Restricting the Legislative Power to Tax in the United States

INTRODUCTION

The Government’s authority to impose taxes is one of its most pervasive and fundamental powers. In the United States, this power is granted to Congress by the U.S. Constitution with few explicit restrictions. Moreover, the courts in the United States almost invariably affirm the Government’s power to tax in the face of constitutional challenges. This “presumption of constitutionality” afforded most tax legislation is a long-standing and well-accepted proposition. As a result, constitutional law has played a relatively minor role in the development of tax laws in the United States.

While many questions arise from the intersection between constitutional law and federal and state taxing power, most are not answered by the litigated cases. Our goal is not to raise possible constitutional claims, but instead to provide an overview of how courts in the United States have applied constitutional limitations to federal and state taxing power so that others may make relevant comparisons with tax systems in other countries. Space limitations require selective treatment of the subject rather than a comprehensive analysis.

---

1. See The Federalist No. 33 (Alexander Hamilton) (describing the power to tax as the most important of the legislative powers).
2. See infra notes 28-35 and accompanying text.
3. See Richard A. Westin, Basic Federal Income Taxation 48 (2002) (“The heart of the matter may be an unspoken judicial concern for not intruding on the workings of Congress in the governmentally crucial area of taxation, but the real world fact is that constitutional objections to federal taxes fare poorly in the courts, despite the apparent analytical strength of the objections.”).
Parts I and II outline the basic legal protections afforded by the U.S. Constitution and explain the process by which tax legislation in the United States is enacted and administered. Part III focuses on challenges to tax legislation based on fundamental rights such as freedom of religion and freedom of speech. Parts IV and V raise the question of whether vertical and horizontal equity, tax policy goals widely used by policymakers to measure fairness in a tax system, are constitutionally required in the United States. The remaining parts of the article examine constitutional questions arising from the tax treatment of families (Part VI), the relationships between separate taxing authorities (Part VII), the legislature's authority to enact retroactive tax legislation (Part VIII), and the validity of tax benefits aimed at specific taxpayers (Part IX).

PART I: FUNDAMENTAL PROTECTIONS OF INDIVIDUAL RIGHTS AND LIBERTIES

In the United States, the ultimate protection of fundamental rights and individual liberties stems from the U.S. Constitution.5 The Fifth and Fourteenth Amendments of the Constitution, respectively, provide that neither the United States nor any State shall divest any person "of life, liberty, or property, without due process of law . . . ."6 The Due Process Clause of the Fifth Amendment ensures that the federal government will not deny an individual any of the freedoms guaranteed by the Bill of Rights,7 including the rights of free exercise of religion, assembly, and speech.8 The Fourteenth Amendment's Due Process Clause has been interpreted to incorporate most of the fundamental protections of the Bill of Rights to prevent State governments from infringing on an individual's rights.9 Due process also entails particular safeguards to ensure fairness when divesting a person of their "life, liberty or property," including the requirements of notice,10 hearing,11 and an independent decision maker.12

5. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND Policies 456 (2d ed. 2002). The Constitution was ratified without the Bill of Rights. At the request of the States, amendments were drafted to enumerate and protect certain rights. Ten of these were ratified by the States and became the Bill of Rights. Id.
7. CHEMERINSKY, supra note 5, at 5 (citation omitted).
8. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").
9. CHEMERINSKY, supra note 5, at 478-84.
10. Id. at 557 (citing Mullhane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950)).
12. Id. (citing Gibson v. Berryhill, 411 U.S. 564 (1973)).
The Fourteenth Amendment further guarantees that no person will be denied "equal protection" under the law.\textsuperscript{13} This equal protection guarantee has been widely used by courts since the 1950s to protect fundamental rights from State and federal infringement.\textsuperscript{14} The Constitution also protects rights that are not explicit, such as the right to marry,\textsuperscript{15} the right to privacy,\textsuperscript{16} and the right to procreate.\textsuperscript{17}

Although, in general, the Constitution only regulates government action,\textsuperscript{18} the U.S. Congress has passed several laws under its Commerce Clause power that prevent private individuals and companies from abusing the rights and liberties of others.\textsuperscript{19} Moreover, the Privileges and Immunities Clause of Article IV guarantees that the fundamental rights enjoyed by a citizen of a State shall not be denied to a nonresident of that State.\textsuperscript{20} State actions are legitimate as a matter of federal constitutional law if not forbidden explicitly or implicitly by the Constitution.\textsuperscript{21}

The U.S. Supreme Court is the ultimate interpreter of constitutional rights in the United States. It has original jurisdiction over cases dealing with, \textit{inter alia}, ambassadors, public officials, and those in which a State is a party.\textsuperscript{22} The Supreme Court also has expansive appellate jurisdiction, subject to Congress’s discretion.\textsuperscript{23}

\textsuperscript{13} U.S. Const. amend. XIV, § 1 ("nor deny to any person within its jurisdiction the equal protection of the laws.").

\textsuperscript{14} The Supreme Court has also required equal protection guarantees of the federal government through the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954). \textit{See also} Chemerinsky, supra note 5, at 642-43.

\textsuperscript{15} Turner v. Safely, 482 U.S. 78 (1987) (holding that inmates cannot be barred from marrying).

\textsuperscript{16} Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that there exists a right to privacy).

\textsuperscript{17} Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that the right to procreate is fundamental).

\textsuperscript{18} The Thirteenth Amendment and the Commerce Clause are the only constitutional provisions that allow Congress to regulate private action. 1 Laurence H. Tribe, American Constitutional Law § 5-17, at 964 (3d ed. 2000). \textit{See also} U.S. Const. amend. XIII (prohibiting slavery); U.S. Const. art. I, § 8, cl. 3 (Congress shall "regulate commerce ... among the several States ... "); Chemerinsky, supra note 5, at 488-89. Also, the Constitution applies to private entities engaged in an activity that is normally only done by the government ("public functions exception") and private conduct that is sanctioned by the government but is unconstitutional. Id. at 495-96.

\textsuperscript{19} U.S. Const. art. I, § 8, cl. 3. For example, in 1964 Congress passed the Civil Rights Act, which, \textit{inter alia}, prevented discrimination in places of public accommodation on the basis of race, gender or religion. Chemerinsky, supra note 5, at 257.

\textsuperscript{20} U.S. Const. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); Tribe, supra note 18, § 6-36, at 1251-52 (citation omitted).

\textsuperscript{21} U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); \textit{see also} Tribe, supra note 18, § 5-2, at 796.

\textsuperscript{22} U.S. Const. art. III, § 2.

\textsuperscript{23} U.S. Const. art. III, § 2, cl. 2 ("The supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").
PART II: THE TAX LEGISLATIVE PROCESS AND THE ROLE OF THE COURTS

Federal tax legislation originates in Congress, which must legislate within the limits proscribed by the U.S. Constitution. Section 8 of Article I grants Congress the power "To lay and collect Taxes . . . ."28 This grant is qualified by Section 2, which requires that "direct Taxes" be "apportioned among the several States . . . ."29 and by Section 9, which provides that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census . . . ."30 Based on these qualifications, the Supreme Court invalidated an early federal income tax enacted in 1894.31 Subsequently, the Sixteenth Amendment removed the apportionment requirement for income taxes.32 Shortly thereafter, Congress adopted the Income Tax Act of 1913, the predecessor of the modern federal income tax.33 Although "the federal income tax swims in a sea of constitutional limits . . . .,"34 since 1913 "these constitutional restraints seldom create any serious problems in the day-to-day application of the federal income tax."35 Tax legislation must originate in the House of Representatives.36 The Ways and Means Committee has jurisdiction over tax legislation.

25. Id. at 469.
26. CHEMERINSKY, supra note 5, at 37.
27. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review by the U.S. Supreme Court over the constitutionality of laws passed by Congress).
31. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), aff'd on rehearing, 158 U.S. 601 (1895) (holding that the income tax violated the direct tax clause because it was not apportioned among the states according to population).
32. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States . . . .")
35. Id. at 9.
36. U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives . . . .").
in the House and the Finance Committee has jurisdiction in the Senate.\textsuperscript{37} If the House and the Senate, which vote separately, approve different legislative proposals, the two committees must hold a joint conference to produce one uniform bill.\textsuperscript{38} Known as a Conference bill, this bill must be approved separately by both the House and the Senate before the legislation is sent to the President.\textsuperscript{39} If the President approves the legislation, it becomes law.\textsuperscript{40} Most enacted tax legislation is codified as part of the Internal Revenue Code ("IRC"), which is Title 26 of the United States Code.\textsuperscript{41}

The U.S. Treasury Department and the Internal Revenue Service ("IRS"), an administrative agency within the Treasury Department,\textsuperscript{42} have authority to issue rules and pronouncements to aid in the interpretation of the IRC.\textsuperscript{43} Regulations promulgated by the Treasury Department are an important source when interpreting the IRC and are generally considered to carry the force and effect of law.\textsuperscript{44} The IRS is primarily responsible for administering the federal tax laws and collecting tax liability.\textsuperscript{45} The Agency also has the authority to issue published guidance, such as Revenue Rulings and Revenue Procedures, that helps taxpayers interpret the meaning of a particular statutory provision.\textsuperscript{46} As a general rule, courts give these


\textsuperscript{38} ROGER H. DAVIDSON & WALTER J. OLESEK, CONGRESS AND ITS MEMBERS 257-58 (8th ed. 2002).

\textsuperscript{39} Id. at 260.

\textsuperscript{40} U.S. CONST. art. I, § 7, cl. 2. If the President vetoes it, Congress can override the veto by a two-thirds majority in both houses. Id.

\textsuperscript{41} The current Code is entitled the Internal Revenue Code of 1986.

\textsuperscript{42} MICHAEL I. SALTMAN, IRS PRACTICE AND PROCEDURE § 1.01[1], at 1-4 (rev. 2d ed. 2004). The Treasury was one of the first departments that Congress created during its first session. Karla W. Simon, CONGRESS AND TAXES: A SEPARATION OF POWERS ANALYSIS, 45 U. MIAMI L. REV. 1005, 1026-27 (1991) (citation omitted).

\textsuperscript{43} I.R.C. § 7805.

\textsuperscript{44} In general, courts give deference to the regulations promulgated by the Treasury although they have on occasion invalidated regulations. LEANDRA LEDERMAN & STEPHEN MAZZA, TAX CONTROVERSIES: PRACTICE AND PROCEDURE 433 (2d ed. 2002) (citing a non-tax case, Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), as the leading Supreme Court case on deference to regulations). Unfortunately, the Supreme Court is unclear regarding the appropriate level of deference to accord tax regulations. See United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) (citing Nat'l Mach. Ass'n. v. United States, 440 U.S. 472 (1979), for the proposition that tax regulations should be given deference, but not citing Chevron). Id. at 441. See also Boeing Co. v. United States, 537 U.S. 437 (2003) (holding that an interpretive tax regulation must be treated with deference).

\textsuperscript{45} I.R.C. § 7801.

\textsuperscript{46} I.R.C. § 7805(a). A taxpayer may also request a private letter ruling from the IRS for guidance with respect to certain tax matters. This guidance is only binding with respect to the individual taxpayer to whom it is addressed. I.R.C. § 6110(b), (k)(3).

HeinOnline -- 54 Am. J. Comp. L. 645 2006
pronouncements from the IRS less weight than Treasury regulations.\textsuperscript{47}

If a taxpayer seeks to litigate a tax controversy, he or she may do so in one of three initial choices of venue.\textsuperscript{48} In the U.S. Tax Court, the taxpayer does not have to pay the tax liability in question before going to trial and there is no jury.\textsuperscript{49} Appeals from the Tax Court go to the Circuit Court of Appeals where the plaintiff resided or had a principal place of business when the Tax Court petition was filed.\textsuperscript{50} The other two trial-level forum choices are the federal district courts, with appeals taken to the appropriate circuit, and the U.S. Court of Federal Claims, with appeals taken to the Court of Appeals for the Federal Circuit.\textsuperscript{51} In these two latter venues, the taxpayer must first pay the tax liability and then seek a refund.\textsuperscript{52} Either party may request review by the U.S. Supreme Court of any appellate decision.\textsuperscript{53} However, the Supreme Court is not required to hear all cases that are appealed\textsuperscript{54} and generally decides few tax cases.\textsuperscript{55}

\textbf{PART III: RAISING CONSTITUTIONAL CHALLENGES TO U.S. TAX LAWS}

United States taxpayers wishing to raise constitutional challenges to tax laws need not enlist the support of an administrator or administrative agency in order to advance their challenges in court.\textsuperscript{56} Some of the most persistent constitutional challenges arise from the tax protestor movement, which, among other goals, seeks to invalidate the entire IRC. Courts frequently reject as frivolous claims by tax protestors that the federal income tax is invalid because, for in-

\begin{footnotesize}
\begin{enumerate}
\item Saltzman, \textit{supra} note 42, \textit{supra} note 1, at 1-38.
\item Id. \textit{supra} note 1, at 1-38.
\item I.R.C. § 7402; Saltzman, \textit{supra} note 42, \textit{supra} note 1, at 1-38. There is also no jury in the U.S. Court of Federal Claims. \textit{See supra} note 49.
\item Saltzman, \textit{supra} note 42, \textit{supra} note 1, at 1-38.
\item Robert L. Stern et al., \textit{Supreme Court Practice} § 1.19, at 54 (8th ed. 2002).
\item A taxpayer may, however, be required to exhaust available administrative remedies through the relevant government agency before a court can take jurisdiction of the taxpayer's case. \textit{See, e.g.}, I.R.C. § 7422(a) (requiring a taxpayer to file a claim for refund before instituting a refund suit). A taxpayer challenging their own tax liability on constitutional grounds usually does not face difficult standing issues. Standing issues are more problematic in cases in which a plaintiff seeks to use their status as a taxpayer to challenge the tax liability of other parties or to challenge government actions and expenditures outside the tax system. \textit{See} Apache Bend Apartments, Ltd. v. United States, 987 F.2d 1174 (5th Cir. 1993).
\end{enumerate}
\end{footnotesize}
stance, it conflicts with the Thirteenth Amendment's prohibition against involuntary servitude or the Eighth Amendment's prohibition against cruel and unusual punishment. 57 Increasingly, courts are imposing monetary penalties on those making such claims. 58

Constitutional challenges to specific provisions of the tax law are less frequent, but certainly not uncommon. As explained in Part V, courts tend to validate tax law provisions even when they create disparities among similarly situated taxpayers. 59 This is due, in part, to the judiciary's treatment of tax issues as affecting property rights, which receive less constitutional protection than fundamental personal rights and liberties, 60 and to the judiciary's willingness to defer to the legislature on tax issues. 61 Even when taxpayers base their constitutional challenges on those affirmative rights typically examined with a greater degree of scrutiny — religious freedom and free speech — case law reveals that courts still generally defer to the will of the legislature. The discussion below examines the courts' approaches to tax law challenges based on the First Amendment's free exercise, establishment, and free speech clauses, 62 as well as challenges arising from allegations of race and gender discrimination.

Taxpayers have challenged tax laws and sought refunds based on the First Amendment's prohibition against laws respecting the establishment of religion and restricting the free exercise thereof. As a general rule, income and sales taxes of general applicability have been held not to infringe on a person's right to free exercise of religion. 63 As one federal court stated: "Nothing in the Constitution prohibits the Congress from levying a tax upon all persons, regardless of religion, for support of the general government." 64 However, the Su-

57. See, e.g., Porth v. Broderick, 214 F.2d 925 (10th Cir. 1954) (holding that the Sixteenth Amendment does not violate the prohibition against involuntary servitude under the Thirteenth Amendment); N.A. Woodworth Co. v. Kavanagh, 102 F. Supp. 9 (E.D. Mich. 1952), aff'd, 202 F.2d 154 (6th Cir. 1953) (holding that tax is not an excessive fine or cruel and unusual punishment under the Eighth Amendment).


59. See infra text accompanying notes 134-38.

60. See, e.g., United States v. Carlton, 512 U.S. 26, 30 (1994) ("The due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive economic legislation . . . .")


62. U.S. Const. amend. I. The First Amendment is made applicable to the States by virtue of the Fourteenth Amendment; see also supra note 9.

63. See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990) (holding that sales tax on religious materials did not violate the Free Exercise Clause of the First Amendment where the tax was not different from other generally applicable laws to which the organization must adhere).

64. Autenrieth v. Cullen, 418 F.2d 586 (9th Cir. 1969) (rejecting tax refund claim based on the theory that a taxpayer could not be compelled to finance a war and thus was entitled to a refund for a portion of their taxes spent on military activities); see
The Supreme Court has ruled that a flat city licensing tax imposed on all persons soliciting merchandise violated the Free Exercise Clause when applied to individuals who distributed and sold religious materials house-to-house. The Court viewed the licensing fee as a tax on religious expression and stated its concern that the tax could be used by the local government to suppress religious ideas.

A separate group of First Amendment cases examines the constitutionality of income tax deductions, exemptions, and other provisions that, directly or indirectly, benefit religious institutions. The Supreme Court has upheld the deduction for contributions to charitable organizations, including religiously-affiliated organizations, against a First Amendment challenge that the deduction violated the Establishment Clause. Although the tax deduction could be viewed as the equivalent of an indirect government subsidy, the Supreme Court has indicated that the deduction for charitable contributions made to religious organizations does not violate the Establishment Clause because it is not limited to contributions to churches and religious entities. Further, because the administration of the deduction generally does not require the government to inquire into a taxpayer's religious beliefs, the prohibition against excessive entanglement between church and State is not violated.

State property tax exemptions for facilities used for religious purposes have passed constitutional muster, at least in those cases in which the tax exemptions were also available to related, but secular, organizations such as hospitals and libraries. Tax benefits confined exclusively to religious organizations and activities, however, have

---

66. Murdock, 319 U.S. at 113-14. The holdings in both Murdock and Follett have subsequently been limited to cases in which the licensing tax acted as a prior restraint on religious activity. See Jimmy Swaggart Ministries, 493 U.S. at 389.
68. In cases involving tax benefits to religious organizations, the Court has rejected the notion that tax benefits create indirect government subsidies. See Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 675 (1970) ("[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."). See generally Donna A. Adler, The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making, 28 Wake Forest L. Rev. 885 (1993) (comparing cases involving direct government grants to religious organizations and indirect grants to such organizations through the tax code).
70. Walz, 397 U.S. at 672-73. See Edward A. Zelinsky, Are Tax "Benefits" for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?, 42 B.C. L. Rev. 805 (2001) (admitting that, under the current state of the law, the constitutionality of tax benefits for religious institutions depends on benefits to secular entities, but challenging that conclusion).
fared more poorly. For example, the Supreme Court has ruled that a sales tax exemption granted only to publications promulgating the teaching of religious faith violated the Establishment Clause because, according to the Court, the exemption had the effect of advancing religious belief and appeared, on its face, to entangle church and State.\(^7\)

The Court’s differential treatment of uniformly applied tax benefits that extend to religious organizations and tax benefits targeted exclusively for sectarian purposes is also evident in cases involving deductions for educational expenses. For example, a State law allowing taxpayers to deduct tuition and related expenses of dependents attending either sectarian or nonsectarian schools was held not to violate the First Amendment,\(^2\) while a tax deduction for educational expenses incurred at nonpublic schools was declared unconstitutional.\(^3\) In the latter case, the legislature granted the deduction for expenses related to “nonpublic” education, rather than more narrowly tailoring the benefits towards religious or sectarian schools. Nevertheless, because, in actual operation, the tax benefit flowed primarily to parents who sent children to sectarian schools, the Court held that the deduction was not sufficiently restricted so as to assure that it would not have the effect of impermissibly advancing the activities of religious organizations.\(^4\)

In the area of free speech, the Court has held that tax legislation that infringes on rights such as freedom of the press and free expression guaranteed by the First Amendment will be upheld as long as the tax serves a compelling government interest.\(^5\) The fact that the tax imposes an incidental burden on free speech rights does not make it unconstitutional. Thus, imposing a form of taxation upon newspaper and other press outlets that is also applicable to other businesses does not, according to the Supreme Court, amount to an unconstitutional infringement of First Amendment rights.\(^6\) When a State use tax singled out newspapers and did not apply to other business entities, however, the Supreme Court held the tax unconstitutional.\(^7\) The Court found that the State’s general interest in raising sufficient revenue was not a compelling one and also expressed concern that a

---

\(^7\) Tex. Monthly Inc. v. Bullock, 489 U.S. 1, 14-15 (1989). A plurality of the Court in Texas Monthly went on to hold that a State does not violate the Free Exercise Clause by taxing the sale of religious publications. Id. at 24-25.


\(^7\) Id. at 794.


\(^7\) See Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue, 460 U.S. 575 (1983).

\(^7\) Id. at 592-93.
tax only on the press could suppress freedom of expression, a goal the Court declared to be “presumptively unconstitutional.”

Tax laws that vary based on the content of the published material are more likely to be declared unconstitutional under the First Amendment. Concerns that tax laws may discriminate on the basis of content have led the Supreme Court to hold that a State sales tax on general interest magazines, with an exemption for religious, professional, or trade magazines, violated the First Amendment. Although the Court found no motive on the part of the legislature to censure any particular viewpoint, the Court characterized the State tax scheme as “particularly repugnant” to First Amendment principles because the amount of tax depended entirely on the magazine’s content. When a tax will be considered content-based and when it will not is unclear. In a related case, the Supreme Court rejected a First Amendment challenge to a State sales tax that applied to cable television services but not to print media. Although the tax discriminated among media outlets, the Court held that such discrimination does not implicate the First Amendment unless it is predicated on the basis of ideas. Because the statute itself did not refer to the content of media communications, and the outlets subject to the tax presented a wide array of viewpoints, the Court found that the sales tax system was not content-based.

While academics frequently maintain that different features of the tax code result in racial or sexual discrimination against targeted groups, constitutional challenges to tax provisions based on race or on sex discrimination are relatively rare. The few challenges alleging that a tax provision unfairly discriminates on the basis of sexual orientation have arisen mostly in the context of the disparate tax treatment of married couples and couples in same-sex unions. As explained in Part VI, courts have rejected most of these challenges on the ground that a systematic bias against a particular group did not exist.

---

78. Id. at 585.
79. See Leathers v. Medlock, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints."); see also Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (ruling that a state licensing tax violated the right to freedom of the press where legislation was enacted, in part, to penalize political dissent). See Ark. Writers’ Project, 481 U.S. at 234.
80. Id. at 228.
81. Id. at 449.
82. Leathers, 499 U.S. at 453.
83. Id. at 449.
85. See, e.g., Druker v. Comm’r, 697 F.2d 46 (2d Cir. 1982), cert. denied, 461 U.S. 957 (1983) (holding that application of different tax rates to single and married taxpayers did not violate the Constitution).
86. See infra text accompanying notes 168-74.
One of the most prominent cases involving the intersection of race and tax law is *Bob Jones University v. United States*.\(^8^7\) In this case, the Supreme Court upheld a decision by the IRS to revoke the tax exemption granted under IRC section 501(c)(3) to a private university that prohibited interracial dating among its students. The Court's holding rested on statutory grounds; specifically, that racially discriminatory policies in education violated "established public policy" and prevented the school from being a "charitable" organization.\(^8^8\) In reaching its holding, the Court rejected the taxpayers' arguments that denial of their school's tax-exempt status violated their First Amendment rights to free exercise of religion.\(^8^9\) According to the Court, the denial of tax benefits may adversely affect the school, but would not prevent the taxpayers from observing their religious beliefs. Moreover, the government's interest in eradicating racial discrimination in education overrides those concerns.\(^9^0\)

**PART IV: ADVANCING THE GOALS OF VERTICAL EQUITY**

Policymakers and politicians agree that fairness in a tax system is more than just a theoretical ideal; it is an important structural goal.\(^9^1\) Fairness, in the tax context, is usually expressed with reference to two standards: horizontal equity and vertical equity.\(^9^2\) Vertical equity, as a broad concept, connotes a tax system that appropriately distinguishes among taxpayers in different economic circumstances.\(^9^3\) The concept of vertical equity is typically discussed in the context of the progressivity debate: Should taxpayers with more income should pay a greater percentage of that income as tax when compared with those who have less income?

Progressivity in the U.S. tax system is achieved in a number of ways, including through the graduated rate structure.\(^9^4\) Federal in-

\(^{87}\) 461 U.S. 574 (1983).

\(^{88}\) Id. at 595-96, 598-99.

\(^{89}\) Id. at 603-04.

\(^{90}\) Id. at 604. For an extensive analysis of the case, see David A. Brennan, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitations for Charities*, 5 *Fla. Tax Rev.* 779 (2002).


\(^{92}\) *Office of the Sec'y, Dep't of the Treasury, Tax Reform for Fairness, Simplicity, and Economic Growth: The Treasury Dep't Report to the President, Overview*, Doc. No. 239, Vol. 1 (1984). Horizontal equity is discussed in Part V.


\(^{94}\) Vada Waters Lindsey, *The Widening Gap Under the Internal Revenue Code: The Need for Progressivity*, 5 *Fla. Tax Rev.* 1, 12 (2001). Some other principal ways of achieving progressivity include the earned income credit and the phase-out of personal deductions for high-income taxpayers. *Id.*
dividual income tax rates have been progressive since 1913. Currently, income tax rates for individuals range from 10% to a maximum of 35%. Tax scholars who oppose a progressive tax system state that it complicates the tax code, encourages tax avoidance schemes, and discourages productivity. Other scholars argue that the progressive income tax is beneficial to society and can be viewed as more equitable because a dollar has less “value” for a high-income taxpayer than a low-income taxpayer. Income inequality in the United States and the difficulty in improving economic standing for those in the lower echelons of society further argue for a system of progressive taxation. The debate today between those for and against progressive taxation dates back to the 1913 income tax act, thus it is not surprising that challenges to the progressive tax system have taken place.

Soon after the adoption of the Sixteenth Amendment, the U.S. Supreme Court held that a progressive income tax was constitutional in the face of a Fifth Amendment Due Process Clause challenge. In Brushaber, the Court rejected the taxpayer's argument by holding that the Due Process Clause does not limit Congress's constitutional taxing power. Despite the Supreme Court's opinion in Brushaber,


96. I.R.C. § 1(i). Congress has the authority to change the tax rates from year to year. Simon, supra note 42, at 1014.


98. Blum & Kalven, supra note 97, at 28-29.


101. See, e.g., Martinez, supra note 91.

102. See U.S. Const. amend. XVI.

103. Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916). See also Knowlton v. Moore, 178 U.S. 41, 109 (1900) (holding a federal inheritance tax constitutional even though the tax rates increased progressively as the size of the legacy increased).

104. Brushaber, 240 U.S. at 24. "[T]he Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause." Id. See also U.S. Const. amend. V; Tyee Realty Co. v. Anderson, 240 U.S. 115, 117-18 (1916) (dismissing arguments that progressive taxes are unconstitutional and rejecting arguments concerning the retroactivity and the allegedly overbroad reach of the income tax law). The Supreme Court also upheld the Social Security Act, although without addressing the regressive nature of its rate structure. Henry Ordower, Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted 26
taxpayers have continued to challenge the progressive rate structure of the income tax.\textsuperscript{105} The Sixth Circuit, on a challenge to the progressive income tax rates in the IRC of 1939, declared, "[t]he constitutionality of progressive tax rates is long settled."\textsuperscript{106} Other courts and circuits have echoed this holding in cases challenging progressive tax rates.\textsuperscript{107} Most recently, the Ninth Circuit held progressive taxes to have a "legitimate legislative purpose."\textsuperscript{108} As the case law demonstrates, a progressive income tax system is constitutionally acceptable.\textsuperscript{109}

Progressive tax rates applied to a tax base other than income, however, have been declared unconstitutional. For example, corporations have successfully invoked the Fourteenth Amendment's Equal Protection Clause\textsuperscript{110} to strike down graduated State tax systems that based rates on gross revenues.\textsuperscript{111} The Supreme Court struck down Kentucky's graduated tax imposed on gross retail sales by noting that gross sales are not the same as net income and the ability to pay higher taxes cannot be determined from gross sales alone.\textsuperscript{112} Thus, the Court found that the statute violated equal protection guarantees because its classifications were "unjustifiably unequal, whimsical and arbitrary . . . ."\textsuperscript{113} A license tax, employing graduated rates that increased with each additional store a chain opened in another county, was also struck down by the Court as violating the Equal Protection Clause.\textsuperscript{114} Despite these rulings, the Supreme Court has up-


\footnotesize{105. For arguments for and against the constitutionality of progressive taxation, compare Martinez, supra note 4, with Calvin R. Massey, Takings and Progressive Rate Taxation, 20 HARV. J.L. & PUB. POL'Y 85 (1996).}

\footnotesize{106. Acker v. Comm'r, 258 F.2d 568, 575 (6th Cir. 1958); see also United States v. Keig, 334 F.2d 823, 826 (7th Cir. 1964) (citing Acker's declaration of the constitutionality of progressive rates where the taxpayer, failing to file income tax returns for five years, challenged the use of progressive taxes).}

\footnotesize{107. See, e.g., Swallow v. United States, 325 F.2d 97 (10th Cir. 1963), cert. denied, 377 U.S. 951 (1964). "It is now well settled that the income tax laws are not unconstitutional under the due process clause of the Fifth Amendment, nor are they constitutionally defective because of discriminatory progressive tax rates." Id. at 98 (citations omitted).}

\footnotesize{108. Quarty v. United States, 170 F.3d 961, 967 (9th Cir. 1999).}

\footnotesize{109. A possible challenge that could succeed would be a tax that was "so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion," that it was not a tax but a confiscation of property and therefore in violation of the Fifth Amendment. Brushaber, 240 U.S. at 24-25.}

\footnotesize{110. U.S. CONST. amend. XIV; see supra note 13.}


\footnotesize{112. Stewart Dry Goods, 294 U.S. at 558.}

\footnotesize{113. Id. at 557.}

\footnotesize{114. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 536 (1933).}
held some States’ graduated flat license taxes on corporations where they were able to demonstrate a rational basis for the tax.115

Another feature of the U.S. tax system that is consistent with the goal of vertical equity is the personal exemption. The IRC allows each individual to claim, in the form of a deduction, a personal exemption of a specified amount for himself, a spouse, and each child.116 This exemption effectively allows a corresponding amount of income to be taxed at a zero rate.117 Although it is categorized as a deduction, in actuality, the personal exemption is part of the overall graduated tax structure.118 In the United States, both political parties support these exemptions because personal exemptions acknowledge that the amount needed for subsistence of an individual who provides for a spouse and dependents is greater than the amount needed for a single individual.119 The personal exemptions are phased-out when a taxpayer meets a threshold income amount. Thus, high-income taxpayers do not receive the benefit of this “zero bracket amount.”120

Prior to 1984, one of the recurring problems with the personal exemption was the failure to index the amount to the rate of inflation

115. See, e.g., Fox v. Standard Oil Co., 294 U.S. 87, 101 (1935), reh’g denied, 294 U.S. 732 (1935) (holding as constitutional a tax that increased with the number of stores. “The classification is not arbitrary, but in its normal operation has a rational relation to the subject matter to be taxed, the capacity to pay, and the justice of the payment.”); State Bd. of Tax Comm’rs v. Jackson, 283 U.S. 527, 541-42 (1931) (holding that a graduated licensing fee, the effect of which was to tax chains at a higher rate than individually owned stores, was constitutional because there are advantages to operating chain stores as opposed to individual stores and thus the classification is rational).


118. Id.


In addition to the personal exemption, a taxpayer may reduce adjusted gross income by a standard deduction of a specified amount, I.R.C. § 63(a), (b), or the total of the taxpayer’s itemized deductions. See e.g., I.R.C. §§ 164(a), 163(h)(2)(D), 213. Certain itemized deductions are reduced when a threshold income amount is met such that high-income taxpayers do not receive the full benefit of many of their itemized deductions. I.R.C. § 68. See also Charles E. McLure, Jr., The Simplicity of the Flat Tax: Is it Unique?, 14 Am. J. Tax Pol’y 283, 286-87 (1997) (noting that taxes would be simpler under a flat tax system, which has no itemized deductions).
or the average increase in personal incomes.\textsuperscript{121} In \textit{Crowe v. Commissioner},\textsuperscript{122} a taxpayer challenged the amount of the personal exemption by arguing that it was insufficient for his cost of living and was otherwise inequitable.\textsuperscript{123} The Eighth Circuit, affirming the Tax Court decision, held that it was without authority to grant relief to the petitioner because the personal exemption was enacted as a "matter of legislative grace." Therefore, courts are powerless to increase the amount of the exemption.\textsuperscript{124} Similarly, a taxpayer who attempted to deduct his living expenses was barred by the IRS from doing so.\textsuperscript{125} The Tax Court held that it was within the sole discretion of Congress to determine what were valid deductions and what were not.\textsuperscript{126}

\textbf{Part V: Horizontal Equity as a Constitutional Principle}

Another standard used by policymakers to measure fairness under the tax laws is the notion of horizontal equity. Horizontal equity calls for legislators to impose equal tax burdens on similarly situated taxpayers. While most commentators agree that horizontal equity is a worthy goal of a tax system,\textsuperscript{127} the IRC is replete with cases in which administrative and other factors trump the concern for equality of treatment.\textsuperscript{128} The exclusion for employee fringe benefits, for instance, creates horizontal inequity, yet the exclusion exists, in large part, because of Congress's desire to avoid the administrative burden of seeking to tax small amounts.\textsuperscript{129}

\textsuperscript{121} Eugene Steuerle, \textit{The Taxation of Poor and Lower-Income Workers}, 34 Tax Notes 695, 696-97 (1987). From 1948 through 1969, the personal exemption did not increase from the $600 set in 1948. \textit{Id.} at 696 tbl. 1.

\textsuperscript{122} Crowe v. Comm'r, 396 F.2d 766 (8th Cir. 1968).

\textsuperscript{123} \textit{Id.} at 767. \textit{See also} Summers v. Comm'r, 30 T.C.M. (CCH) 58 (1971) (holding that the court cannot grant relief where a taxpayer felt the personal exemption was inadequate to meet basic needs).

\textsuperscript{124} \textit{Crowe}, 396 F.2d at 767 (quoting Helvering v. Indep. Life Ins. Co., 292 U.S. 371, 381 (1934): "Unquestionably Congress has power to condition, limit or deny deductions from gross income in order to arrive at the net that it chooses to tax."). \textit{See also} Labay v. Comm'r, 55 T.C. 6, 14 (1970), \textit{aff'd}, 450 F.2d 280 (5th Cir. 1971) (holding that due process is not violated when deductions are denied).

\textsuperscript{125} Reading v. Comm'r, 70 T.C. 730, 734 (1978), \textit{aff'd}, 614 F.2d 159 (8th Cir. 1980).

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{See}, e.g., Richard A. Musgrave, \textit{Horizontal Equity, Once More}, 43 Nat'l Tax J. 113 (1990); \textit{Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986} 7 (1986). Not all commentators agree that horizontal equity is a workable or even worthwhile tax policy goal. \textit{See} Staudt, \textit{supra} note 93, at 925-32 (arguing that horizontal equity is an unhelpful concept because of the impossibility of determining empirical standards for fairness and because the notion of equal treatment of equals is inconsistent with efficiency concerns).


Some commentators maintain that horizontal equity is grounded in constitutional norms.\textsuperscript{130} The Uniformity Clause in Article I Section 8 of the U.S. Constitution, which mandates that taxes and levies "shall be uniform throughout the United States," would appear, on its face, to express some concern for equality of treatment.\textsuperscript{131} However, in defining uniformity under Article I, the Supreme Court has interpreted the limitation to allow Congress wide discretion to draw distinctions between what receipts should or should not be taxed and at what rates. In fact, the Court's position seems to be that the Uniformity Clause concerns only geographic uniformity, in the sense that any given tax system adopted by Congress must operate the same throughout the United States.\textsuperscript{132} Thus, allegations that the federal income tax violated the Uniformity Clause because the incidence of the tax varied among taxpayers based on the differential application of State property law have been rejected.\textsuperscript{133}

The principle of horizontal equity would also seem to be an inherent part of the U.S. Constitution's equal protection guarantee. Early on, however, the Supreme Court downplayed the role of due process and equal protection challenges as a mean of limiting the legislature's power to enact tax laws.\textsuperscript{134} The Court's reluctance to second guess a legislature's decision has led it to establish a high threshold in order to find a tax provision unconstitutional on equal protection grounds. According to the Court:

\begin{quote}
[In taxation, even more than in other fields, legislatures possess the greatest freedom in classification. . . . The presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.\textsuperscript{135}
\end{quote}

\textsuperscript{130} See Musgrave, supra note 127, at 113 ("Not only does [horizontal equity] offer protection against discrimination but it also reflects the basic principle of equal worth."). But see Martinez, supra note 91, at 428-33 (arguing that, as a matter of constitutional law, notions of fairness do not play a role in judicial review of Congress's taxing power).

\textsuperscript{131} See Bittker, supra note 34, at 10 ("A broad reading of the uniformity clause . . . would not only have rendered exemptions and differential tax rates unconstitutional, but it might well have invalidated . . . a host of other provisions that make up the warp and woof of the Internal Revenue Code.").


\textsuperscript{133} Poe v. Seaborn, 282 U.S. 101 (1930).

\textsuperscript{134} See Brushaber v. Union Pac. R.R., 240 U.S. 1, 24 (1916).

Based on this standard, the Court has ruled that Congress may permissibly grant a tax subsidy to one group of taxpayers without granting it to all, so long as the distinction among groups is not based on a suspect classification.136 Similarly, the Court has rejected an equal protection challenge to a State property tax law that allowed long-term property owners to pay less tax than newer owners of comparable properties.137 As evidence of the Court’s extreme unwillingness to question State action on equal protection grounds, the Majority concluded its opinion in the property tax case with the following statement: The “Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”138

This is not to say that an equal protection challenge to income tax legislation could never prevail under the “hostile or oppressive” standard set forth above. One example stands out. In Moritz v. Commissioner,139 the taxpayer, an unmarried man, challenged on equal protection grounds an income tax deduction for dependent care expenses available to women regardless of their marital status, but not available to men who had never married. Acknowledging the broad powers of the legislature to make classifications under the tax law, the Tenth Circuit nonetheless found that the deduction discriminated on the basis of sex.140 In doing so, the court rejected the Government’s claim that the limitation was justified on the grounds that Congress intended the deduction to benefit women, who have traditionally had lower-paying jobs.141 Outside of clear cases of discrimination such as Moritz, however, horizontal equity, as one noted commentator has concluded, has “failed to find a constitutional voice.”

PART VI: TAX TREATMENT OF MARRIAGE AND THE FAMILY

The IRC provides filing statuses for income taxes, such as married filing jointly, surviving spouse, and head of household, that bene-

136. Id. (upholding the validity of prohibition against tax exempt organizations using funds to engage in political lobbying even though Congress allowed veterans’ groups to use contributions for lobbying and retain their tax exempt status).
138. Id. at 17 (citing Vance v. Bradley, 440 U.S. 93, 97 (1979)).
139. 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973).
140. Id. at 469-70. Compare id., with Kahn v. Shevin, 416 U.S. 351 (1974) (rejecting an equal protection challenge to state income tax provision permitting a tax exemption for widows but not widowers). In Kahn, the Court accepted the legislature’s disparate classification based on sex as a means to balance the economic capabilities of men versus women.
141. Moritz, 469 F.2d at 470.
142. Martinez, supra note 91, at 446.
fit certain family structures.\textsuperscript{143} The tax rates on any given dollar of income depend upon which category applies to the taxpayer.\textsuperscript{144} The married filing jointly status provides an opportunity for “income splitting” between spouses because the rate schedule for married filing jointly has wider tax brackets than those for single taxpayers.\textsuperscript{145} Surviving spouses may avail themselves of the same rate schedule as married filing jointly.\textsuperscript{146} Recognizing the additional financial burden of raising children, the head of household status provides a different rate schedule to reduce overall tax liability for those who are eligible.\textsuperscript{147}

Married couples may elect to file jointly or separately.\textsuperscript{148} Federal income tax rate schedules provide either a benefit or a penalty for married taxpayers filing jointly depending primarily on whether they are a one-earner or a two-earner couple.\textsuperscript{149} Tax brackets for

\begin{footnotes}
\textsuperscript{143} I.R.C. § 1(a), (b). Surviving spouses and married individuals filing jointly use the same rate table, while heads of households use a separate table with tax brackets that are narrower than the married filing jointly table but wider than the single taxpayer or the married filing separately table. I.R.C. § 1(a) – (d)(i).
\textsuperscript{144} For example, assuming an adjusted gross income of $51,200 in 2005, a single father with one child would file as head of household, have a standard deduction of $7,300, and pay $5,103 in taxes. A single taxpayer with the same adjusted gross income would have a standard deduction of $5,000 and pay $7,415 in taxes. A couple married filing jointly, with the same adjusted gross income, would have a standard deduction of $10,000 and would pay $4,490 in taxes. Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 971-72 tbls. 1-3, 973.
\textsuperscript{145} Compare I.R.C. § 1(a) (married filing jointly), with I.R.C. § 1(c) (unmarried individuals).
\textsuperscript{146} I.R.C. § 1(a). See also I.R.C. § 2(a) (defining a surviving spouse as a taxpayer “whose spouse died during either of his two taxable years immediately preceding the taxable year” and “who maintains as his home a household which constitutes for the taxable year the principal place of abode ... of a dependent ...”). After the two-year period, the surviving spouse can qualify for head of household status. I.R.C. § 2(b) (defining head of household as an unmarried individual who is not a surviving spouse and either “maintains as his home a household which constitutes for more than one-half of such taxable year the principal place of abode ... of a qualifying child ...” or “any other person who is a dependent of the taxpayer ...” or “maintains a household which constitutes for such taxable year the principal place of abode of the father or mother of the taxpayer ...”).
\textsuperscript{147} I.R.C. § 1(b). The standard deduction for a head of household is also larger than the standard deduction for a single taxpayer. I.R.C. § 63(c)(2). This amount is indexed annually for inflation. I.R.C. § 63(c)(4).
\textsuperscript{149} Lawrence Zelenak, Doing Something About Marriage Penalties: A Guide for the Perplexed, 54 Tax L. Rev. 1, 6 (2000); Dorothy Brown, The Marriage Penalty/ Bonus Debate: Legislative Issues in Black and White, 16 N.Y.L. Sch. J. Hum. Rts. 287, 288-89 (1999). Congress has alleviated the “marriage penalty” for lower-income taxpayers by increasing the standard deduction available to married couples to double that of single taxpayers and widening the 10% and 15% tax brackets so they are twice as wide for married couples as for single taxpayers. I.R.C. §§ 63(c)(2)(A) – (C), 1(f)(8). These provisions expire after December 31, 2010. Working Families Tax Relief Act of
\end{footnotes}
married couples filing separately are half as wide as those for married couples filing jointly. Married filing separately tax rates can be higher for a given dollar of income than the rates applicable to single individuals, thus married filing separately is the least desirable filing status.

Marriage for all federal statutes (including the IRC) is limited to legal unions between a man and a woman as husband and wife. The IRC does provide income tax benefits for some alternate family situations, however. For example, a married individual who does not live with his or her spouse for the last six months of the tax year and who provides more than half of the support for a qualifying individual may elect head of household filing status, a status otherwise limited to a single taxpayer with dependents. The Tax Court has reviewed and rejected the few constitutional challenges to the head of household filing status that have been raised.

General inequities arising from the income tax rate schedules applied to married individuals in both the federal and State income tax codes have also been challenged as violations of the Constitution. These inequities are commonly referred to as the "marriage penalty." In Hooper v. Tax Commission of Wisconsin, a married couple alleged both due process and equal protection violations because of a Wisconsin statute mandating that married couples aggregate their incomes. The U.S. Supreme Court held that taxing an individual by referencing another individual's earnings violated the Fourteenth Amendment of the Constitution. The federal marriage penalty was not an issue in Hooper because Congress did not enact the married filing jointly status until 1948. Thus, although the

150. Compare I.R.C. § 1(d), with I.R.C. § 1(a).
151. See, e.g., I.R.C. § 1(c), (d). For 2005, the 25% tax rate is applied to income in excess of $22,700 but not over $71,950 for single taxpayers whereas the 25% tax rate is applied to income not over $59,975 for married filing separately taxpayers. Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 972 tbls. 3-4.
152. 1 U.S.C. § 7 (2005) ("In determining the meaning of any Act of Congress . . ." the word "marriage means only a legal union between one man and one woman as husband and wife . . . ").
153. I.R.C. §§ 2(c), 7703(b). For the definition of head of household, see supra note 146 and accompanying text.
154. See, e.g., Bayless v. Comm'rr, 61 T.C. 394 (1973) (holding that barring married people from claiming head of household status does not violate the Constitution).
155. Zelenak, supra note 149, at 6; Brown, supra note 149, at 288-89 (explaining that a two-earner couple with similar incomes pay more than if they were filing individually but a couple with one income earner saves money filing jointly).
156. 248 U.S. 206 (1931).
157. Id. at 213-14.
158. Id. at 215.
159. Zelenak, supra note 149, at 4.
Court struck down the Wisconsin statute in *Hooper*, it has yet to rule on the constitutionality of the federal marriage penalty.\(^{160}\)

Lower courts, however, have grappled with the issue of whether the marriage penalty is constitutionally suspect. The marriage penalty is largest when both spouses earn relatively equal amounts of income.\(^{161}\) In this situation, the tax paid by the married couple exceeds the tax they would have paid if they were unmarried and each filed as a single taxpayer.\(^{162}\) The IRC rate schedules were challenged in *Johnson v. United States* as unconstitutional because they infringed on a couple's fundamental right to marriage.\(^{163}\) The Northern District Court of Indiana held that the federal statute setting forth the tax rates did not impermissibly infringe on their right to marry because the couple could elect to file jointly or separately.\(^{164}\) The Second Circuit, when presented with a challenge to the federal rate schedule for the married filing separately status, held that applying different rate schedules to single and married taxpayers did not violate the Constitution.\(^{165}\) The Eighth Circuit also rejected a claim arising from a single taxpayer who challenged the constitutionality of a federal statute that prohibited her from filing jointly because she was not married.\(^{166}\) More recently, a New Jersey court rejected a constitutional challenge to a State law that required married couples filing their federal income tax return jointly to also file their New Jersey income tax return jointly.\(^{167}\)

As noted above, marriage for federal tax purposes is limited to a union between one woman and one man. In *Mueller v. Commissioner*, a same-sex couple argued that the IRC infringed on their constitutional right to marry because it precluded them from using the

\(^{160}\) "The joint-return system makes one spouse liable for tax on the other spouse's income, but any constitutional objection is vitiated by the fact that a spouse can always avoid that result by electing to file a separate return." Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 388 n.232 (1994).


\(^{162}\) Id. See also supra note 151 (showing why married filing separately is not a fiscally viable alternative to avoiding the marriage penalty).


\(^{164}\) *Johnson*, 422 F. Supp. at 973.


\(^{166}\) *Jansen v. United States*, 441 F. Supp. 20, 21 (D. Minn. 1977), *aff'd per curiam*, 567 F.2d 828 (8th Cir. 1977) (holding that providing married couples with beneficial tax treatment does not violate the Constitution).

married filing jointly status. The Seventh Circuit held that the eligibility for joint filing status resulted from a couple’s decision to marry. Because this couple was not married in their own State, the filing status did not preclude them from marrying and, therefore, did not impinge on a right protected by the Constitution.

Although the U.S. Supreme Court uses a heightened scrutiny standard to determine the constitutionality of laws restricting or banning marriage, the Court has never ruled that the right to marry extends to same-sex couples. While some States extend civil unions to same-sex couples, the federal government does not. The Defense of Marriage Act (DOMA) makes it impossible for a couple, even in a State recognizing same-sex marriage, to be considered married for federal income tax purposes. Any challenge to the constitutionality of DOMA barring a same-sex married couple from filing jointly would have to come from a State where same-sex marriage is legal. In the few cases challenging the constitutionality of DOMA, courts have upheld the Act.

PART VII: SEPARATE TAXING AUTHORITIES

As noted in Part II, the federal government’s power to tax derives from the U.S. Constitution. Each of the fifty States also retains the power to tax and may delegate that authority to political subdivisions.

---

169. Id.
170. CHEMERINSKY, supra note 5, at 771.
175. Patricia A. Cain, Federal Tax Consequences of Civil Unions, 30 CAP. U.L. Rev. 387, 387-88 (2002). A same-sex civil union couple could possibly challenge the constitutionality of DOMA on the basis of equal protection. Id. at 406-07 (arguing that there is no rational basis for the distinction between marriage and civil unions in federal statutes).
of the State, such as counties and cities. The taxing power of any State extends to all persons, property, and businesses within its jurisdiction. The federal government and most States tax income, but, unlike most States, the federal government does not impose a general sales tax. In some instances the taxing power of the federal government conflicts with that of a State, leading to constitutional challenges under the General Welfare Clause and the Tenth Amendment. Questions involving a State's authority to tax transactions and taxpayers within its borders have led to constitutional challenges implicating the Privileges and Immunities Clause and the dormant Commerce Clause.

On a challenge based on Congress's General Welfare Clause power, the Supreme Court held unconstitutional the Agricultural Adjustment Act, which provided federal processing and floor stock tax assessments on basic agricultural commodities. The Court reasoned that Congress had overstepped its taxing power under the General Welfare Clause because it invaded the reserved power of the States by regulating agricultural production within the States. Despite striking the Act down, the Court acknowledged that Congress does have an expansive power to tax for the general welfare.

Occasionally States have challenged federal regulations that are effectively taxes, arguing that they violate the Tenth Amendment's assurance of State sovereignty. In one case, the Supreme Court

---

177. 84 C.J.S. Taxation § 7 (2001) (citing Banner County v. State Bd. of Equalization & Assessment, 411 N.W.2d 35 (Neb. 1987); Grant v. Kansas City, 431 S.W.2d 89 (Mo. 1968)).
179. Scholars debate the constitutionality of a national sales tax, whether in the form of a consumption tax or a value added tax. Compare Erik M. Jensen, The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes", 33 Ariz. St. L.J. 1057 (2001) (arguing that such a tax at the national level would be unconstitutional), with Calvin H. Johnson, Purging Out Pollock: The Constitutionality of Federal Wealth or Sales Taxes, 97 Tax Notes 1723 (2002) (arguing that such a tax would be constitutional).
180. U.S. CONST. art. I, § 8, cl. 1. See also Tribe, supra note 18, at 833-34.
181. U.S. CONST. amend. X.
182. U.S. CONST. art. IV, § 2, cl. 1.
183. The dormant Commerce Clause provides that States shall not burden interstate commerce. Although the clause is not an express provision in the Constitution, "the Supreme Court has inferred this from the grant of power to Congress in Article I, section 8, to regulate commerce among the states." Chemerinsky, supra note 5, at 401.
185. Id. at 74-75.
186. Chemerinsky, supra note 5, at 268-69.
187. The ability of States to use the Tenth Amendment against the federal government has waned. Tribe, supra note 18, § 5-11, at 861-62 (citing Collector v. Day, 78 U.S. (11 Wall.) 113 (1871) for the proposition that under the Tenth Amendment, Congress does not have the power to tax State judges' salaries). But see Graves v. New York, 306 U.S. 466, 486 (1939) ("Collector . . . [is] overruled so far as [it] recognize[s] an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government of their instrumentalities.").
upheld an IRC provision denying federal tax exemption for unregistered long-term government bonds in the face of a Tenth Amendment challenge.\textsuperscript{188} New Hampshire was also unsuccessful in using the Tenth Amendment to challenge the 1976 amendments to the Federal Unemployment Tax Act, which required that States provide State employees with unemployment compensation.\textsuperscript{189}

In the area of a State's authority to tax within its own borders, taxpayers have frequently challenged State governments for discriminating between residents and nonresidents under the Privileges and Immunities Clause.\textsuperscript{190} For example, in \textit{Toomer v. Witsell},\textsuperscript{191} the Supreme Court struck down one licensing fee on nonresident shrimp boat owners imposed at a rate a hundred times greater than resident owners because the State failed to demonstrate a unique link between the State's conservation interests and the discriminatory fee measures.\textsuperscript{192} Generally speaking, any State seeking to tax nonresidents must do so in "substantial equality" to how its residents are taxed.\textsuperscript{193} An example of an individual successfully invoking the Privileges and Immunities Clause in a tax discrimination case is \textit{Lunding}.\textsuperscript{194} There, the Supreme Court struck down a New York statute that prevented nonresidents from deducting alimony payments.\textsuperscript{195} This resulted in a greater tax liability for a nonresident than that for a similarly situated resident.\textsuperscript{196} The Court explained that although the Privileges and Immunities Clause does not demand precise equality, New York had failed to offer a substantial justification for the tax discrimination.\textsuperscript{197}

Tax subsidies to encourage investment within a State could theoretically be challenged under the dormant Commerce Clause,\textsuperscript{198} a doctrine that limits a State's ability to interfere with interstate com-

\begin{flushleft}
\textsuperscript{190} Although the Fourteenth Amendment also speaks of privileges and immunities, it appears that there is only one case where a State tax law was struck down as a violation of the Fourteenth Amendment clause. Ti PAUL J. HARTMAN & CHARLES A. TROST, \textit{FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION} \S 4:1, at 406 (2d ed. 2003) (citing Colgate v. Harvey, 296 U.S. 404 (1940) as the only case). \textit{See also} U.S. \textit{CONST.} amend. XIV, \S 1; Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 586 (1839) (holding that the protections of the Privileges and Immunities Clause do not extend to corporations).
\textsuperscript{191} 334 U.S. 385 (1948).
\textsuperscript{192} \textit{Id.} at 406.
\textsuperscript{195} \textit{Id.} at 314-15.
\textsuperscript{196} \textit{Id.} at 293.
\textsuperscript{197} \textit{Id.} at 297, 299.
\textsuperscript{198} The dormant Commerce Clause is a doctrine that has been read into the Constitution's affirmative grant of Congress's power "[t]o regulate Commerce . . . among the several States." \textit{U.S. CONST.} art. I, \S 8, cl. 3.
\end{flushleft}
merce.199 Implicitly, the Commerce Clause prohibits State discrimination of interstate commerce, as well as undue burdens on commerce.200 The Supreme Court has provided murky guidance for determining when violations of the clause have occurred, and the case law on specific tax schemes does not establish a clear pattern of precedent.201 Under the test spelled out in dicta in Complete Auto,202 a tax on interstate commerce must meet four requirements to survive a constitutional challenge under the Commerce Clause.203 The third prong of this test, the ban on discrimination against interstate commerce, is the predominant basis upon which the Supreme Court has struck down State taxes in recent years.204 In fact, as Professor Enrich notes, “[t]he Supreme Court’s calendar has included a steady diet of state tax cases raising Commerce Clause issues, but to date, the Court has not applied its Commerce Clause doctrine to a state [investment tax credit], to a jobs credit, or any of the other characteristic location incentives.”205 While the Court consistently finds discriminatory tax schemes unconstitutional, the Court is reluctant to strike down positive tax incentives that favor local industry.206

Professors Hellerstein and Coenen note: “a tax which by its terms or operation imposes greater burdens on out-of-state goods, ac-

199. See generally Tribe, supra note 18, § 6-2, at 1030.
201. “Supreme Court decisions concerning commerce clause limitations on state taxing power have long been characterized by meaningless distinctions, encrusted rules, and a lack of principled analysis.” David Shores, State Taxation of Interstate Commerce—Quiet Revolution or Much Ado About Nothing?, 38 TAX L. REV. 127, 129 (1982). See also Edward A. Zelinsky, Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation, 29 OHIO N.U.L. REV. 29 (2002). Professor Zelinsky suggests ending the dormant Commerce Clause prohibition on discriminatory taxation because of the difficulties in “distinguishing between tax breaks and direct subsidies equivalent in effect and design nor can we convincingly differentiate between discriminatory taxes.” Id. at 88.
202. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). In a unanimous decision, the Supreme Court upheld the constitutionality of a Mississippi tax on gross revenues for the privilege of doing business in that State. Id. at 277-78. The Court stated that the taxpayer “did not allege that its activity which Mississippi taxes does not have a sufficient nexus with the State; or that the tax discriminates against interstate commerce; or that the tax is unfairly apportioned; or that it is unrelated to services provided by the State.” Id. (citations omitted) See also Chemerinsky, supra note 5, at 345.
203. See Richard D. Pomp & Oliver Oldman, State and Local Taxation at 1-21 (4th ed. 2001). The four requirements are: 1) the activity must be sufficiently connected to the state to justify a tax; 2) the tax must be fairly apportioned; 3) the tax must not discriminate against interstate commerce; and 4) the tax must be fairly related to benefits provided to the taxpayer. Complete Auto Transit, Inc., 430 U.S. at 279.
204. Tribe, supra note 18, § 6-16, at 1107.
206. Id.
tivities, or enterprises than on competing in-state goods, activities, or enterprises will be struck down as discriminatory under the Commerce Clause.”207 In Boston Stock Exchange, the Supreme Court stated: “No State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.”208 Although this seems like an applicable standard that could produce consistent results, it has left much to the interpretation of the courts. This is demonstrated by the Court’s general willingness to allow location tax incentives, which clearly favor one State’s businesses over another.209 However, Cuno v. DaimlerChrysler, a Sixth Circuit case striking down such a tax incentive as unconstitutional, is currently pending before the Supreme Court.210 Modern Commerce Clause doctrine forbids nearly all discrimination on the basis of economic factors from sister-states.211 If the Supreme Court affirms the ruling in Cuno, it will send a message to States that positive location incentives may receive similar constitutional disdain.

PART VIII: THE VALIDITY OF RETROACTIVE CHANGES IN THE LAW

Tax law changes that apply to the time period before the date of enactment may adversely affect a taxpayer who has made economic and investment decisions in reliance upon prior law. While Congress often provides transitional relief through prospective effective dates,212 Congress has in the past exercised its taxing power in a ret-

207. Walter Hellerstein & Dan T. Coenen, Commerce Clause Restraints on State Business Development Incentives, 81 CORNELL L. REV. 789, 793 (1996). Professors Hellerstein and Coenen come to this conclusion after an analysis of major Supreme Court cases on tax discrimination including New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) (striking down an Ohio credit against the state’s motor fuel tax for each gallon of ethanol sold provided that the ethanol was made in Ohio or another state with a similar tax credit).


209. See Enrich, supra note 205, at 407.

210. 386 F.3d 738 (6th Cir. 2004), cert. granted, 73 U.S.L.W. 3751 (U.S. Sept. 27, 2005) (No. 04.1704). In Cuno, the Sixth Circuit ruled on two Ohio tax incentives stemming from an agreement between the City of Toledo and DaimlerChrysler to build a plant in Toledo, Ohio. Id. at 746. The court held that the investment tax credit violated the Commerce Clause. Id. at 746. However, the court found that the personal property tax exemption for all equipment and machinery used in the new plant did not violate the dormant Commerce Clause because it did not favor in-state activity. Id. at 747. The Sixth Circuit in Cuno distinguished the Ohio property tax scheme from Camps Newfound by noting that it did not discriminate against nonresidents. Id. In Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997), the Supreme Court had held that a property tax exemption including non-profit organizations run for nonresidents violated the dormant Commerce Clause.


rospective manner. Scholars disagree over the wisdom and efficiency of providing taxpayers with protection against transitional losses arising from changes in tax laws. Most courts, including the Supreme Court, however, agree that retroactive application of tax legislation that increases a taxpayer’s income or wealth tax liability typically does not violate any constitutional proscription.

A long line of taxpayer challenges to retroactive tax legislation exists, most premised on the assertion that the legislation violates the Due Process Clause of the Fifth or Fourteenth Amendments. In cases involving income taxes, the Supreme Court has consistently upheld retroactively applied tax changes. In Welch v. Henry, the Court offered the following explanation when upholding a retroactive State tax on corporate dividends:

Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumed by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process . . .

The Majority went on to rule that retroactively applied tax law amendments are permissible unless the changes are “so harsh and oppressive as to transgress the constitutional limitation.” More recent cases confirm the constitutional validity of retroactive income


216. 305 U.S. 134 (1938).

217. Id. at 146-47 (invoking a Fourteenth Amendment due process challenge to Wisconsin law).

218. Id. at 147; see also United States v. Darusmont, 449 U.S. 292 (1981) (applying “harsh and oppressive” test and holding that retroactive application of alternative minimum tax liability on sale of home did not violate due process).
tax amendments, requiring that the changes merely further some rational legislative purpose.\textsuperscript{219}

Taxpayers had some limited success in the 1920s challenging tax legislation that instituted, retroactively, the federal estate and gift tax. Shortly after Congress introduced these taxes, the Supreme Court sustained due process challenges to the retroactive application of both.\textsuperscript{220} In concluding that retroactive imposition of the gift tax conflicted with Fifth Amendment due process rights, the Court suggested that the taxpayer's inability to alter past behavior to avoid or lessen the effect of the newly enacted and retroactively-applied tax was relevant to the due process analysis.\textsuperscript{221} Since these cases were decided, however, several courts have noted that concerns about a taxpayer's ability to foresee changes in the tax laws and a taxpayer's inability to alter his or her behavior accordingly are relevant primarily in the case of newly enacted taxes, rather than retroactive amendments to an existing tax.\textsuperscript{222}

In a more recent challenge to the constitutionality of retroactive estate tax legislation, \textit{United States v. Carlton},\textsuperscript{223} the Supreme Court applied the same standard as in the case of income taxes, ruling that as long as the retroactive legislation furthered some "legitimate legislative purpose," the due process challenge would fail.\textsuperscript{224} The Majority opinion also rejected the taxpayer's claims of detrimental reliance on existing law. According to the Majority, reliance on existing law is an insufficient basis for a constitutional challenge because a citizen has no vested interest in the tax laws.\textsuperscript{225} While \textit{Carlton} is the most

\textsuperscript{219} See, e.g., Kitt v. United States, 277 F.3d 1330, 1334 (Fed. Cir. 2002) (holding that retroactive application of 10% penalty on early IRA withdrawals did not violate due process because legislation had a rational legislative purpose).

\textsuperscript{220} Untermeyer v. Anderson, 276 U.S. 440 (1928) (holding that retroactive application of the 1924 gift tax violated Fifth Amendment due process); Blodgett v. Holden, 275 U.S. 142 (1927) (same); Nichols v. Coolidge 274 U.S. 531, 542-43 (1927) (holding that retroactive application of the 1919 estate tax violated Fifth Amendment due process).

\textsuperscript{221} See Blodgett, 275 U.S. at 147 ("It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequences, made absolute disposition of his property by gift should thereafter be required to pay a charge for doing so.").

\textsuperscript{222} See, e.g., Ferman v. United States, 993 F.2d 485, 490 n.7 (5th Cir. 1993), cert. denied, 512 U.S. 1218 (1994) (“This court and our sister circuits also have recognized the distinction between a retroactive change in existing tax law and the retroactive imposition of a wholly new tax, thereby limiting Nichols, Blodgett, and Untermeyer to their facts.”); see also United States v. Hemme, 476 U.S. 558 (1986) (holding that due process rights are not violated when retroactive application of tax did not result in a net detriment to the taxpayer).

\textsuperscript{223} 512 U.S. 26 (1993).

\textsuperscript{224} Id. at 30 (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984)). The Supreme Court rejected the Ninth Circuit's due process analysis of retroactive tax legislation in the earlier appeal, which had relied on two factors: detrimental reliance on preamendment law and lack of notice that the tax law would be retroactively amended. See United States v. Carlton, 972 F.2d 1051 (9th Cir. 1992).

\textsuperscript{225} Carlton, 512 U.S. at 33 (citing Welch v. Henry, 305 U.S. 134 (1938)).
recent case in which the Supreme Court has considered the constitutionality of retroactive tax changes, other courts have since rejected arguments that retroactive tax increases violate the Apportionment Clause in Section 8 of Article I, the Takings, the Equal Protection,\(^2\) and the Just Compensation Clauses of the Fifth Amendment, as well as the Excessive Fines Clause of the Eighth Amendment.\(^3\) Thus, while constitutional concerns surrounding retroactive tax legislation exist, the courts have afforded legislators a great deal of leeway to apply tax law changes in a retroactive manner.

**PART IX: TAX LEGISLATION THAT BENEFITS NARROW GROUPS OF TAXPAYERS AND INVESTMENTS**

The IRC is filled with exclusions, deductions, credits, and tax rate reductions that favor certain taxpayers, investments, and business activities over others.\(^4\) The deduction for interest paid on debt used to acquire a personal residence, for example, benefits homeowners when compared with taxpayers who rent.\(^5\) Reduced tax rates on capital gain income, the child tax credit, and the exclusion from gross income for certain scholarships are among the hundreds of subsidies that currently exist in the tax code.\(^6\) While most policymakers decry these widely applicable special tax benefits as economically inefficient, Congress has made little effort since 1986 to curtail their enactment.\(^7\)

More troubling are tax preferences that benefit or provide transitional relief to one or only a few taxpayers. Often referred to as "loop-holes," "ad hoc," or "rifles shot" provisions, their enactment is not a new phenomenon. One of the most famous taxpayer-specific relief provisions was section 1240 of the IRC of 1954,\(^8\) known as the Mayer amendment, which granted tax relief for retirement plan distrib-

---

\(^3\) Kitt v. United States, 277 F.3d 1330, 1337 (Fed. Cir. 2002).
\(^4\) Tax provisions that deviate from the "normal" income tax base, generally defined with reference to the Haig-Simons economic definition of income (I = C +(-/+) NW), are sometimes referred to as "tax expenditure" provisions. See generally Stanley S. Surrey & Paul R. McDaniels, Tax Expenditures (1985). The Joint Committee on Taxation publishes annually a list of what it considers to be tax expenditures and the cost to the federal government associated with each. Staff of the Joint Committee on Taxation, Estimates of Federal Tax Expenditures for Fiscal Years 2005-2009 (Jan. 13, 2005). The published list only includes tax expenditures that result in more than a projected $50 million revenue loss over a five year period. Id.
\(^5\) I.R.C. § 163(h)(3). Renters are not entitled to a deduction for rent paid on a personal residence. See I.R.C. § 163(h)(1) (denying a deduction for personal interest).
\(^6\) I.R.C. §§ 1(h) (capital gains rate reduction), § 24 (child tax credit), § 117 (exclusion from gross income for certain qualified scholarships).
\(^7\) See Michael J. Graetz & Deborah H. Schenk, Federal Income Taxation: Principles and Policies 53 (5th ed. 2005) (“There has been a rapid increase in the number of tax expenditures and in their revenue cost in the past two decades.”).

The courts have had little opportunity to comment on the constitutionality of narrowly tailored tax benefits. One major roadblock to judicial review is the question of standing. In Apache Bend Apartments, Ltd. v. United States,\footnote{702 F. Supp. 1285 (N.D. Tex. 1988), rev’d 987 F.2d 1174 (5th Cir. 1993).} the Fifth Circuit denied standing to plaintiffs who brought suit against the United States challenging on equal protection grounds the constitutionality of several narrowly-drawn transition relief provisions in the Tax Reform Act of 1986.\footnote{Id. at 1286. Plaintiffs in the same suit objected to other transitional rules that benefited a single taxpayer. Id. at 1286-87.} The plaintiffs in Apache sought injunctive relief to prevent implementation of the 1986 Act; in effect, asking the court to deny the tax benefits to those who received them. The Fifth Circuit characterized
the plaintiffs' claims of unfair treatment as an attempt to challenge the tax liability of those taxpayers who received the tax benefit, rather than an effort to contest their own tax liability.\textsuperscript{240} According to the Court, the plaintiffs' allegations of unequal treatment presented "abstract questions of wide public significance which amount to generalized grievance" that are more appropriately addressed by Congress.\textsuperscript{241}

Instead of seeking to deny tax benefits to those narrow classes of taxpayers who received them, as the plaintiffs did in Apache, what if the taxpayer's requested relief is an extension of the special tax benefit to themselves? In that case, the Anti-Injunction Act, which prohibits suits against the Government seeking to enjoin the collection of tax, likely would apply.\textsuperscript{242} Thus, given the Anti-Injunction Act and the lack of standing to challenge tax breaks given to others, it appears unlikely that a taxpayer could contest Congress's grant of special tax relief even if, on the merits, a viable equal protection or other constitutional claim might be made.

\textbf{Conclusion}

Upon close examination, many provisions of the U.S. Constitution could, theoretically, restrict the legislative power to tax. And taxpayers have, in fact, attempted to use almost every protection afforded by the Constitution to defeat tax legislation. These challenges, however, are rarely successful primarily because of the willingness of courts to defer to the legislature on tax issues. This has led to the observation that there may be two Constitutions, "one for taxes and one for all other matters."\textsuperscript{243}

\textsuperscript{240} \textit{Apache}, 987 F.2d at 1177.
\textsuperscript{241} \textit{Id.} at 1180.
\textsuperscript{242} 26 U.S.C. § 7421(a); \textit{Apache}, 702 F. Supp. at 1294-95; 987 F.2d at 1184-85 (Goldberg, J. dissenting); Zelenak, \textit{supra} note 233, at 613-15.
\textsuperscript{243} \textit{Westin}, \textit{supra} note 3, at 48.