitutional purposes, Chief Justice Roberts proceeded to caution: "Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other *requirements* in the Constitution."[82]

The plural "requirements" is particularly instructive. The Constitution places two specific limitations on Congress's taxing power: apportionment[83] and uniformity.[84] In addition, the General Welfare

81. I.R.C. § 5000A(c)(4)(D) (repealed Mar. 2010).

82. NFIB v. Sebelius, 132 S. Ct. 2598, 2598 (2012) (emphasis added).

83. Apportionment appears twice in the original U.S. Constitution and twice in amendments. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 4 ("proportion"); U.S. CONST. amend. XIV, XVI.

84. U.S. CONST. art. I, § 8, cl. 1. This applies specifically to duties, excises, and imposts. *Id.* Whether it also applies more generally to all indirect taxes is covered below.

Clause limits Congress's power: "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." Chief Justice Roberts discussed the general welfare limitation three times. He quoted it as part of Article I, Section 8.[85] Later, he twice described it as a limitation on the Spending Power:

> The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States."[86]
>
> The conditions imposed by Congress ensure that the funds are used by the States to "provide for the . . . . general Welfare" in the manner Congress intended.[87]

Justice Roberts's discussion of the limitation in relation to spending, but not in relation to taxing, is at least interesting. It places some context on his use of the plural term "requirements" in relations to taxing power limitations. After that general reference to "requirements," the Justice discussed the application of apportionment to section 5000A, concluding the requirement does not apply.[88]

Much of the debate surrounding the taxing power implications of the Affordable Care Act focused on the application of apportionment. Several prominent academics have insisted that "general welfare" was the only realistic taxing power limitation.[89] Justice Roberts effectively dismissed such arguments, and explained that Congress's taxing power was more limited than merely by that meager requirement: for three pages he discussed the apportionment requirement.

While one cannot read the Justice's mind, he appeared to be thinking of apportionment and uniformity. Indeed he spoke at length of apportionment, but in contrast he mentioned uniformity only in passing. Nevertheless, he had to know of the historically important apportionment/uniformity dichotomy of taxes: one for direct and the other for indirect. Certainly, he spoke extensively of "direct" taxes, finding that section 5000A was not one. Implicitly, he suggested the

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85. *NFIB*, 132 S. Ct. at 2601.

86. *Id.* at 2601.

87. *Id.* at 2602.

88. *Id.* at 2599.

89. *See* Calvin H. Johnson, Letter to the Editor, *Healthcare Penalty Need Not Be Apportioned Among the States*, TAX NOTES (July 19, 2010) (arguing against apportionment as relevant for the Affordable Care Act, criticizing *Pollock*, and arguing the Court should follow *Hylton*); Calvin H. Johnson, Commentary, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 299 (2004) (arguing apportionment is a "profound stupidity;" Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 2 (1999) (arguing that apportionment is "absurd").

penalty is an indirect tax.

2. The Reference to Pollock

In 1865, the Supreme Court struck down the income tax, finding it an un-apportioned direct tax. Many commentators conclude the decision was not only wrong, but that it also no longer applies.[90] Yet, Justice Roberts did not agree. While his *Pollock* comments were mostly neutral, he cited the case as correctly holding an income tax to be a direct tax.[91] Then, in the very next sentence, he concluded that section 5000A is no form of "recognized category of direct tax."[92] Despite persistent arguments by academics and brief writers who claimed that section 5000A could be justified as an income tax,[93] Justice Roberts unquestionably disagreed. He resurrected the academic nemesis of *Pollock* and relied upon it to say an income tax is a direct tax. He then boldly held that section 5000A is not a direct tax—or at least not a *recognized* one. As such, it cannot be justified under the 16th Amendment, which removed the apportionment requirement from an income tax.

While Justice Roberts never described section 5000A as an "indirect" tax, his persistent references to "direct tax" and his finding that the section is not direct suggests he viewed it as "indirect" and thus subject to uniformity.[94]

3. The Reliance on Hylton

The most significant evidence of uniformity applying to section 5000A flows from the Court's use of *Hylton*:[95] the earliest Supreme Court case on Congress's taxing power. Briefs and articles extensively argued the importance of *Hylton*;[96] indeed, proponents of the ACA consistently

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90. *See* Johnson, *supra* note 89, at 299, 348, 351 (arguing *Pollock* should never be followed again and instead the Court should return to the *Hylton* analysis); Ackerman, *supra* note 89, at 4-5.

91. *NFIB*, 132 S. Ct. at 2598.

92. *Id.* at 2599.

93. Edward D. Kleinbard, *Constitutional Kreplach*, Commentary, 128 TAX NOTES 755, 760 (2010).

94. *Cf.* Steward Mach. Co. v. Davis, 301 U.S. 548, 582 (1937) (discussing but dismissing the idea of another kind of tax); United States v. Ptasynski, 462 U.S. 74, 79, 80, n.9 (1983).

95. Hylton v. United States, 3 U.S. 1 (1796).

96. Johnson, *supra* note 89, at 348; Ackerman, *supra* note 89, at 1; HHS Reply Brief, for the Petitioner at 24-25, Department of Health and Human Serv. Petitioners v. State of Florida, No. 11-398 (11th Cir. Mar. 7, 2012), at 24-25 (supporting *Hylton* as authority); David B. Rivkin, Jr. et al., Debate, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PENN. ST. L. REV. 93, 114, 116 (2009).

cited *Hylton* in support of its constitutionality.[97] They did so to support the notion that apportionment is a very limited requirement that would not restrict section 5000A. They were apparently concerned with the apportionment question, but paid little heed to the alternative uniformity requirement.

Justice Roberts also relied on *Hylton*—and specifically Justice Chase's opinion—for what were arguably his most important lines:

> A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, "without regard to property, profession, or *any other circumstance*." *Hylton*, *supra*, at 175 (opinion of Chase, J.) (emphasis altered).[98]

While out of context, that reference is critical because it stresses the importance of the *Hylton* decision. As others have opined,[99] the *Hylton* Justices were contemporaries of the constitutional convention delegates and would have been well aware of the debate on taxing power limitations.[100]

Although Justice Roberts's use of *Hylton* related to apportionment, the case is informative on another critical issue: uniformity and the breadth of the taxing power. Three Justices wrote significant opinions in *Hylton*. All three opined on the uniformity requirement. Each noted how the Constitution requires direct taxes to be apportioned and excises, duties, and imposts to be uniform. Each recognized the list might not cover the universe of potential taxes: perhaps some other form of tax, as yet undiscovered, could be possible. If so, must it be apportioned or uniform, or need it satisfy neither requirement? Justices Iredell and Patterson were clear: if such a tax is possible, it must be uniform. Justice Chase was more circumspect: "[i]f there are any other species of taxes that are not direct, and not included within the words duties, imposts, or excises, they may be laid by the rule of uniformity, or not; as Congress

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97. *See* Rivkin, Jr. et al., *supra* note 96, at 116 (2009).

98. *NFIB* v. Sebelius, 132 S. Ct. 2566, 2598. The Chief Justice did not quote the full sentence expressed by Justice Chase in his *Hylton* opinion: "*I am inclined to think, but of this I do not give a judicial opinion*, that the 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." *Hylton*, 3 U.S. Dallat 175 (emphasis added). The omitted independent clause appears significant as it changes the critical quoted comment "without regard to any other circumstance" to weak *dicta*: Justice Chase declined to stand behind the comment as his judicial opinion. **[Author: Need Cite]**. That this incomplete quotation became the sole cited authority for not striking the ACA as an un-apportioned direct tax is noteworthy.

99. Ackerman, *supra* note 89, at 20 (arguing that *Hylton* was as important as Marbury v. Madison).

100. *Id.* at 21. Justices, Chase, Paterson, and Wilson were delegates.

shall think proper and reasonable."[101]

Justice Roberts's reliance on *Hylton* for such a critical part of his own opinion suggests he was fully aware of *Hylton's* significance. That, in turn, suggests he was aware the tax he described as "no kind of recognized direct tax" must be something else. He must have known that "indirect" was not a term used in the Constitution. Thus, he must have contemplated the issue of whether it need be uniform. Appropriately, his opinion did not cover the point, as it would be a premature as applied challenge, albeit an argument raised in at least one *amici* brief.[102] Justice Roberts's reliance on *Hylton* suggests agreement with it.

The 1796 *Hylton* decision was not the only instance that the Supreme Court discussed the broad application of "uniformity." In 1867, Justice Chase in the *License Tax Cases* stated:

> It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and *indirect taxes by the rule of uniformity.*[103]

The broad application of uniformity to "indirect" taxes is reminiscent of similar language in the Federalist papers.[104] Later, in 1910, Justice Day not only quoted the broad "*indirect*" language from the *License Tax Cases*,[105] but also added:

> The act now under consideration does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Article I, § 8, clause 1 of the Constitution, and described generally as *taxes, duties, imposts and excises*, upon which the limitation is that they shall be uniform throughout the United States.[106]

The Court thus applied the uniformity requirement not only to "duties, imposts and excises," but also to "taxes" generally. The *Hylton* discussion of uniformity's reach rested on the Constitution's initial use of the general term "taxes" and then the later specific terms "duties, imposts and

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101. *Hylton*, 3 Dall. at 173.

102. Brief of Amicus Curiae Tax Foundation and Law Professors in Support of Amici Curiae Supporting Appellants and Urging Reversal, Apr., 29, at 6-7, United States v. Marshall, No. 12-20804 (5th Cir. Apr. 29, 2013, 6-7). Brief of Professor Steven Willis.

103. License Tax Cases, 72 U.S. 462, 471 1867) (emphasis added).

104. THE FEDERALIST NO. 36 (Alexander Hamilton).

105. Flint v. Stone Tracy Co., 220 U.S. 107, 153-54 (1910).

106. *Id.* at 150 (emphasis added).

excises."[107] In 1983, Justice Powell, writing for a unanimous *Ptsyanski* Court stated: "Article I, § 9, cl. 4, provides that direct taxes shall be apportioned among the States by population. *Indirect taxes, however, are subject to the rule of uniformity. See* Hylton v. United States, 3 Dall. 171, 176 (1796) (opinion of Paterson, J.)."[108] Thus Justice Roberts's *NFIB* reliance on *Hylton* regarding constitutional tax requirements is consistent with Supreme Court opinions spanning some 215 years. By not applying the apportionment requirement to section 5000A, and by limiting the general welfare requirement to spending,[109] Justice Roberts must have anticipated a uniformity challenge to section 5000A when he spoke of the tax having to satisfy constitutional "*requirements.*"[110]

IV. WHETHER THE 5000A IS GEOGRAPHICALLY SUSPECT

The general individual mandate tax is a function of the modified household income of taxpayers who fail to acquire minimum essential coverage in relation to the nationwide average cost of a bronze plan.[111] That facially satisfies uniformity: although it varies by income, it applies the same general rate throughout the United States.

But, the low-income taxpayer exception applies a very different rule. Under subsection (e), taxpayers are not subject to the penalty if the price of lowest cost *available* bronze plan (after application of the section 36B credit) exceeds 8% of their modified household income. The price of the plan is a function of the taxpayer's age, household size, and tobacco use, as well as where the taxpayer resides.

Significantly, the exception goes to the heart of the *Affordable Care Act* in that it imposes the tax for low-income persons who might not be able to afford coverage. The variations under the low-income exception are partially geographic:

> The tax is a function of the bronze plan price where the taxpayer resides. Such plan prices vary widely within states and among states.
> The tax is a function of the section 36B credit, which varies from state to state in two aspects: (1) because of varying silver plan prices, and (2) because of varying poverty lines.

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107. *Hylton*, 3 Dall. at 173.

108. United States v. Ptasynski, 462 U.S. 74 n. 9 (1983) (relying on Paterson, J, in *Hylton*) (emphasis added).

109. *NFIB* v. Sebelius, 132 S. Ct. 2566, 2601 (2012).

110. *Id.* at 2598.

111. I.R.C.A. § 5000A(c)(1)(b) (2015).

These two variations are facially geographic. As such, they prompt the need for a *Ptasynski* examination.

V. WHETHER THE SUSPECT SECTIONS PASS A CLOSE UNIFORMITY ANALYSIS

A. *Analysis of Suspect Issues*

The section 5000A tax, ignoring the subsection (e) low-income exception, is uniform: it is a function of the national average cost of the cheapest bronze plans in the exchanges. But, the paragraph (e)(1) exception for "Individuals Who Cannot Afford Coverage" is non-uniform. It exempts anyone whose "required contribution" exceeds 8%[112] of his/her modified adjusted gross income [MAGI].[113] For persons not eligible for employer sponsored insurance, the required contribution equals the price of the lowest cost bronze plan available to the person in his/her own rating area[114] minus the amount of the section 36B credit allowable.[115] The formula for this is:

$$B - [S - (F)(MAGI)] > (.08)(MAGI)$$
$$B - [S - (F)(MAGI)] > (.08)(MAGI)$$
$$B - [S - (F)(MAGI)] > (.08)(MAGI)$$
$$B - [S - (F)(MAGI)] > (.08)(MAGI)$$
$$B - [S - (F)(MAGI)] > (.08)(MAGI)$$
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$$B - [S - (F)(MAGI)] > (.08)(MAGI)$$

MAGI = the taxpayer's household "modified adjusted gross income."
B = the lowest cost Bronze plan available to the taxpayer in his/her rating area.
S = the second lowest cost Silver plan sold in the taxpayer's rating area.
F = a factor which varies from .02 to .095. This factor is a function of the taxpayer's household MAGI divided by the federal poverty level and a statutory conversion chart.[116]

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112. I.R.C.A. § 5000A(e)(1)(A).
113. I.R.C.A. § 5000A(c)(4)(C).
114. I.R.C.A. § 5000A(e)(1)(B)(ii).
115. *Id.*
116. *See* I.R.S. Table 2, Instructions for Form 8962, Cat. No. 60401R, 5, 8 tbl.2 (Oct. 16,

The formula varies among the states in three ways:

1. *B* (lowest cost bronze plan) varies by rating areas within and among states. Thus, similar taxpayers have different *B*'s solely because of their state of residence.
2. *S* (second lowest cost silver plan) varies by rating areas within and among states. Thus, similar taxpayers have different *S*'s solely because of their state of residence.
3. *F* (poverty-level factor) is uniform among the "lower 48" states, but differs in both Alaska and Hawaii. Thus, similar taxpayers have different *F*'s solely because they reside either in Alaska, Hawaii, or in the lower 48.

Facially, subsection 5000A(e) does not appear uniform: the three state-to-state variables are purely geographic. As explained earlier, however, a facial challenge to subsection 5000A(e) is unlikely to be successful; instead, a successful challenge must be as-applied, which requires a plaintiff to demonstrate he/she is liable for the tax solely because of the state in which he/she resides.

An ideal plaintiff would be able to demonstrate that moving to a neighboring county in another state[117] would cause him/her to escape the penalty. Ideally, such neighboring counties would be geographically and demographically similar, so as to avoid any *Ptasynski/Mellon/Regional Rail* argument: Congress may violate uniformity to correct isolated regional problems. Such ideal examples abound, at least hypothetically.

B. *Hypothetical Non-Diverse, Non-Isolated, Non-Uniform Taxpayers*

Example One

Posit two Taxpayers, each aged 60, unmarried, and with no dependents. Each has $65,000 MAGI, neither is eligible for an employer-sponsored plan or any exemption other than possibly the section 5000A(e) low-income exemption, neither uses tobacco, and neither had minimum essential coverage during 2014. One resides in Cleburne

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2015).

117. A lack of uniformity within a single state would also arguably violate uniformity; however, lack of uniformity between states presents a stronger case. Non-uniformity within a state could arguably be justified because of "diverse" or "isolated" conditions between rural and urban areas. In contrast, non-uniformity between states is much more difficult to justify or excuse when the only distinction is the state political boundary.

County, Alabama and the other in Haralson County, Georgia.

The Alabama taxpayer *would* be subject to a $95 tax for failure to have health insurance. The 2014 lowest priced Cleburne County[118] Bronze plan cost $401.67 per month. Because the taxpayer's income exceeded 400% of the $11,490 poverty level, he/she would not have received a section 36B credit.[119] Because the lowest priced 2014 Bronze plan cost *less than* $433.33 (8% of the taxpayer's monthly income), the Alabama taxpayer would not be eligible for the section 5000A(e) exemption and thus would owe the tax.

In contrast, the Georgia taxpayer *would not* be subject to the tax. The 2014 lowest priced Haralson County[120] Bronze plan cost $455 per month. Because the taxpayer's income exceeded 400% of the $11,490 poverty level, he/she would not have received a section 36B credit. Because the lowest priced 2014 Bronze plan cost *more than* $433.33 (8% of the taxpayer's monthly income), the Georgia taxpayer would be eligible for the section 5000A(e) exemption and thus would owe no tax.

If the Alabama taxpayer moved one mile to the east along U.S. Highway 78, he/she could escape the tax. The two counties appear geographically identical and demographically very similar, mooting an "isolated problems" exception. Both Cleburne and Haralson counties are in the southern part of the Blue Ridge Mountains. Cleburne had a 2010 population of 14,972 with a density of 26 persons per square mile.[121] Haralson had a 2010 population of 28,780 with a density of 102.[122] Cleburne had a median age of 4141[123] while Haralson had a median age of 39.[124] The two counties have similar demographic make-ups in terms of average income, racial diversity, and percentage of households below the poverty level.[125] Although Haralson is more densely populated, both

118. *Health Coverage Tax Tool*, *supra* note 72, at Zip Code 36269. The federal government operates a web site that determines the "lowest cost bronze plan" available for each state by zip code. Id.

119. I.R.C.A. § 36B(b)(3)(A)(i).

120. Zip Code 30176.

121. *State & Cleburne County, Alabama, QuickFacts*, U.S. CENSUS BUREAU (Dec. 02, 2015, 9:51 AM), http://quickfacts.census.gov/qfd/states/01/01029.html.

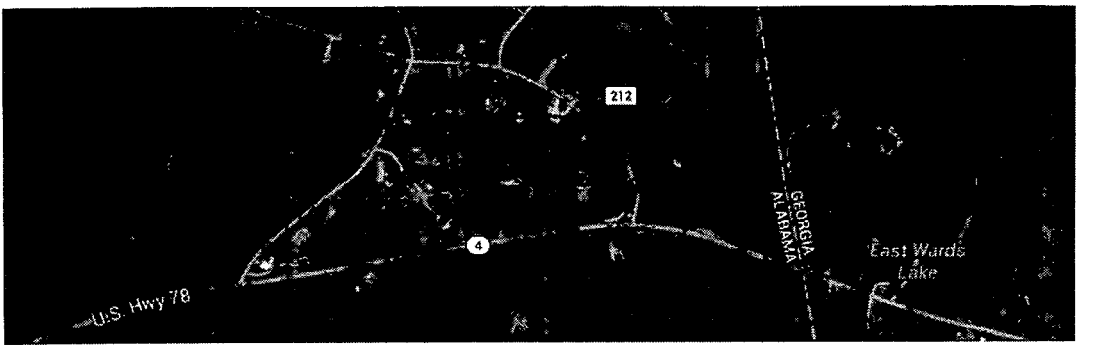
122. *State & Haralson County, Georgia, QuickFacts*, U.S. CENSUS BUREAU (Dec. 02, 2015, 9:53 AM), http://quickfacts.census.gov/qfd/states/13/13143.html.

123. *Cleburne County, Alabama, American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/navnavtableservices/jsf/pages/community_factsfactsproductview.xhtml# (last visited Jan. 29, 2016).

124. *Haralson County, Georgia, American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/navnavtableservices/jsf/pages/community_factsfactsproductview.xhtml# (last visited Jan. 29, 2016).

125. *Compare Cleburne County, Alabama, American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/navnavtableservices/jsf/pages/community_factsfactsproductview.xhtml (last visited Jan. 29, 2016)), *with Haralson County, Georgia, American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/navnavtableservices/jsf/pages/communi

are predominantly rural. The only important difference between the two is the state political boundary.



Example Two

Posit three Taxpayers, each aged 60, unmarried, and with no dependents. Each has MAGI of $50,000, none is eligible for an employer-sponsored plan or any exemption other than possibly the section 5000A(e) low-income exemption, none uses tobacco, and none had minimum essential coverage during 2014. One resides in Miami, Oklahoma, another in Joplin, Missouri, and the third in Galena, Kansas.

The Oklahoma taxpayer would owe the tax,[126] but the taxpayers in both Kansas[127] and Missouri[128] would escape it. The Oklahoma taxpayer could escape the tax by merely moving 20 miles to the north into Kansas or 28 miles to the northeast into Missouri. Demographically, the three counties are similar, with Jasper County Missouri (Joplin) being the most prosperous. Ottawa County, Oklahoma, has a noticeably higher population of Native Americans, arguably a favored group in a *Ptasynski/Mellon/Regional Rail* analysis; however, Ottawa residents are more likely subject to the tax than those in the more prosperous Jasper County. Hence, no apparent reason exists for Congress wishing to tax Oklahoma residents as compared to those of Kansas and Missouri.

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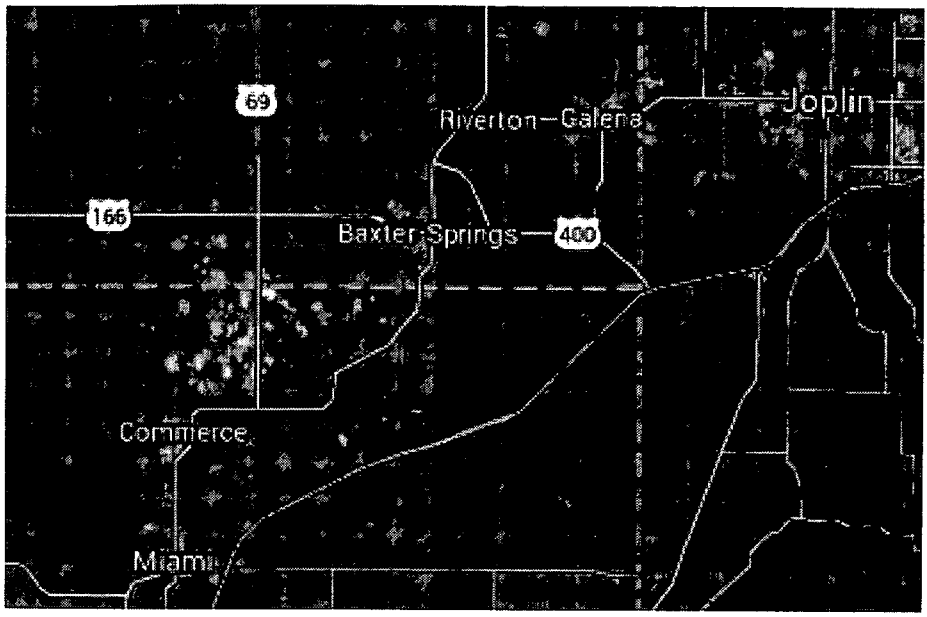
ty_facts.xhtml#factsproductview.xhtml# (last visited Jan. 29, 2016).

126. Health Coverage Tax Tool, *supra* note 72, at Zip Code 74354. In Miami, Oklahoma, the cheapest 2014 Bronze Plan cost $305.69, which is less than 8% of the taxpayer's MAGI ($333.33), thus trigging the tax. *Health Coverage Tax Tool*, *supra* note 72.

127. *Health Coverage Tax Tool*, *supra* note 72, at Zip Code 66739. In Galena, Kansas, the cheapest 2014 Bronze Plan cost $410.66, which *exceeds* 8% of the taxpayer's MAGI ($333.33), thus trigging the tax exemption. Healthcare.gov, *supra* note 72.

128. *Health Coverage Tax Tool*, *supra* note 72, at Zip Codes 64801, 64804. In Joplin, Missouri, the cheapest 2014 Bronze Plan cost $421.14, which *exceeds* 8% of the taxpayer's MAGI ($333.33), thus trigging the tax exemption. Healthcare.gov, *supra* note 72.



Similarly, if the hypothetical taxpayer had income of $62,000, he would be subject to the tax if he lived in Galena, Kansas, but not subject to the tax if he moved four miles to the east and resided in Joplin, Missouri. Again, no apparent reason exists to favor residents of Joplin, Missouri over those who reside a few miles to the west across the Kansas state line.

Example Three

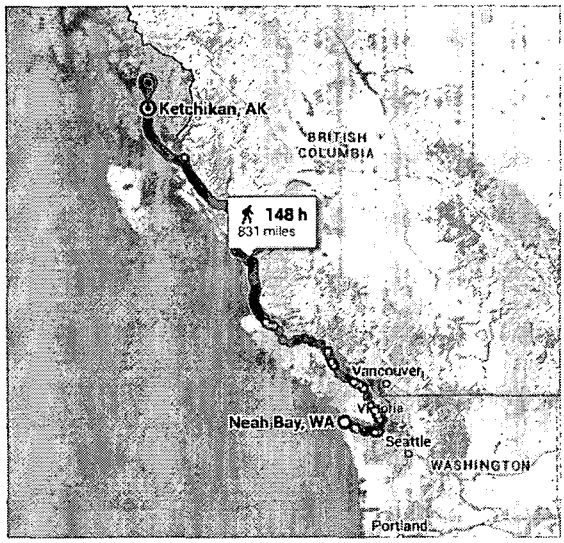
Posit two Taxpayers, each aged 60, unmarried, and with no dependents. Each has $55,000 MAGI, neither is eligible for an employer-sponsored plan or any exemption other than possibly the section 5000A(e) low-income exemption, neither uses tobacco, and neither had minimum essential coverage during 2014. One resides in Neah Bay, Washington (Clallam County), and the other in Ketchikan, Alaska (Ketchikan Gateway Borough).

The Alaska taxpayer *would* be subject to a $95 tax for failure to have health insurance. The 2014 lowest priced Ketchikan Borough[129] Bronze plan cost $658 per month. Because the taxpayer's income did not exceed 400% of the $14,580 poverty level, he/she would have received a section

129. *Health Coverage Tax Tool, supra* note 72, at Zip Code 36269. The federal government operates a web site that determines the "lowest cost bronze plan" available for each state by zip code. *Health Coverage Tax Tool, supra* note 72.

36B credit.[130] The credit would have been $430 per month ($865 [the cost of the second lowest priced silver plan] minus 9.5% of the $55,000 MAGI). The net would have been $228, which is *less than* $366.66 (8% of the taxpayer's monthly income). The Alaska taxpayer would not be eligible for the section 5000A(e) exemption and thus would *owe the tax.*

In contrast, the Washington taxpayer *would not* be subject to the tax.



The 2014 lowest priced Clallam County[131] Bronze plan cost $491.71 per month. Because the taxpayer's income exceeded 400% of the $11,490 poverty level, he or she would not have received a section 36B credit. Because the lowest priced 2014 Bronze plan cost *more_than* $366.66 (8% of the taxpayer's monthly income), the Washington taxpayer would be eligible for the section 5000A(e) exemption and thus would *owe no tax.*

The two localities are both fairly rural, although Neah Bay, Washington has a significantly higher population.[132] They are 831 miles apart; however, they are about as close as any habitable point in Alaska is to a "lower 48" state. Same aged taxpayer, same family status, same income, but the Alaska taxpayer would owe the tax and the Washington taxpayer would not. The difference is the eligibility of the Alaska taxpayer for the section 38B credit. This results because the federal poverty level for Alaska is greater than the federal poverty level for Washington.[133]

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130. *See* King v. Burwell, 135 S. Ct. 2480, 2494-95 (2015) (holding the I.R.C. section 36B credits apply both in state and federally created exchanges).

131. *Health Coverage Tax Tool, supra* note 72, at Zip Code 30176. The federal government operates a web site that determines the "lowest cost bronze plan" available for each state by zip code. *Id.*

132. *Compare Clallum County, Washington, QuickFacts*, U.S. CENSUS BUREAU (Feb. 1, 2016, 9:00 PM), http://quickfacts.census.gov/ qfd/states/53/53009.html, *with* Ketchikan Gateway Borough, Alaska, QuickFacts, U.S. CENSUS BUREAU (Feb. 1, 2016, 9:00 PM), http://quickfacts.census.gov/qfd/states/02/02130.html.

133. *See supra* text accompanying note 13.

C. *Conclusions on Uniformity*

The section 5000A(e) low-income exception cannot satisfy an as-applied uniformity challenge for the year 2014. The tax applies to the failure to purchase a product that is essentially the same product in each state. The only important difference between the hypothetical Alabama taxpayer and the hypothetical Georgia taxpayer is the arbitrary political state boundary. The two bronze plans the hypothetical taxpayers fail to purchase are not akin to different kinds of oil, as in *Ptasynski*; instead, they are effectively the same plan providing "minimum essential coverage." The two counties do not have any apparent unique or isolated problems Congress appears to have been addressing, per the test in *Blanchette*. The two counties also do not present any apparent "diverse" conditions justifying a lack of uniformity, as approved in *Florida v. Mellon*.

The strongest argument favoring the ACA against a uniformity challenge centers on *Florida v. Mellon*, which upheld the estate tax despite its more favorable treatment of taxpayers in states with inheritance tax as compared to states without such taxes. The Court dismissed the challenge on procedural grounds, but strongly suggested Florida had made its own decision not to have an inheritance tax and thus created the diverse conditions resulting in a lack of uniformity.[134] Arguably, that is true of all fifty states that chose to regulate health insurance. All states, with the few recent exceptions attempting state compacts for health insurance,[135] regulate insurance differently. Arguably, that makes the bronze plans in each state sufficiently different to justify a *Ptasynski* analysis. More significantly, that lack of uniformity is the choice all fifty states have made.

But, unlike the state constitutional provision in *Florida v. Mellon* that precluded an inheritance tax, the state-by-state regulation of insurance is something Congress created. In response to *South-Eastern Underwriters Association*,[136] in which the court held insurance to be "commerce," Congress in 1945 enacted the MaCarran-Fergeson Act[137] exempting insurance from significant federal regulation. Repeated attempts to repeal MaCarran-Fergeson have failed. For Congress to justify the lack of ACA uniformity on its own legislation is plausible—all fifty states have taken

134. Florida v. Mellon, 273 U.S. 12, at 17 (1927).

135. Diane Stafford, *9 States Sign Compact to Run Health Care without Congress*, GOVERNING (Aug. 28, 2014), http://www.governing. com/news/headlines/mct-state-health-compact.html;; *States Consider Health Compacts to Challenge Federal PPACA*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 1, 2015), http://www.ncsl.org/research/health/states-pursue-health-compacts.aspx..

136. United States v. Se. Underwriters Assoc., 332 U.S. 533 (1944).

137. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2012).

advantage of that legislation. However, it seems at best disingenuous.

Still, the MaCarran-Fergeson defense, even if valid, does not justify the lack of uniformity between southeast Alaska and northwest Washington—two fairly similar places. That lack of uniformity has no possible *Florida v. Mellon* defense because it results from the federally mandated choice to distinguish poverty levels in Alaska and Hawaii as compared to the other states.

VI. CONGRESS OR THE STATES CAN REMEDY THE UNIFORMITY PROBLEMS

Although a constitutional requirement, uniformity (or the lack thereof) has statutory solutions.

Congress could amend section 5000A(e) to make it a function of the nationwide bronze average—rather than the cost of the plan where the taxpayer lives—which would moot all problems other than those involving Alaska or Hawaii.

States could form compacts for the interstate sale of health insurance and rating areas that cross state lines.[138] That could result in counties such as Cleburne and Haralson being in the same exchange rating area despite being in different states.[139] Or, Congress could repeal MaCarran-Fergeson. Or, Congress could expand the provision for nationwide plans[140] and eliminate the current state opt-out for such plans.

Congress could change the poverty distinctions for Alaska and Hawaii. This would be a necessary change, along with one of the above.

VII. CONCLUSION

Justice Roberts's *NFIB* opinion upheld the ACA as a tax in 2012. Congress, as a result, has had the opportunity to cure the foreseeable uniformity problem. It did not do so for 2014; hence, the ACA is subject to a successful uniformity challenge for that year. Based on announced 2015 rates, a similarly successful uniformity challenge is plausible. The constitutional uniformity problem is serious, but presents procedural problems because of its annual nature. It is necessarily an "as applied"

138. *See* Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, § 1333(a), 124 Stat. 119, 206-07 (2010). *Id.* at 221.

139. *See* 15 U.S.C. § 1012. The McCarran-Ferguson Act of 1945 granted states the right to regulate health insurance within their borders; *see* PPACA, *supra* note 138, at 119, 206-08. The ACA in section 1333 granted states the power to form interstate compacts for the sale of health insurance. *Id.* at 206-08.

140. *See* PPACA, *supra* note 138, at 207-08.

challenge and is subject to simple legislative solutions, although they may be politically difficult.