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## I. Introduction

In 1980, Congress enacted the Crude Oil Windfall Profit Tax[1] as a response to the excessive revenues or "windfall profits" oil producers were expected to reap because of the decontrol of oil prices.[2] Not all domestic oil is subject to the tax; certain Alaskan oil is specifically excluded.[3] The

1. 26 U.S.C. § 4986 (Supp. V 1981). Commentators consider the tax a very complex and ambiguous piece of legislation. *See* Kinnan, *An Introduction to the Crude Oil Windfall Profit Tax Act of 1980*, 3 W. New Eng. L. Rev. 645, 646 (1981) (Windfall Profit Tax extremely complex legislation); Shurtz, *The Windfall Profit Tax—Poor Tax Policy? Poor Energy Policy?*, 34 U. Miami L. Rev. 1115, 1117 (1980) (windfall tax complicated and ambiguous).

2. *See* H.R. Rep. No. 304, 96th Cong., 1st Sess. 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News 587, 594. *See generally* Miller & Easley, *The Windfall Profit Tax—An Overview*, 12 St. Mary's L.J. 414, 415-16 (1981) (discussion of Windfall Profit Tax and its relation to decontrol).

3. *See* 26 U.S.C. § 4994(e) (Supp. V 1981).

Uniformity Clause of the United States Constitution,[4] however, requires all excise taxes such as the Windfall Profit Tax be uniform throughout the country.[5] The purpose of this comment is to briefly introduce the reader to the Windfall Profit Tax itself and examine the tax's constitutional and economic soundness. The question of the tax's validity is especially important when one considers that the tax is expected to generate $227.3 billion in revenues.[6] While that sum certainly reduces our federal deficit and aids homeowners[7] and businesses[8] in the form of tax credits, the tax as an additional cost to our domestic oil industry seems to hinder efforts made to achieve energy independence and the benefits thereof. No attempt has been made to treat all aspects of the Windfall Profit Tax; however, the author has attempted to focus on the major problems related to the tax and to propose solutions to some of the problems.

## II. THE WINDFALL PROFIT TAX

### A. *Background*

The Crude Oil Windfall Profit Tax Act of 1980,[9] enacted on April 1, 1980,[10] was a congressional response to several years of national economic and energy problems.[11] America's supply of crude oil, for example, drasti-

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4. U.S. CONST. art. 1, § 8, cl. 1.

5. *See id. See generally* Comment, *The Unconstitutional Exemption of North Slope Crude Under the Windfall Profit Act: Exhuming the Direct Tax and Uniformity Provisions*, 35 TAX LAW. 717, 721-22 (1982) (discussion of Uniformity Clause and its history).

6. *See* 26 U.S.C. § 4990 (Supp. V 1981).

7. *See* Windfall Profit Tax Act on Domestic Crude Oil Act of 1980, Pub. L. No. 96-223, § 101, 94 Stat. 229 (1980).

8. *See id.* § 221.

9. *See* 26 U.S.C. § 4986 (Supp. V 1981).

10. *See* Windfall Profit Tax on Domestic Crude Oil Act of 1980, Pub. L. No. 96-223, § 101, 94 Stat. 229 (1980) (codified in the Internal Revenue Code of 1954, 26 U.S.C. §§ 4986-4995 (Supp. V 1981)). The title of the Act is a misnomer. The Act is not a tax on profits but is an excise or severance tax on the sale of domestically produced crude oil. Since oil companies, however, were expected to gain excessive revenues because of the decontrol of oil prices, the public perceived the Act to be a tax on windfall profits. *See* H.R. REP. No. 304, 96th Cong., 1st Sess. 4, 7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587, 591, 594.

11. *See, e.g.*, Drapkin & Verleger, *The Windfall Profit Tax: Origins, Development, Implications*, 22 B.C.L. REV. 631, 638 (1981) (determination of world oil price shifted from United States to exporting countries in 1973); Miller & Easley, *The Windfall Profit Tax—An Overview*, 12 ST. MARY'S L.J. 414, 415 (1981) (America's supply of petrochemical energy noticeably dwindled in 1960's and 1970's); Nash, *Energy Crisis in Historical Perspective*, 21 NAT. RESOURCES J. 341, 341 (1981) (Arab oil boycott and Iranian Revolution of 1979 added to America's energy problems).

cally declined in the late 1960's and early 1970's,[12] and the Arab oil embargo of the winter of 1972-1973 added to and evidenced America's shortage of oil.[13] During this time, the Organization of Petroleum Exporting Countries (OPEC)[14] began initiating unprecedented price increases while limiting the output of oil causing widespread fuel shortages.[15] In order to avoid the excessive and artificial world oil prices caused by OPEC, the United States initiated price controls on domestic crude oil in 1973.[16] The price controls, however, resulted in low fuel prices which in turn resulted in large domestic consumption of petroleum.[17] This tremendous domestic demand for oil, coupled with OPEC's power over the world price and supply of oil, created a substantial dependence on foreign oil.[18]

In the wake of crude oil shortages caused by decreased Iranian production in April 1979, President Carter voiced his intent to gradually decontrol domestic oil prices.[19] The rationale behind decontrol was that by bringing domestic oil prices to world levels, fuel conservation would be

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12. *See* Miller & Easley, *The Windfall Profit Tax—An Overview*, 12 ST. MARY'S L.J. 414, 415 n.3 (1981).

13. *See* H.R. REP. No. 223, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 545.

14. OPEC is an oil cartel made up of Middle Eastern and other foreign nations. OPEC was formed in the early 1970's so that its members might seek higher prices for their oil. *See* H.R. REP. No. 223, 96th Cong., 2d Sess. 141, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 545.

15. *See* Miller & Easley, *The Windfall Profit Tax—An Overview*, 12 ST. MARY'S L.J. 414, 415 (1981). Until 1973, determination of the world price for oil had always been in the hands of the United States. In 1973, however, the United States was replaced by OPEC, so that now OPEC dictates the world price for oil and the United States merely follows. *See* H.R. REP. No. 304, 96th Cong., 1st Sess. 5-7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587, 592-94.

16. *See* 38 Fed. Reg. 22,536 (1973) (codified at 6 C.F.R. part 150, subpart L (1973)). Following the Arab oil embargo, Congress passed the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760 (1976). The Act authorized the President to require mandatory allocation of crude oil, residual fuel oil, and refined petroleum products at fair prices. *See id.* § 753. *See generally* Carroll, *Department of Energy Crude Oil Producer Price Regulations: An Overview and an Update*, 12 NAT. RESOURCES LAW. 327, 334 (1979) (detailed discussion of crude oil price regulations).

17. *See* Drapkin & Verleger, *The Windfall Profit Tax: Origin, Development, Implications*, 22 B.C.L. REV. 631, 647-48 (1981).

18. *See id.* at 648-49.

19. *See* Shurtz, *The Windfall Profit Tax—Poor Tax Policy? Poor Energy Policy?*, 34 U. MIAMI L. REV. 1115, 1115 (1980). Congress, by enacting the Energy Policy and Conservation Act of 1979, authorized the President to either continue price controls or decontrol oil prices. 42 U.S.C. § 6201 (Supp. III 1979). Although President Carter intended to gradually remove all price controls by October 1981, President Reagan eliminated the program when he removed price controls from the sale of crude oil on January 28, 1981. Exec. Order No. 12,287, 3 C.F.R. 124 (1982).

encouraged[20] and domestic producers would be less dependent on and more competitive with foreign producers.[21] Oil companies, however, could expect to gain 1 trillion dollars or more in revenues from decontrol as the price paid in the United States rose to the artificial world price for oil created by OPEC.[22] The Windfall Profit Tax was enacted to divert some of the unearned or "windfall profits" oil producers would receive[23] to the federal government and provide for various government programs.[24]

### B. *The Tax Itself*

Under the Act, the tax base, or "windfall profit," is the difference between the amount for which a barrel of oil is sold ("removal price") and an adjusted base price.[25] For purposes of the tax, oil is classified under one of three different categories, or "tiers,"[26] and each tier is assigned an appropriate tax rate.[27] The applicable tier is determined by Department

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20. *See* President Carter's Energy Address to the Nation, 15 WEEKLY COMP. PRES. DOC. at 721-22 (Apr. 5, 1979).

21. *See id.*

22. *See* DEMOCRATIC STUDY GROUP, WINDFALL PROFIT TAX CONFERENCE REPORT FACT SHEET, H.R. DOC. No. 29, 96th Cong., 2d Sess. 1 (1979); *see also* S. REP. No. 394, 96th Cong., 1st Sess. 6, 141, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 410, 417, 545-46, 545-46.

23. *See* H.R. REP. No. 304, 96th Cong., 1st Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587, 594.

24. *See* S. REP. No. 394, 96th Cong., 1st Sess. 124, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 531-34. The Act does not earmark the funds which it created. *See* H.R. REP. No. 817, 96th Cong., 2d Sess. 117, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587, 626. A low-income energy assistance program was incorporated into the Act. *See* Windfall Profit Tax on Domestic Crude Oil Act of 1980, Pub. L. No. 96-223, § 101, 94 Stat. 229. Revenues are also to be used for various transporation programs. *See* CONFERENCE REPORT, H.R. REP. No. 817, 96th Cong., 2d Sess. 110, 117 (1980). *See generally* Shurtz, *The Windfall Profit Tax—Poor Tax Policy? Poor Energy Policy?*, 34 U. MIAMI L. REV. 1115, 1148-50 (1980) (detailed discussion of uses of Windfall Profit Tax revenues).

25. *See* 26 U.S.C. § 4988(a) (Supp. V 1981). Note that the tax is not on profits but on the sale of taxable crude oil. *See id.* § 4988(a). Unless specifically exempted from the Act under section 4994, crude oil produced from wells located in the United States or in its possessions are subject to the tax. *See id.* § 4996(b)(3)-(5). The taxable event occurs when the oil is transported from the premises. *See id.* § 4986(a).

26. *Id.* § 4991. *See generally Analysis of the Crude Oil Windfall Profit Tax: With an Emphasis on the Independent Producer*, 28 OIL & GAS TAX Q. 418, 423-28 (1980) (discussion of different classifications).

27. *See* 26 U.S.C. § 4991 (Supp. V 1981). The tax rates are: tier one, 70%; tier two, 60%; tier three, 30%. *See id.* § 4987(b). The Act also classifies certain oil as independent producer oil. *See id.* § 4992. The Act allows a decreased rate of taxation for an independent producer's first thousand barrels per day of tier one and tier two oil. *See id.* §§ 4987(b)(2), 4992(c). The rationale behind this provision was that since independent producers contribute to so much exploratory drilling in the United States, they should be entitled to added incentive to encourage their drilling operations. *See Analysis of the Crude Oil Windfall Profit Tax: With An Emphasis on the Independent Producer*, 28 OIL & GAS TAX Q. 418,

of Energy classifications[28] based on the type of property from which the oil is produced.[29] The tax is computed by multiplying the "windfall profit" by an appropriate tax rate.[30] Some domestic crude oil, however, is exempted from the Act.[31]

There are three different categories for taxable crude oil.[32] Tier one includes all oil that does not fall into either of the other two categories and oil produced from properties that began production before 1979.[33] The applicable tax rate for tier one oil is seventy percent of the "windfall profit."[34] Tier two oil consists of taxable crude oil produced from stripper well properties[35] or from a National Petroleum Reserve held by the United States,[36] and a sixty percent tax is imposed.[37] The third tier includes newly discovered oil,[38] heavy oil,[39] and incremental tertiary oil.[40]

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440 (1980). The reduced rate for tier one oil is 50% and for tier two oil, 30%. 26 U.S.C. § 4987(b)(2) (Supp. V 1981).

28. *See* 41 Fed. Reg. 48,324 (1976) (codified at 10 C.F.R. § 212 (1981)).

29. *See* 40 Fed. Reg. 31,147 (1975) (codified at 10 C.F.R. § 212 (1981)). Oil produced from water flooding or gas injection, for example, is tertiary oil and the applicable tax rate is thirty percent. *See* H.R. REP. No. 304, 96th Cong., 2d Sess. 98, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587, 651.

30. *See* 26 U.S.C. § 4987 (Supp. V 1981). The tax rate, or amount of tax imposed on a barrel of oil, is the applicable percentage of the "windfall profit" on that barrel of oil. The applicable percentage is determined by which category a particular type of oil is classified. *See id.*

31. *See id.* § 4996(g). Oil produced by an Indian tribe or tribal organization, for instance, is exempted from the tax. *See id.* § 4994(d).

32. *See id.* § 4987(b).

33. *See id.* § 4991(c)(1)-(2). Generally, tier one oil consists of oil produced from property that began production before 1979 but not including stripper, heavy, or incremental tertiary oil. *See id.*

34. *See id.* § 4987(b)(1). This is the highest tax rate imposed by the Act. *See id.*

35. *See id.* § 4991(d)(1)(A). Stripper well oil is oil produced from property where average daily production of crude oil per well does not exceed ten barrels per day during any twelve-month period beginning after December 31, 1982, assuming that each well operates at its maximum rate of production. *See* 41 Fed. Reg. 48,323 (1976) (codified at 10 C.F.R. § 212.54 (1981)).

36. *See* 26 U.S.C. § 4991(d)(1)(B) (Supp. V 1981). National Petroleum Reserve consists of property management by the Secretary of Interior for the protection of the environment, wildlife, and other interests within the general welfare. *See* 42 U.S.C. §§ 6502-6503 (1977).

37. *See id.* § 4987(b)(1).

38. *See id.* § 4991(e)(1)(A), (2). Newly discovered oil is oil produced from property which did not produce oil in commercial proportions during 1978. *See id.* § 4991(e)(2); 44 Fed. Reg. 25,832 (1979) (codified at 10 C.F.R. § 212.79 (1981)). In order to prevent producers from circumventing the Act by transferring or dividing their property after 1978 to enjoy more favorable tax treatment under tier three, Congress voided newly discovered oil status for property transferred after 1978 if it would not have been classified as such had there been no transfer. *See* H.R. REP. No. 304, 96th Cong., 1st Sess. 32, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587, 614.

39. *See* 26 U.S.C. § 4991(e)(1)(B), (3) (Supp. V 1981). Heavy oil has a weighted average

The tax rate on tier three oil was originally thirty percent of the "windfall profit."[41]

Once crude oil is categorized and the applicable tax rate determined, the "windfall profit" itself must be calculated. This is generally done by subtracting the adjusted base price from the removal price.[42] The base price itself is adjusted for inflation quarterly,[43] and a state severance tax adjustment is subtracted from the base price as well.[44] This adjustment is the difference between the state severance tax that would have been levied if the barrel was sold at its adjusted base price and the state severance tax actually imposed.[45] In sum, the tax paid on a barrel of oil is computed by multiplying the tax base or windfall profit by an appropriate tier tax rate.[46] Oil producers will not be paying the tax indefinitely.[47]

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gravity of 16 degrees API or less and is hard to produce and refine because of its thickness and viscosity. *See id.* § 4991(e)(3).

40. *See id.* § 4991(e)(1)(C), (4). Incremental tertiary oil is produced by fire-flooding or chemical techniques which are approved by the government. *See id.* § 4993(c); 44 Fed. Reg. 51,152 (1979) (codified at 10 C.F.R. § 212.78(c) (1981)). Tertiary recovery methods include steam drive injection, alkaline flooding, carbonated water flooding, microemulsion, or any other method approved by the Secretary of the Treasury. *See id.* § 4993(d)(1). *See generally* Shattuck, *Planning for the Crude Oil Windfall Profit Tax*, 28 OIL & GAS TAX Q. 387, 397 (1980) (detailed discussion of incremental tertiary oil).

41. *See* 26 U.S.C. § 4987(b)(3) (Supp. V 1981) (currently (1983) rate is 25% to decrease to 15% in years 1986 and thereafter).

42. *See id.* § 4988(a). The removal price of a barrel of oil is usually the sales price of that barrel. *See id.* § 4988(c)(1). The adjusted base price is the average price for which the oil would have sold in 1979 before decontrol. *See id.* § 4989(c)-(d). A constructive sales price is substituted for the removal price if the oil is sold to a related party, removed from the premises before it is sold, or refined on the premises from which it is produced. *See id.* § 4988(c)(2)-(4). In any event, the Secretary of the Treasury has the authority to adjust the removal price to insure the fair market value of crude oil removed in any transaction. *See id.* § 4996(f).

43. *See id.* § 4989(b). The inflation adjustment works by multiplying the base price by a gross national product price deflator provided by the United States Department of Commerce to reflect inflation subsequent to 1979. *See id.* § 4989(a)-(b). Tier three oil receives an additional adjustment, which equals an extra one-half percent per quarter increase. *See id.* § 4989(b)(2).

44. *See id.* § 4996(c).

45. *See id.* § 4996(c)(1). Under the Act, a state severance tax is imposed by a state on produced oil and is calculated on the basis of the gross value of the crude oil extracted. *See id.* § 4996(c)(2). This adjustment was made in order to ease a producer's tax burden when he is subject to the windfall profit tax, state severance taxes, and federal and state income taxes. *See* H.R. REP. No. 304, 96th Cong., 1st Sess. 35, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587, 617.

46. *See* 26 U.S.C. § 4987 (Supp. V 1981). Once all the classifications and calculations have been made, one can finally compute the windfall profit tax. For an example of computing the tax, assume a barrel of tier three heavy oil is removed and sold for $30.00. The adjusted base price is $20.00, and the state severance tax rate is five percent. The windfall profit tax on that barrel of oil would be $2.85.

Phaseout of the Windfall Profit Tax is scheduled to begin January 1, 1988 or when the United States Treasury receives 227.3 billion dollars in windfall profit tax revenues, whichever is later.[48] The phaseout will occur over a thirty-three month period during which time the tax liability will be reduced about three percent each month.[49] Thus, the tax should end sometime between October 1990 and November 1993.[50]

### C. *The Alaskan Exemption*

While the tax is in effect, however, not all domestic crude oil is taxed.[51] Except for oil produced from the Salerochit Reservoir,[52] any crude oil which is produced north of the Arctic Circle, or north of the Alaska-Aleutian Mountain Range divide, and at least seventy-five miles from the nearest point on the Trans-Alaska Pipeline System, is exempt from the

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| Removal Price | $30.00 |
| Adjusted Base Price, Including Inflation Adjustment | -20.00 |
| State Severence Tax Adjustment (30.00 x 5% - 20.00 x 5%) | - .50 |
| Windfall Profit | 9.50 |
| Tax Rate (Tier 3) | X 30% |
| Windfall Profit Tax | $ 2.85 |

Under the Act, however, the windfall profit tax on any barrel of crude oil may not exceed ninety percent of the net income attributable to that barrel. *See* 26 U.S.C. § 4988(b)(1) (Supp. V 1981). This is known as the net income limitation. *See id.* The net income of a barrel of oil is basically the producer's taxable income of the property involved minus applicable deductions such as operating expenses or overhead and other certain adjustments divided by the number of barrels produced from the property during the taxable year. *See id.* § 4988(b)(2). *See generally* Kinnan, *An Introduction to the Crude Oil Windfall Profit Tax Act of 1980*, 3 W. NEW ENG. L. REV. 645, 657-58 (1981) (detailed discussion of net income limitation); *Analysis of the Crude Oil Windfall Profit Tax: With an Emphasis on the Independent Producer*, 28 OIL & GAS TAX Q. 418, 429 (Supp. V 1981 (thorough discussion of net income limitation).

47. *See* 26 U.S.C. § 4990 (Supp. V 1981). Since the tax was intended to take from oil producers some of the alleged increases in revenues caused by decontrol, the tax is temporary in nature as those alleged increases would eventually diminish. *See* H.R. REP. No. 304, 96th Cong., 1st Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587, 594.

48. *See* 26 U.S.C. § 4990 (Supp. V 1981).

49. *See id.* § 4990(c)(1)-(2).

50. *See* Kinnan, *An Introduction to the Crude Oil Windfall Profit Tax Act of 1980*, 3 W. NEW ENG. L. REV. 645, 663 (1981).

51. *See* 26 U.S.C. § 4991(b) (Supp. V 1981). The oil exempted is Alaskan oil, Indian oil, front-end tertiary oil, and oil produced from a qualified governmental interest or a qualified charitable interest. *See id.* § 4994. *See generally* Kinnan, *An Introduction to the Crude Oil Windfall Profit Tax Act of 1980*, 3 W. NEW ENG. L. REV. 645, 653-54 (1981) (discussion and analysis of exempt oil).

52. *See* 26 U.S.C. § 4994(e) (Supp. V 1981). The Sadlerochit Reservoir is located at Prudhoe Bay in the northeastern corner of Alaska.

tax.[53] Hence the exemption applies expressly to only one state—Alaska.[54] The rationale behind the exemption was that it would offset the costs of extracting and producing Alaskan oil, thereby encouraging exploration to reduce American dependence on foreign oil.[55]

## III. THE UNIFORMITY REQUIREMENT

### A. *The Concept of Uniformity*

The Alaskan exemption, however, and thus the Crude Oil Windfall Profit Tax Act of 1980 appear to conflict with a constitutional guideline for taxation.[56] The Uniformity Clause of the Constitution requires that all excise taxes be uniform throughout the United States.[57] In determining what kind of uniformity the Constitution demands, the Supreme Court of the United States has decided that geographic uniformity is required,[58] and not an intrinsic or operational uniformity in which a tax has an equal effect in each state.[59] In *Fernandez v. Wiener*,[60] for example, the Supreme Court upheld an estate tax levied upon community property.[61] The

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53. *See id.*

54. *See id.* Since the Alaskan exemption applies to the Alaskan North Slope, the exemption is sometimes referred to as the North Slope exemption. *See generally* Reese & Black, *Comparative Analysis of Tax-Exempt Status for Federal Income and Windfall Profit Taxation*, 29 OIL & GAS TAX Q. 459, 490-95 (1981) (discussion of Alaskan exemption and its creation).

55. *See* H.R. REP. No. 817, 96th Cong., 2d Sess. 103, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 642, 656. The exemption favors this particular geographic area because "taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions." *Id.*

56. *See* U.S. CONST. art. 1, § 8. The section provides in pertinent part that "[c]ongress shall have power to lay and collect Taxes . . . but all Duties, Imposts, and Excises, *shall be uniform throughout the United States.*" *Id.* (emphasis added).

57. *See id.*

58. *See, e.g.*, Fernandez v. Wiener, 326 U.S. 340, 361 (1945) (tax of subject matter must be identical in every state where subject matter found); Miller v. Standard Nut Margarine Co., 284 U.S. 498, 510 (1932) (excises laid by Congress shall be uniform throughout United States); Knowlton v. Moore, 178 U.S. 41, 98 (1900) (Constitution requires uniformity among excise taxes). The Court in *Fernandez* said that the Uniformity Clause "refers to geographical uniformity in the application of the particular excise which Congress has prescribed . . . . [The clause] requires only that what Congress has properly selected for taxation must be identically taxed in every state where it is found." Fernandez v. Wiener, 326 U.S. 340, 361 (1945).

59. *See* Knowlton v. Moore, 178 U.S. 41, 87-106 (1900). In other words, the Windfall Profit Tax would be "uniform" if it operated fairly in oil producing states. The fact that states not producing oil are not affected by the tax is immaterial. *Cf. id.* at 87-106.

60. 326 U.S. 340 (1945).

61. *Id.* at 340.

tax was attacked because it did not apply to common law states and was, therefore, not uniform.[62] The Supreme Court, however, found that the geographic uniformity requirement had been satisfied because the tax was identical in those states in which the tax did apply.[63] In other words, an excise tax on property, whether it is crude oil or community property interests, must be identical in every state where the subject matter of the tax is found.[64] Thus, to satisfy the Constitution, the uniformity requirement would not be violated if a non-oil producing state, such as Connecticut, was not subject to the Windfall Profit Tax.[65] On the other hand, the uniformity requirement would appear to be violated if an oil producing state was exempted from the tax.[66] This seems to be the case since the tax is applied to all oil producing states except Alaska.[67] Despite the sound reasoning behind the Alaskan exemption,[68] the Uniformity Clause has never been subject to qualification or exception.[69]

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62. *Id.* at 360. Those attacking the tax argued that since interests in tenancies in common and limited partnerships are very similar to community property interests, the tax involved was not uniform because it did not tax the similar interests. *Id.* at 360-61.

63. *Id.* at 360-61.

64. *See* LaBelle Iron Works v. United States, 256 U.S. 377, 392 (1921); *see also* Head Money Cases, 112 U.S. 580, 594 (1884) (tax uniform when operates with same force and effect in every place where subject found); *cf.* Poe v. Seaborn, 282 U.S. 101, 117-18 (1930) (differences in state law do not create non-uniformity).

65. *See, e.g.*, Steward Mach. Co. v. Davis, 301 U.S. 548, 583 (1937) (tax should operate fairly in every state where taxed subject found); Bromley v. McCaughn, 280 U.S. 124, 138 (1929) (where subject matter of excise tax found, tax should be identical); LaBelle Iron Works v. United States, 256 U.S. 377, 392 (1921) (tax uniform when collected in every place where subject found); *see also* Phillips v. Commissioner, 283 U.S. 589, 602 (1931) (differences in state law do not effect uniformity when tax identical wherever taxed interest found).

66. *Cf.* Fernandez v. Wiener, 326 U.S. 340, 360-61 (1945) (federal tax affecting community property interests found geographically uniform since applied in every community property state).

67. *See* 26 U.S.C. § 4994(e) (Supp. V 1981).

68. *See* H.R. REP. No. 817, 96th Cong., 2d Sess. 103, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 642, 656. Alaskan oil was exempted from the tax in order not to discourage production where harsh climatic conditions existed. *See id.* This would in turn ease America's dependence on OPEC oil. *See* H.R. REP. No. 304, 96th Cong., 1st Sess. 6-7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 410, 417-18.

69. *See, e.g.*, Steward Mach. Co. v. Davis, 301 U.S. 548, 583 (1937) (uniformity requirement never qualified); South Carolina v. United States, 199 U.S. 437, 450-51 (1905) (excises must be uniform throughout United States); Heitsch v. Kavanaugh, 200 F.2d 178, 180 (6th Cir. 1952) (liability of excise tax must be same in all parts of country), *cert. denied*, 345 U.S. 939 (1953); *cf.* Florida v. Mellon, 273 U.S. 12, 17 (1927) (rule of federal tax liability must be same in all parts of United States).

B. *Railway Labor Executives' Association v. Gibbons*

Recently, in *Railway Labor Executives' Association v. Gibbons*,[70] the United States Supreme Court demonstrated the unbending nature of the uniformity requirement.[71] The case dealt with a bankruptcy law enacted for the benefit of one regional bankrupt railroad in the process of reorganization.[72] Other railroads going through reorganization proceedings were not affected by the legislation.[73] The Constitution, however, requires bankruptcy laws, just like excise taxes, to be geographically uniform throughout the country.[74] The Supreme Court construed the statute as nothing more than a "private bill" or a response to the problems of one bankrupt railroad[75] and declared it unconstitutional because it did not operate uniformly throughout the country.[76] Similarly, the Alaskan exemption appears to be simply a response to the expense involved in producing oil in some parts of Alaska.[77] As a result, the Windfall Profit Tax appears difficult to reconcile with the uniformity requirement of the Constitution[78] and the standards established by the United States Supreme Court[79] because it does not operate uniformly throughout the United

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70. 455 U.S. 457 (1982).

71. *See id.* at 469-473.

72. *Id.* at 466-67. The bankrupt railroad, Rock Island & Pacific Railroad Co., attempted reorganization under section 77 of the Bankruptcy Act of 1898, but finally had to liquidate its entire operation. In the meantime, Congress enacted the Rock Island Transition and Employee Assistance Act to insure economic benefits for Rock Island employees. *See id.* at 467-68.

73. *See id.* at 470 n.11.

74. *See* U.S. CONST. art. 1, § 8, cl. 4. The clause provides that Congress has the power to enact bankruptcy laws that are uniform throughout the United States. *Id.* The Supreme Court has determined that this uniformity requirement, like that of excise taxes, is one of geographic uniformity. *See* Wright v. Vinton Branch Mountain Trust Bank, 300 U.S. 440, 463 n.7 (1937); Stellwagen v. Clum, 245 U.S. 605, 613 (1918).

75. Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982).

76. *Id.* at 471. The court stressed that the statute was not in response to a geographically isolated problem, or even a problem involving a particular class such as bankrupt railroads. The statute applied to only one debtor and did not even apply uniformly to other bankrupt railroads, much less other bankrupt organizations. The statute, therefore, did not satisfy the uniformity requirement and was held unconstitutional. *See id.* at 471.

77. *See* H.R. REP. No. 817, 96th Cong., 2d Sess. 103, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 642, 656. The Alaskan exemption was necessary because of "concern . . . that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climactic conditions." *Id.*

78. *See* U.S. CONST. art. 1, § 8, cl. 1.

79. *See, e.g.*, Fernandez v. Wiener, 326 U.S. 340, 359 (1945) (Uniformity Clause requires geographic uniformity); Brushaber v. Union Pac. R.R., 240 U.S. 1, 24 (1916) (Constitution requires geographic uniformity only); Knowlton v. Moore, 178 U.S. 41, 87-106 (1900) (uniformity requirement is geographical in nature).

States.[80]

## IV. The Doctrine Of Severability

While the Alaskan exemption seems to be unconstitutional, the doctrine of severability may prevent invalidation of the entire tax.[81] According to the doctrine of severability, if one part of a statute is declared unconstitutional, a court may eliminate the unconstitutional portion and uphold the remaining part.[82] On the other hand, if the two provisions are interdependent so that Congress would not have enacted one without the other, then severability is not applicable and the whole statute may be struck down.[83] In deciding whether to apply the doctrine, courts look at congressional intent[84] and determine whether the legislation would have passed without the unconstitutional portion.[85] Thus, if it appears that

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80. *See* 26 U.S.C. § 4994(e) (Supp. V 1981).

81. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (doctrine of severability applies where two different statutory provisions exist); Lynch v. United States, 292 U.S. 571, 586 (1934) (valid part of statute may remain if Congress intended its effect when standing alone); Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (doctrine of severability allows valid portion of statute to stand alone if Congress so intended).

82. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The *Chaplinsky* Court noted that when two provisions are distinct or can stand independently of each other then the doctrine of severability may be applied. *See id.* at 572.

83. *See* Carter v. Carter Coal Co., 298 U.S. 238, 312-13 (1936). *Carter* involved the question whether the price regulations of the Bituminous Coal Conservation Act of 1935, 15 U.S.C. §§ 801-827 (repealed 1937), were severable from the Act's labor regulations. *See id.* at 314. The Court held that the test of severability depends on the intent of the legislature; specifically, severability may not be applied if there is a clear probability that the legislature would not have enacted the statute without the invalid portion. *See id.* at 312-13. The Court added that for severability to be applicable, the invalid portion and valid portion must not be mutually dependent. *See id.* at 313.

84. *See id.* at 312-13. The Court noted the general presumption that Congress intends an act to be valid as a whole, "and if a provision be unconstitutional, the presumption is that the remaining provisions fall with it." *Id.* at 312. Some statutes, however, contain severability or saving clauses which expressly allow severability if any portion is deemed invalid; in such a case the presumption is in favor of severability. *See id.* at 312. The Internal Revenue Code, of which the Windfall Profit Tax is a part, incorporates a general severability clause which provides that if "any provision of this title . . . is held to be invalid . . . the remainder of the title . . . shall not be affected thereby." 26 U.S.C. § 7852(a) (1976). The clause is broad in nature and was apparently enacted to protect the entire Internal Revenue Code from invalidation when a particular portion was declared invalid. Nevertheless, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." United States v. Jackson, 390 U.S. 570, 585 n.27 (1968). Moreover, such clauses are merely aids in determining legislative intent and are not "inexorable command[s]." *See* Dorchy v. Kansas, 264 U.S. 286, 290 (1924).

85. *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235, 241 (1929) (if dominant purpose cannot be obtained without unconstitutional portion, then entire statute invalid); International Textbook Co. v. Pigg, 217 U.S. 91, 113 (1910) (entire statute invalid if portion

Congress would have enacted the Windfall Profit Act without the Alaskan exemption, the entire Act would not be unconstitutional.[86]

During debate on the Windfall Profit Tax, some senators voiced their concern about the constitutionality of the tax.[87] Aside from his concern for the constitutionality of the tax, Senator Stevens vigorously opposed any further taxation on Alaskan oil.[88] Both the House and Senate committees that discussed the tax exempted Alaskan oil in their proposed bills[89] and the Senate approved the tax only after lengthy negotiations and compromises that resulted in the Alaskan exemption.[90] On the other hand, Senator Long of Louisiana asserted during Senate debate that the tax would pass irrespective of the Alaskan exemption.[91] While the Congress did not expressly indicate their intent as to whether or not the Windfall Profit Tax would have passed without the Alaskan exemption, it would appear from the concerns of some senators and the negotiations involved that the Windfall Profit Tax would not have passed without the Alaskan exemption.[92]

Of course, one of the primary purposes of the tax was to divert some of the "windfall profit" caused by decontrol from oil producers to the federal government.[93] Severing the Alaskan exemption and thereby subjecting Alaskan oil to the tax would certainly accomplish that task. The tax

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standing by itself not intended by legislature); Berea College v. Kentucky, 211 U.S. 45, 55-56 (1908) (statute struck down when valid part could not function without invalid part).

86. *See* Lynch v. United States, 292 U.S. 571, 586 (1934). The *Lynch* Court held that a valid portion of a statute could stand alone if it could be given legal effect and if the legislature intended the valid part could stand without the unconstitutional provision. *See id.* at 586; *see also* Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (unobjectionable portion is not severable unless Congress so intended).

87. *See* 126 CONG. REC. S. 2771 (daily ed. March 20, 1980). Senator Stevens of Alaska, for example, recognized the constitutional requirement of geographic uniformity for excise taxes and argued that the Windfall Profit Tax failed to meet this standard. *See id.* (statement of Sen. Stevens). Senators Boren of Oklahoma and Schmitt of New Mexico read into the record an article concerning the conflict between the tax and the Uniformity Clause. *See id.* at 2825.

88. *See* 125 CONG. REC. S. 18,564, 18,565 (daily ed. Dec. 14, 1979) (statement of Sen. Stevens).

89. *See* H.R. REP. No. 304, 96th Cong., 2d Sess. 30, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587, 612; S. REP. No. 394, 96th Cong., 2d Sess. 35-37, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 410, 444-46.

90. *See* 125 CONG. REC. S. 18,564, 18,566 (daily ed. Dec. 14, 1979) (statement of Sen. Stevens).

91. *See* 126 CONG. REC. S. 3056 (daily ed. March 26, 1980) (statement of Sen. Long).

92. *See* H.R. REP. No. 304, 96th Cong., 1st Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 587, 594.

93. *See* S. REP. No. 394, 96th Cong., 2d Sess. 6, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 410, 417.

was structured, however, to avoid discouraging domestic production.[94] Newly discovered oil, for example, is subject to the lowest tax rate in the Act.[95] Thus, in conjunction with collecting "windfall profits" from oil producers was a desire to avoid negative effects on domestic production.[96] The Alaskan exemption is evidence of this latter goal.[97] Severing the exemption would tend to discourage domestic production and thereby circumvent its legislative intent and purpose. Due to the nonseverable nature accorded the Act by both case law and the separability clause found in the Internal Revenue Code, the Act must be constitutionally reviewed in its entirety.[98]

## V. DISCRIMINATION

Aside from the severance doctrine, other reasons point to the impropriety of simply striking the exemptions rather than the whole Act. First, the uniformity requirement is not subject to exception regardless of how rational the legislation might be.[99] Senator Long, however, demonstrated the legislative misunderstanding of the Uniformity Clause. In defense of the tax, Senator Long pointed out that the exemption was necessary to avoid discouraging exploration and development in areas subjected to extreme climatic conditions.[100]

Were it not for the uniformity rule, political expediency and reasoning such as Senator Long's, whether good or bad, would result in discriminatory measures such as the Windfall Profit Tax.[101] One of the purposes of

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94. *See* 26 U.S.C. § 4991(e) (Supp. V 1981).

95. *See* S. REP. No. 394, 96th Cong., 2d Sess. 6, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 410, 417.

96. *See* S. REP. No. 394, 96th Cong., 2d Sess. 30, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 410, 439.

97. *See id.*; *see also* H.R. REP. No. 817, 96th Cong., 2d Sess. 103, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 642, 656 (Alaskan exemption necessary to Act to encourage exploration in areas of extreme climatic conditions and to lessen dependence on foreign oil). *But see* Comment, *The Unconstitutional Exemption of North Slope Crude Under the Windfall Profit Act: Exhuming the Direct Tax and Uniformity Provisions*, 35 TAX LAW. 717, 734-35 (1982) (constitutional provisions of Windfall Profit Tax Act should be given effect).

98. *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235, 241 (1929) (entire statute unconstitutional if dominant purpose cannot be reached without invalid portion); International Textbook Co. v. Pigg, 217 U.S. 91, 113 (1920) (whole statute invalid if valid parts alone do not further legislative intent); Berea College v. Kentucky, 211 U.S. 45, 55-56 (1908) (statute struck down when valid section could not function without invalid portion).

99. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 583 (1937); *cf.* Stellwagen v. Clum, 245 U.S. 605, 613 (1918) (article I, section 8 requires federal bankruptcy laws be uniform).

100. *See* 126 CONG. REC. S. 3056 (daily ed. March 26, 1980) (statement of Sen. Long).

101. *See* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 428 (3d ed. 1858). The uniformity requirement is necessary to prevent "the grossest and most oppressive inequalities . . . . [A] combination of a few states in congress might secure a

the Uniformity Clause is to insure fair and equal taxation among the different states.[102] Without the uniformity requirement, Congress would be free to tax one state differently from another with discrimination a likely result.[103] Because of the Alaskan exemption, it appears the Windfall Profit Tax has a discriminatory effect on oil producing states.[104] In Oklahoma, for example, oil producers have had to abandon some wells because of the additional cost of the Windfall Profit Tax.[105] Those closed wells result in a less productive economy and more unemployment.[106] As an additional cost, the tax is a burden to all oil producing states except Alaska.

## VI. LEGISLATIVE PURPOSES

Another reason for striking the entire Act is that severing the unconstitutional portion and applying the tax to Alaskan oil would frustrate the congressional intent of encouraging exploration and production of oil in the harsh climatic regions of Alaska because of the additional cost imposed by the tax.[107] Moreover, applying the tax to Alaska would neutralize any incentive for increased production in Alaska, thereby making the United States more dependent on foreign oil and again circumventing the

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monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favoured neighbors." *Id.; see also* 2 ANNALS OF CONG. 379 (1792). Hugh Williamson of North Carolina noted that the intention of the uniformity clause was "that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another." 2 ANNALS OF CONG. 379 (1792).

102. *See* Miller v. Standard Nut Margarine Co., 284 U.S. 498, 510 (1932). The *Miller* Court invalidated a tax levied only on Florida manufacturers because the resulting discrimination between taxpayers from different states "conflicts with the principle underlying the constitutional provisions directing that excises laid by Congress shall be uniform throughout the United States." *Id.* at 510. The Court concluded that operation of the tax was arbitrary and oppressive. *See id.* at 510.

103. *See* Downes v. Bidwell, 182 U.S. 244, 251 (1901). *Compare* Fernandez v. Wiener, 326 U.S. 340, 359 (1945) (tax on community property uniform and not discriminatory since only affected community property states) *with* Miller v. Standard Nut Margarine Co., 284 U.S. 498, 510 (1932) (discrimination between taxpayers from different states conflicts with constitutional provision requiring excises laid by Congress to be uniform throughout United States).

104. *See* 26 U.S.C. § 4994(e) (Supp. V 1981).

105. *See* Comment, *The Unconstitutional Exemption of North Slope Crude Under the Windfall Profit Tax: Exhuming the Direct Tax and Uniformity Provisions*, 35 TAX LAW. 717, 730 n.113 (1982).

106. *See id.* at 730.

107. *See* H.R. REP. No. 817, 96th Cong., 2d Sess. 103, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 642, 656.

legislative intent behind the exemption.[108] In addition, recent legislation lessens the burden of the Windfall Profit Tax and encourages increased production of domestic oil.[109] Tax credits, for instance, for those subjected to the tax have been increased.[110] Moreover, an accelerated reduction of the tax rate on newly discovered oil has been enacted in order to increase the incentive for exploration and development of new oil;[111] taxing Alaskan oil would conflict with the intent of the reduction amendment. In sum, the Alaskan exemption was intended to and does provide a great incentive for development of Alaskan oil.[112] Severing the exemption, however, and thus applying the tax to Alaska would eliminate that incentive and in fact discourage production, thereby contradicting the goals and intent of the Windfall Profit Tax and recent legislation.[113]

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108. *See* H.R. REP. No. 304, 96th Cong., 2d Sess. 6-7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 410, 417-18.

109. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172. *See generally* Hennessee, *Effect of the Economic Recovery Tax Act of 1981 on the Windfall Profit Tax*, 30 OIL & GAS TAX Q. 620, 620 (1982) (primary objective of legislation to stimulate exploration and development of new domestic oil in order to reduce dependence on foreign oil); Mangum, *Evolution of the Crude Oil Windfall Profit Tax—An Examination of Recent Changes*, 13 ST. MARY'S L.J. 767, 771-76 (1982) (detailed discussion of recent legislation and effect on tax).

110. *See* 26 U.S.C. § 4994(f) (Supp. V 1981).

111. *See id.* § 4987(b)(3). A decrease in the Windfall Profit Tax rate on newly discovered oil is the equivalent of a price increase for that oil, and as a result, exploration, development, and production of domestic oil should be stimulated. *See* Hennessee, *Effect of the Economic Recovery Tax Act of 1981 on the Windfall Profit Tax*, 30 OIL & GAS TAX Q. 620, 624 (1982).

112. *See* H.R. REP. No. 817, 96th Cong., 2d Sess. 103, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 642, 656.

113. *See id.*; S. REP. No. 144, 97th Cong., 1st Sess. 93, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 105, 197-99. For the oil industry then, the main thrust behind the Economic Recovery Tax Act was to "stimulate exploration and development of new prospects which in turn would reduce U.S. dependence on foreign oil." Hennessee, *Effect of the Economic Recovery Tax Act of 1981 on the Windfall Profit Tax*, 30 OIL & GAS TAX Q. 620, 620 (1982). Note that by applying the tax to Alaska, the courts would apparently be levying a tax. *See, e.g.*, Frost v. Corporation Comm'n, 278 U.S. 515, 525 (1929) (unconstitutional amendment should be held invalid but scope of law may not be extended to include subject expressly excluded by legislature); Davis v. Wallace, 257 U.S. 478, 484 (1922) (when part of statute found invalid, court will not enlarge scope of valid portions); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902) (court may not extend statute to reach exempted classes). Congress levies taxes. *See, e.g.*, Mathews v. DeCastro, 429 U.S. 181, 185 (1976) (Congress has discretion to spend money for general welfare); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340 (1974) (Congress "sole organ" for levying taxes); Marchetti v. United States, 390 U.S. 39, 58-60 (1968) (Constitution entrusts Congress, not courts, with power to tax). Courts have no such authority. *Cf.* U.S. CONST. art. 1, § 8, cl. 1. The provision provides that only Congress has the power to lay and collect taxes. *See id.* Simply severing the Alaskan exemption and thus enlarging the tax to include Alaska would result in impermissible judicial conduct. *See* National Cable Television Ass'n, Inc. v.

## VII. The Windfall Profit Tax: Alternatives and Consequences

### A. *Classification According to Geography Rather Than Class*

The enormous amount of revenue generated by the tax[114] and the effect it could have on the volatile oil industry and our energy-dependent society, point to the need to resolve the infirmities of the tax. As a tax inconsistent with the Uniformity Clause[115] because of its geographic line-drawing,[116] the Windfall Profit Tax in its present form should not stand. That does not mean, however, that Congress is unable to levy a similar tax which satisfies the Constitution. Instead of levying a tax along geographic or regional lines, Congress is free to tax a particular class of oil or oil producers.[117] The Uniformity Clause only requires that property selected by Congress for taxation "must be identically taxed in every state where it is found."[118] Thus, if Congress exempted a certain class of oil, such as heavy oil, and not a particular region from the Windfall Profit Tax, there would be no violation of the uniformity requirement.[119] Suppose, for example, heavy oil was only found in Texas and Alaska and heavy oil was exempted from taxation; the exemption would be constitutionally sound because it operated identically in the two states where heavy oil was found.[120] On the other hand, if Texas and Alaska were simply excluded from any tax on oil, the exemption would be drawn along regional lines

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United States, 415 U.S. 336, 340 (1974). The Supreme Court noted that taxation is solely a legislative function. *See id.* at 340. The Supreme Court has established that legislation is entirely void if striking down the invalid portion results in application of the law beyond the legislature's intent. *See* Frost v. Corporation Comm'n, 278 U.S. 515, 525 (1929).

114. *See* 26 U.S.C. § 4990(d)(2) (Supp. V 1981). During the period the tax is in effect, it could collect up to $227.3 billion. *See id.* (2)-(3) (determination of aggregate net windfall revenue).

115. U.S. Const. art. 1, § 8, cl. 1.

116. *See* 26 U.S.C. § 4994(e) (Supp. V 1981) (the Alaskan exemption).

117. *Cf.* Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 469 (1982) (uniformity requirement demands bankruptcy law apply uniformly to defined class of debtors).

118. Fernandez v. Wiener, 326 U.S. 340, 361 (1945); *see, e.g.*, Brushaber v. Union Pac. R.R., 240 U.S. 1, 13 (1916) (uniformity requirement demands geographic uniformity); Knowlton v. Moore, 178 U.S. 41, 106 (1900) ("to operate generally throughout the United States" means to be geographically uniform); Head Money Cases, 112 U.S. 580, 594 (1884) (tax uniform when operates equally in every place where subject found).

119. *Cf.* Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 473 (1982) (uniformity requirement does not deny Congress' ability to define classes of debtors and provide appropriate relief).

120. *Cf.* Fernandez v. Wiener, 326 U.S. 340, 360 (1945) (tax levied on community property interests and identical in every community property state does not lack uniformity because of no effect in common law states).

and would violate the uniformity requirement.[121]

B. *Economic and Energy Soundness*

Whether constitutionally sound or not, the Windfall Profit Tax is a detriment to America's economy and energy position.[122] The Supreme Court recognizes that a tax on any good or product discourages investment or production of that good,[123] so that the general effect of the Windfall Profit Tax is to reduce the level of production of domestic oil.[124] The tax neutralizes any incentive oil producers might have to discover and produce new oil.[125] Less exploration and production results in fewer jobs available in the domestic industry.[126] Moreover, as an additional cost to producers, the tax will be felt by consumers as it is passed down the economic chain.[127]

C. *Dependence*

A decline in domestic production not only causes greater dependence on foreign oil, but also contravenes the purpose behind the decontrol of oil prices—that of greater domestic development.[128] Increased depen-

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121. *See, e.g.*, Florida v. Mellon, 273 U.S. 12, 17 (1927) (uniformity requirement demands tax should not be drawn along geographical lines); Brushaber v. Union Pac. R.R., 240 U.S. 1, 24 (1916) (Constitution requires geographic uniformity only); Knowlton v. Moore, 178 U.S. 41, 106 (1900) (uniformity requirement geographical).

122. *But see* Shurtz, *The Windfall Profit Tax—Poor Tax Policy? Poor Energy Policy?*, 34 U. MIAMI L. REV. 1115, 1157-58 (1980) (tax is fair and provides adequate incentives for domestic oil production).

123. *See, e.g.*, United States v. Sanchez, 340 U.S. 42, 44 (1950) (tax not void because discourages or deters activities taxed); Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (that tax restricts or suppresses thing taxed does not effect validity of tax); McCray v. United States, 195 U.S. 27, 63 (1904) (although tax represses manufacture of thing taxed, tax not void).

124. *See* Crow, *U.S. House Passes Excise Tax on Decontrol Revenues*, OIL & GAS J., Mar. 17, 1980, at 59. The tax is expected to reduce production by 1.6 million barrels per day. *Id.; see also* McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) (power to tax involves power to destroy).

125. *See* McDonald, *The Incidence and Effects of the Crude Oil Windfall Profit Tax*, 21 NAT. RESOURCES J. 331, 338 (1981).

126. EVANS ECONOMICS, INC., THE ECONOMIC IMPACT OF OIL PRICE DEREGULATION AND THE WINDFALL PROFITS TAX, *reprinted in Hearings on Windfall Profit Tax Before Senate Finance Comm.*, 96th Cong., 1st Sess. 812 (1979) (statement of Michael K. Evans).

127. *But see* McDonald, *The Incidence and Effects of the Crude Oil Windfall Profit Tax*, 21 NAT. RESOURCES J. 331, 331 (1981) (effect of tax will be substantial domestic output).

128. *See* President Carter's Energy Address to the Nation, 15 WEEKLY COMP. PRES. Doc. 609, 721-22 (Apr. 5, 1979). Decontrol was intended to eliminate dependence on foreign oil and encourage exploration and production of oil. *See id.*

dence on foreign oil leaves American industry and consumers extremely vulnerable to the world pricing power of OPEC.[129] The Windfall Profit Tax's failure as sound economic and energy policy outweighs whatever benefit might accrue from the revenue collected by the tax. Assuming the Supreme Court declares the tax unconstitutional,[130] Congress would do best by not enacting similar legislation.

## VIII. CONCLUSION

Aside from its constitutional infirmity and the resulting discrimination, the Windfall Profit Tax and its benefits do not outweigh the detrimental effect of the tax on the economy and energy policy. While America seeks to achieve some kind of energy independence, the tax deprives American producers of some of the incentive to do so. Congress could simply cure the constitutional problem, but the tax would remain a burden on the oil industry; and in a nation fueled by oil and petroleum products, the ramifications would continue to be felt throughout the whole sphere of society. Pursuing a policy of energy independence and thus becoming less subject to outside forces could be better accomplished without the Windfall Profit Tax.

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129. *See* S. REP. No. 394, 96th Cong., 1st Sess. 141-54, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 410, 545-58.

130. *See* Ptasynski v. United States, 550 F. Supp. 549, 556 (D. Wyo. 1982), *prob. juris. noted,* 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-1066), *argued,* 51 U.S.L.W. 3789 (U.S. May 3, 1983). The court declared the Windfall Profit Tax unconstitutional because the Alaskan exemption violated the Uniformity Clause and it could not be severed from the rest of the tax. *See id.* at 555. The court stayed the proceedings until a higher court could decide on the issue. *See id.* at 556. The Supreme Court is expected to review the case within the next year. Since the tax is targeted to generate some $227.3 billion in revenue while in effect, the validity of the tax encompasses not only constitutional issues, but financial considerations of national magnitude. Whether the Windfall Profit Tax is unconstitutional or not, the decision to uphold or invalidate a tax which provides a deficit-prone government several hundred billion dollars involves judicial and political concerns. The Supreme Court, moreover, has been reluctant in the past to strike down federal taxes. *See* Comment, *The Unconstitutional Exemption of North Slope Crude Under the Windfall Profit Tax: Exhuming the Direct Tax and Uniformity Provisions,* 35 TAX LAW. 717, 717 (1982).