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THE FUNCTION OF CONSTITUTIONAL PROVISIONS
REQUIRING UNIFORMITY IN TAXATION*

By William L. Matthews, Jr.**

CHAPTER VI
TAXES WHICH MAY BE LABELED PROPERTY OR
NON-PROPERTY

SECTION 1

In General

One of the best indications available as to the significance of the
labeling technique in resolving problems of uniformity is the extent
to which the courts have their attention directed to the idea that all
taxes are in reality taxes on property Nearly every type of tax legisla-
tion imaginative legislatures can produce is contested on the theory
that it is subject to the constitutional restriction of uniformity gen-
erally applicable to property taxation. The argument meets with
little success where few, if any, of the characteristics of the general
property tax are present. Thus poll or capitation taxes were seldom
attacked historically on this basis, and the authorities are unanimous
about the nature of inheritance taxes. Usually excise, occupation,
privilege, license, sales, use, and other similar taxes are sustained as
non-property in character, but, where the object and method of the
legislation is not absolutely clear, they may be held unconstitutional.

One of the chief weaknesses of such categorical conceptualism in
tax cases is the fact that it gives little recognition to the existence of
a normal middle-ground where a statute combines characteristics
familiar to both property and non-property taxation. Quite often a
tax does not have the simplicity of method or object which will permit
placing it in one category or the other. It has been said that "whether

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ington.
or not a given tax is an excise, or a privilege and occupational, or a property tax, is ordinarily not difficult of solution, but it is doubtful if many courts would subscribe to this sentiment, especially where a statute includes features of both types in a single tax. When pointing to distinctions in a general way the courts advance at least two tests. The one most frequently agreed upon emphasizes the method of laying the tax. The Supreme Court gave it early expression in *Society for Savings v Coite*, by saying:

"An excise and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If the tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise; but if the tax is computed upon a valuation of property, and assessed by assessors either where it is situated or at the owner's domicile, although privileges may be included in the valuation, it is considered a property tax."

If property normally is taxed according to value this general test is varied somewhat to stress a feature consistent with the language of the state's constitution as in *Pacific Gas and Electric Company v Roberts*, where the California court stated:

"The essential difference between an ad valorem tax and any form of privilege tax is that the ad valorem tax is based upon the value of the property, tangible or intangible. The privilege tax need not be based upon such value at all."

The second test makes the object or purpose of the tax determinative as illustrated by the explanation in *Reif v Barrett*, an Illinois case, to the effect:

"Their character and their object are vastly different. A property tax is levied merely for the purpose of raising revenue, and is levied against property. It does not seek or in any wise attempt to control the use, operation, or regulation of the property. When the tax is raised, the mission of the property tax has been fulfilled. A property tax has nothing whatever to do with the question of privilege, license, or permission. On the other hand, an occupational tax may be levied under the general police powers of the state, where its purpose is to regulate or control a given occupation, or it may be levied under the general sovereign powers of the state where its sole purpose is to raise revenue. Under which power it is levied makes no difference as to the character of the tax."

There is a third test based on an economic rather than a purely legal

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162 Reif v. Barrett, 355 Ill. 104, 188 N. E. 889 (1918).
163 6 Wall. 594 (U. S. 1868).
164 168 Cal. 420, 143 Pac. 700 (1914).
view which relies on the so-called incidence of the tax, but it is not in general use. The Arizona court applied it in upholding a license tax by saying: 108

"Taxes are classified as poll, property and excise. The meaning of the first two is obvious. Excise has come to include every form of taxation which is not a burden laid directly on persons or property."

Whether the test is one of method or object its application to those taxes which fall in the shadows between categories is most difficult, and it is precisely here that the functions and effect of the uniformity provision is most apparent.

SECTION 2

Franchise Taxes

Franchise taxes seem to have given the courts as much trouble as any other. In addition to the general conflict as to whether a corporate franchise is or is not property within the purview of the general tax law 107 there is considerable confusion on the nature of taxes levied against the corporation directly. If the tax is called a franchise tax levied because of the corporation's right to exist and right to do business within the state, it is in a legal sense a sort of privilege tax and not subject to the strict rule of uniformity. But, since the tax usually is measured by the value of corporate property, it is possible to find that it is just another property tax to be paid by the corporation. The tax most often levied is an ad valorem tax on the capital stock or other property.

The privilege theory is clearly illustrated in Kaiser Land and Fruit Company v. Curry, 108 where a statute provided that all corporations engaged in business should pay an annual tax proportionate to the amount of the authorized capital stock of the corporation. The court not only found the tax was a charge for the privilege of existing as a corporation, but held that assessment of the franchise as property within the meaning of the constitution in no way prevented the state from levying this additional tax as a privilege. Similarly, an annual franchise tax of five cents on each one hundred dollars of capital stock represented by business transacted, and property located in, the state is not a property tax, because the value of the corporate assets in no way measures the amount of the tax masmuch as the capital may be

108 Blackrock Copper Mining and Milling Company v. Thigey, 34 Utah 369, 98 Pac. 180 (1922).
109 155 Cal. 638, 103 Pac. 341 (1909).
increased by surplus profits without increasing the amount of the capital stock.\textsuperscript{169} On the privilege basis it is possible to levy at a different rate on preferred stock of foreign corporations and common stock of domestic corporations without violating uniformity,\textsuperscript{170} and the theory may even be broad enough to sustain a fixed rate based on such proportion of the outstanding capital stock, surplus, undivided profits, and bonds not maturing within one year as the gross receipts derived from business done in the state bears to the total from the corporation's entire business.\textsuperscript{171} In short, a tax graduated by the amount of capital stock of a corporation, either authorized or outstanding, the capital stock represented by property owned and used in business in the state, is usually regarded as a franchise tax imposed on the privilege of corporate existence or right to do business and therefore valid.\textsuperscript{172}

When there is interjected into the legislation some method of return comparable to a property tax valuation, however, the result is entirely different. For instance, a statute levying a tax upon the "capital stock of all corporations" which requires the chief officer of the corporation to make a return of all the taxable property of the corporation, in which he must state the market value of the capital stock, the items of property in which it is invested, as well as the number of shares into which it is divided with the par value and actual value of each, was held to impose a property levy rather than a franchise tax.\textsuperscript{173} The court said:\textsuperscript{174}

\begin{quotation}
"Owing to the difficulty of distinguishing between the capital and the property in which it is invested, tests for determining whether a tax is on the franchise or on the property may be regarded generally as uncertain and unsatisfactory; yet the determination is
\end{quotation}

\textsuperscript{169} People ex rel Roberts and Son v. Emerson, 305 Ill. 348, 147 N. E. 202 (1922).
\textsuperscript{171} Airway Electric Appliance Corporation v. Archer, 279 Fed. 878 (1922).
\textsuperscript{173} State v. Stonewall Insurance Company, 89 Ala. 355, 7 So. 753 (1889).
\textsuperscript{174} Id. at 340, 7 So. at 754.
often necessary. The usual and most certain test is whether the tax is upon the capital stock, eo nomine, without regard to its value or at its assessed valuation in whatever it may be invested; if the former it is a franchise tax; if the latter a tax upon the property."

Also, if the statute couples with such a return feature a provision that the tax is in lieu of all other taxes it is not uniform, unless the constitution specifically authorizes the taxing of corporations according to uniformity within the class. The reasoning in these cases seems to be that such a statute merely represents a plan to reach more conveniently this class of property in the hands of the corporate owner. However, even if it is settled that such a tax on capital stock is a property tax, it by no means follows that every tax levied on capital stock is necessarily a tax on property.

The method test also may result in striking down statutes which make exemptions other than the all inclusive one just mentioned. In Kentucky for instance, a so-called franchise tax on all public utility corporations requiring them to make a return to the state auditor of the total value of the corporation's property, from which the value of all tangible property held in the state was to be deducted was held to be in fact a property tax upon all the intangible property of the corporation; and a corporate excess tax computed by subtracting from the value of the capital stock all real and personal property otherwise subject to taxation is a property tax void for lack of uniformity because it taxes money in the bank which is exempt in the hands of individuals. The language of the statute is of little consequence under a strict application of the method test in such cases because a statute requiring a railroad to pay a "fee" is still a property tax, and a capital stock tax is not made an excise by the phrase: "to be assessed a sum in the nature of an excise tax, or license." One of the things about the method rule that has made it so appealing is its versatility. It is a facile test at best and can be used to tip the scales either way. One would think, for example, that a tax measured by the value of specifically enumerated property of the corporation is a property tax, but a strikingly different result is reached in State v. Western

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Union Telegraph Company, where a statute required every telegraph corporation doing business in the state to pay a tax of two and one-half per cent on the value of any telegraph line owned within the limits of the state including "all poles, wire, insulators, office furniture, batteries, instruments, et cetera." The tax was in lieu of all other taxes on any of the property or shares of the corporation. In sustaining the tax the court said:

"The method by which the burden is imposed, though not conclusive, has a significant bearing upon the meaning and purpose of the act. It is not levied as property taxes usually are. There is no given fund to be assessed in which the percentage is fixed by valuation, but the percentage is fixed by law, leaving the amount to be ascertained by the valuation. But what is more important is the kind of property selected for valuation. It is not all the property which the company may have, but only such as is used in the telegraph business. It is the telegraph line, with a detailed statement of such articles as constitute that line, or are necessary to its operation. No real estate is specified, no other property however convenient it might be, or however much the company might own or may acquire, can be included in the valuation. This tax, then, is virtually imposed upon that which stands for the capital stock, or rather upon the use of the property and upon the use of that which in some degree represents the extent of its business. It is that which is invested in the business and exclusively used for carrying it on, and may fairly be used as a test of the extent of the business for the purpose of fixing the amount to be paid for that business. Further, while it is the property used which is valued, it is only while it is in use for this business."

Here, the court combines a test of method with one of object or purpose, particularly where attention is directed to the use of the property, and where the value of the property is considered a valid measure of the extent of business done and the franchise or privilege enjoyed. But even on this basis it is hard to rationalize the Western Union Case for other courts under similar circumstances are not able to find a sufficient connection between value and extent of use to counteract the importance of the method of levying the tax. Thus a statute requiring companies owning railroad cars other than those which were the property of railroad companies to submit an annual statement showing the aggregate number of miles made by their cars during the year, and the average number of miles traveled per day by the cars of the particular class, and requiring the state board of equalization to ascertain from such statement the number of cars required to make the total mileage of the cars of the company, and to collect a tax of two per cent in lieu of all other taxes is not an excise or franchise tax, and violates the constitutional requirement of un-

\[ \text{182 Id. at 521.} \]
A similar result is reached where the tax is measured by a flat rate per ton of copper and iron ore mined, and in the case of a tax imposed on mining royalties.

SECTION 3

Gross Receipts Taxes

Possibly in an attempt to take advantage of the logic illustrated by the Western Union Case that a tax measured by something which reflects more directly than capital stock or corporate property the value of the franchise, privilege or amount of business done, might not be a property tax and therefore not unconstitutional, some statutes call for the tax to be measured by gross receipts. Here, also, the general position is that such a tax can be sustained as being non-property in character, but the courts are far from complete agreement on the point. The theory is that a tax measured by gross earnings is a tax on the business which is performed and not a tax upon property in any sense. In other words, a property tax based on the value of the franchise and a business tax based on gross earnings are not identical as to the subject of taxation. A variation of this explanation was adopted by the Supreme Court in Flint v Stone Tracy Company, when it found that a federal tax on the net income of insurance companies over and above a certain sum received from all sources during the year was not imposed upon the franchise, nor upon the property of the corporation, but as an excuse upon the doing of corporate or insurance business. The authority of this case, however, opens the

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183 State ex rel Armour Packing Company v. Stephens, 146 Mo. 662, 48 S. W 929 (1898).
184 State v. Lakeside Land Company, 71 Minn. 283, 73 N. W 970 (1898).
185 State ex rel Oliver Iron Mining Company v. Arson, 181 Minn. 221, 232 N. W 35 (1903).
187 Lincoln Traction Company v. Lincoln, 84 Neb. 837 121 N. W 435 (1908); Nebraska Telephone Company v. Lincoln, 82 Neb. 59, 117 N. W 284 (1905). In this case the Nebraska Court went so far as to find that a tax on foreign insurance companies providing that their gross receipts were “to be taken as an item of property of that value to be assessed and taxed on the same percentage of such value as other property” was not violative of the constitutional provision requiring the taxation of property according to value because it was a business tax rather than a property tax.
188 220 U. S. 107 (1910).
way to a controversy on the nature of net receipts as compared with gross earnings, a point developed more fully in the income tax cases, but applicable here since it may be found that a tax upon net receipts of an insurance company is a tax on its personal property to be listed by the board of assessors and taxed the same as other property.\textsuperscript{180}

The line of reasoning that can be taken in making such distinctions is well shown by a vigorous dissent in State ex rel Norwood v. New York Life Insurance Company.\textsuperscript{190} The statute in question imposed a tax on the net receipts of every insurance company doing business in the state and provided that "such tax shall be in lieu of all other taxes." It was sustained by the court as an occupation tax on the condition that the lieu clause be eliminated as violative of the uniformity provision, but Wood, J., dissented on the ground that the tax was on property and violative of the constitutional provision requiring taxation according to value. He said:\textsuperscript{191}

"The act has all the earmarks of a property tax and none of the distinguishing features of an occupation tax. If the legislature had intended to impose an 'excise tax,' entirely different language would have been employed. The language 'shall pay a tax on net receipts shows a property tax was intended. 'Net Receipts are property. Then the words 'such tax shall be in lieu of all other taxes show conclusively to our mind that the legislature intended that the tax imposed by the act was in lieu of all other property taxes. It is conceded in the majority opinion that the clause violates uniformity and equality in taxation, and for that reason is void. This demonstrates conclusively the correctness of my conclusion. For if it were a privilege tax, it could not violate any provision of our constitution because, as we have seen, there is no provision of our constitution requiring equality and uniformity in occupation taxes."

The usual answer to this argument that receipts and earnings are property is that they are not the subject of the tax, but merely represent the standard by means of which the amount of the tax is determined. As one court has said, "while it is true that the constitution defines property as anything subject to ownership, and, in a sense, one's business and its earnings are owned by him, the privilege of engaging in business and gainful pursuit under the protection of our laws is something far and away beyond and above the mere ownership of a business.\textsuperscript{192} It is on the strength of such distinctions as to the real subject or object of a tax measured by gross receipts that many of them have been sustained.


\textsuperscript{190} 119 Ark. 322, 173 S. W. 1099 (1915).

\textsuperscript{191} Id. at 326, 173 S. W. at 1103.

\textsuperscript{192} Stiner v. Yelle, 174 Wash. 402, 25 P. 2d 91 (1933).
To some extent the legal nature of a gross receipts tax is made uncertain by a series of Supreme Court cases which describe it as a property tax.\textsuperscript{193} These cases hold that a state cannot burden interstate commerce by taxing directly receipts derived from interstate business, but because a gross receipts tax is in reality a tax on property measured by receipts which come only in part from business of an interstate character it is not open to attack as inconsistent with the Constitution. In the absence of some distinguishing factor this interpretation could prove fatal where the question involved is uniformity rather than interference with interstate commerce, because one of the reasons for measuring the tax by gross receipts is to circumvent the constitutional limitations applicable to property taxation. However, the true purpose of these decisions is to establish a distinction between statutes which obviously attempt to burden interstate commerce and those which merely use gross receipts to measure a tax the State has the legitimate power to impose.\textsuperscript{194} In the particular instances where the tax is called a property tax the legitimate power of the State is exercised through the taxation of property. In other instances the State exercises its legitimate power by taxing the corporate franchise or privilege and simply uses gross receipts to measure the amount of business done. In these cases the Supreme Court makes the same distinction regarding the object of the legislation as it does in the "property tax" cases.\textsuperscript{195} As is shown in the \textit{Ohio Tax Cases},\textsuperscript{196} the Court, in both situations, is concerned primarily with the effect of the legislation on interstate commerce, rather than determining if the exaction is one upon property rights or upon franchise and privileges. Mr. Justice Holmes commented on the distinction in \textit{Galveston, Harrisburg and San Antonio Railway Company v Texas}, as follows:\textsuperscript{197}

\begin{quote}
"It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole
\end{quote}


\textsuperscript{194} U. S. Express Company v. Minnesota, 223 U. S. 335, 344 (1911).

\textsuperscript{195} Maine v. Grand Trunk Railroad Company, 142 U. S. 217 (1890).

\textsuperscript{196} 222 U. S. 576 (1913).

\textsuperscript{197} 210 U. S. 217, 227 (1907).
scheme of taxation into account. That must be done by this court
as best it can."

In this vein it is appropriate to add that the "whole scheme" of the
Supreme Court decisions pertaining to a tax measured by gross re-
ceipts is designed to permit the State considerable freedom in legiti-
mate taxation. Certainly it is not designed to furnish conclusive au-
thority on the nature of the tax.

It is of the utmost importance to a legislature to know that the
State may levy a gross receipts tax which is consistent with the Federal
Constitution not only by designating the tax as one on property, but
also by making the privilege to do business the subject of the tax. This
knowledge, or rather its absence, is illustrated perfectly in Chicago,
Rock Island and Pacific Railroad Company v Robertson. The Mis-
sissippi legislature enacted a statute taxing the railroad cars of freight
line companies according to a certain percentage of their gross earn-
ings. The statute provided that all cars used exclusively within the
state, or used partially within and without the state "are hereby de-
clared to have a situs in the state, and the value of such property for
the purpose of taxation is to be determined as provided for by sections
four (4) and five (5) of the act." Sections four and five measured
the tax by gross earnings and further provided that gross earnings
should include earnings on business beginning and ending within the
state, and a proportion, based on mileage, of earnings of all interstate
business passing through or into or out of the state. The statute pro-
vided explicitly that the exaction was "to be a tax on its property and
in lieu of all other taxes upon the same." Obviously, the legisla-
ture's intention was to tax the freight line companies as going concerns
without burdening interstate commerce, and the court disposed of this
aspect of the case with ease by saying:

"If the tax here sought to be collected is imposed di-
rectly on the company's gross earnings as such, they being derived
partly if not wholly, from interstate commerce, it is a burden on such
commerce and consequently void. But if the gross earnings of the
company are simply taken as the measure of the value of the cars
owned by the company that come into the state of Mississippi, and
the amount of the tax is not in excess of what would be legitimate
as an ordinary tax on the cars with reference to their use as part of
a going concern, it does not in fact restrain or burden such commerce,
and will be valid if permitted by the state Constitution.

"The contention of counsel for the company therefore is,
and sections 3 and 4 of the statute so declare, that the tax is on the

108 122 Miss. 417 84 So. 449 (1920).
109 122 Miss. 417, 419, 84 So. 449 (1920).
200 Ibid.
201 Id. at 420, 84 So. at 450.
cars of the company that are used partially within and without the state; the aggregate amount of the rentals received therefor by the company being simply taken as the measure of their value."

The problem posed by section 112 of the Mississippi Constitution proved more difficult. The pertinent parts of this section provided:

"Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legislature may provide for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county."

The court construed the constitutional provision to mean that all property must be assessed at its true value, and that there must be no discrimination in rates between different species of property. In other words, all property must be taxed at the same rate on its true value. It found that neither of these requirements was met in the statute under consideration because gross earnings from the cars was substituted for their true value and the rate of taxation was different from that imposed on other property. The court did indicate some concern for the practical result reached in its decision when it added:

"That the legislature may have been of the opinion that the amount of taxes that would be paid by freight line companies under this statute would be a just equivalent for the taxes they would pay on the true value of their property conferred upon it no power to enact the statute, for the Constitution as now written forbids the substitution of any other method of taxing property for the one therein prescribed. The question here under consideration is one of power and not of economics."

Thus the state constitutional limitation requiring uniformity of taxation according to true value served to restrict severely the legislature's power to tax, even where a careful effort was made to exercise that power in a manner consistent with the Federal Constitution. Granting that the court was handicapped by the legislature's express description of the nature of the tax, it is not necessary to rewrite the Mississippi uniformity provision in order to reach the corporation's gross earnings, although the ambiguous wording and unnecessary restrictions of that provision tend only to confuse the issue. Both the legislature and the court in the instant case were victims of the rigid conceptualism referred to before. They thought of the tax only as a

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1 Id. at 421, 84 So. at 450.
2 122 Miss. 417, 423, 84 So. 449, 451 (1920).
property tax, and therefore could not break with the traditional idea that the only way to tax a corporation doing business in interstate commerce is to levy against its property according to true value. This preoccupation with the nature of the tax caused the legislature to call the tax a levy on the railroad cars when it could have conceived of the tax as one levied on the corporation for the privilege of doing business in the state. The court thought the only alternative to calling the tax a property tax was to describe it as one levied directly against the gross earnings which clearly were derived in part from interstate commerce. It might well have advised the legislature to eliminate the express reference to the nature of the tax and thereby opened the way for successful enactment of the statute on the privilege theory. That this theory was known to the court is apparent from the historical analysis it made of the uniformity provision. In describing a provision in the Constitution of 1869 similar to section 112, the court said:

"While that Constitution was in force, the legislature, with the approval of this court, was accustomed to impose privilege taxes on certain characters of business in lieu of an ad valorem tax on the property used therein. But the convention of 1890, evidently for the purpose of insuring equality of taxation by preventing such discriminations in the methods of valuation, rewrote the section, and among other things provided that property shall be assessed for taxes at its 'true value'."

This last statement leaves the impression that the court thought section 112 required privilege taxes to be levied according to true value, but there is nothing in the provision which requires more than the taxation of property according to true value. Apparently the court still was blinded at this point by the notion that a gross receipts tax is always a property tax.

This case reveals the confusion caused by the uniformity provisions and the techniques that are used to apply and interpret them. To begin with the Mississippi provision was archaic and created a difficult situation for the legislature by denying it the power to classify property. The legislature, faced with the need for taxing freight line companies in a manner which would reflect their true wealth, misconceived the extent of its power under the Federal Constitution and levied a property tax. The court in turn showed little imagination in discussing the constitutionality of the tax, although it recognized that its interpretation was contrary to economic necessity. It tested the statute by the time tried technique of labeling the nature of the tax and found that it was prohibited by the constitutional limitation. Thus this limitation served only to prevent the legislature from equal-

284 122 Miss. 417 422, 84 So. 449, 450 (1920).
izing the tax burden. At best such a result contributes little to uniformity in taxation in the modern sense.

As a matter of fact, the Mississippi court failed to reach as enlightened a result as the one achieved by the Nebraska court in *Western Union Telegraph Company v City of Omaha*, decided fifteen years earlier. There the court, in applying a similar constitutional provision to a similar tax, made it plain that the statute could be sustained if the sections pertaining to the method of valuation and the nature of the tax were removed. After finding the statute invalid, the court said:

"There is nothing to prevent provisions of law similar to those affecting insurance companies from being applied to companies engaged in the express, telegraph or telephone business, so far as levying a tax upon their business as measured by the gross receipts is concerned. The only fault to be found with the sections applying to these occupations as they now stand is that the legislature said too much when it provided that the franchise should be valued, and the gross receipts taken as the measure of the value. The gross receipts may be taken as a proper measure of the amount of business tax to be levied upon such business, but may not be arbitrarily taken as a measure of the value of the franchise."

The distinctions made between the "property tax" theory and the "privilege tax" theory are significant only where the State's power to tax property is limited. Sometimes it is found, as in Minnesota, that "the state has the constitutional right to impose a tax upon the property within its borders, regardless of the use to which it is devoted by its owners, and, as a method of determining what is a fair and equitable property tax, it may permit the tax to be computed on the basis of a fixed percentage of the gross earnings of the property."

SECTION 4

Sales Taxes

A tax levied on the receipts derived from the sale of property differs very little from a tax on a corporation measured by a certain percentage of its gross receipts or earnings. Statutes providing for this type of tax are usually sustained on the basis that the subject of the tax is the privilege or occupation engaged in rather than the property itself. It is on this theory that a tax on every person in the state engaged in the business of selling any tangible property, real or per-
sonal, at a certain rate upon the gross receipts of the business is called an "occupation privilege sales tax," and not a property tax which would violate the constitutional requirement that taxes shall be uniform and ad valorem on all property subject to be taxed. Arguments invoking the idea that "property" is anything subject to ownership and that one's business and its earnings are owned by him and therefore are property, though often made, are not strong enough to overcome the privilege explanation. The fact that the tax normally is collectible only from those persons who are engaged in the business of selling is one of the factors which determines the nature of the tax. This feature of the statute outweighs the fact that the retail selling price of property is indicative of its value, and that a tax measured by value often is a property tax. Thus it is held in Lionel's Cigar Store v. McFarland, that a tax imposed by a statute which declares its object to be the levying of a tax upon retail dealers in tobacco is not a property tax although the statute further provides that "there is hereby levied a tax, in the sum hereinafter set forth, 'upon tobacco and tobacco products' of 10 per cent of the retail selling price of said products at retail." Also it is of importance that a tax on sales assessed at a percentage of the amount of sales is not a specific sum imposed on the sale of particular property, because this interpretation eliminates the possibility of attacking the statute on the ground that it taxes property without regard for its value, and therefore violates constitutional provisions requiring that property be taxed on an ad valorem basis.

The privilege theory, which most courts will find underlies the sales tax, makes this form of legislation one of the best methods available to the legislature in its efforts to reach sources of revenue otherwise protected from the burden of taxation by constitutional limitations on the power to tax. In upholding South Dakota's general sales tax imposed both on the sale of services and the sale of goods, and measured by a certain percentage of gross receipts, the court of that state emphasized this point by holding:

"It would appear, therefore, that, though this statute cannot reach the gross receipts dollar merely by calling it an income dollar or by imposing a tax upon it as such, it may be possible nevertheless, by virtue of the privilege concept, to reach the gross receipts dollar to some extent as the measure of the amount of a legitimate tax upon a privilege."

210 Rome v. McWilliams, 52 Ga. 251 (1874).
211 State ex rel Botkin v. Walsh, 61 S. D. 593, 251 N. W. 189 (1933).
In a somewhat similar way the Alabama legislature successfully imposed a five per cent net income tax on banks which employed money capital coming into competition with the business of national banks by defining the tax as an excise for the privilege of engaging in the business of conducting such a financial institution in the state. In sustaining the statute the court said:

“That the statute has provisions for ascertaining net income, such as deductions, exemptions and credits analogous to provisions of income tax laws, cannot affect the essential nature of the tax as one levied upon the privilege of doing a defined business.”

On the strength of interpretations much like those mentioned above a statute requiring any person operating any office building to pay a sum equal to one tenth of one per cent of the gross rents imposes a tax on the business of operating an office building rather than a direct tax on the building itself, and an ad valorem tax imposed by a city ordinance on the accounts receivable from the sales of dairy products is not a property tax, and therefore does not violate the uniformity clause of the state constitution because of certain exemptions made.

In the latter case the court found:

“A tax on a business or occupation because it is measured by the number of pieces of property used in said business, although the pieces of property are subject to ad valorem taxation, is not a tax on property within the meaning of the term as used in the Constitution. It follows that a tax on sales, which may constitute a part or all of the business of the party taxed, is not a tax on property within the meaning of the Constitution merely because the tax is measured by the accounts receivable resulting from sales.”

In addition to the advantages gained in the way of permissible exemptions and graduations under the privilege theory, its use precludes the raising of questions of double taxation which arises frequently under the uniformity provisions. For instance, in Michigan a sales tax and a tax on chain stores graduated by the number of stores do not constitute double taxation because the two taxes are on different privileges and are measured differently. Where the tax is thought of as a property tax it is much easier to find that the property has been subjected to taxation previously. Although retail sales tax legislation is almost always sustained on the ground that it does not

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213 Title Guarantee Loan and Trust Company v. State, 228 Ala. 636, 155 So. 305 (1934).
214 State v. Heymann, 178 La. 479, 151 So. 901 (1933).
216 Ibid.
impose a property tax, it does present to the courts some nice problems in labeling the nature of the tax. In *Wiseman v. Phillips*, the court put the point rhetorically by saying:

"What kind of tax is it? What is it a tax upon? Some of counsel say that it is a property tax, others that it is an occupation tax, and others that it is either a gross income tax or an occupation tax, while another says it has all the earmarks of a property tax. Counsel for appellant and those amici curiae supporting that view contend that it is neither a tax on property, an occupation tax, nor a tax on gross income; that it is an excise tax or privilege tax, and the argument is made with some force that it is a tax upon the right to acquire personal property by purchase for use or consumption."

After reviewing its previous decisions defining the nature of an inheritance tax, income tax, use tax and severance tax, the Arkansas Court solved the problem of the sales tax, so far as the uniformity provision was concerned, by finding that it, like the other taxes mentioned, was not a property tax. It took the wise position that there was no need to define the exact nature of the tax, and in so doing avoided the meaningless distinctions so often made in interpreting the uniformity provisions. The pitfalls incidental to the questionable practice of engaging in an unnecessary debate on the precise nature of the tax are revealed in a concurring opinion in the *Wiseman* Case. Johnson, C. J., considered himself governed by the decisions reviewed in the majority opinion, but he left no doubt as to his dissatisfaction with the result reached in them. In pointing out two reasons why the previous decisions should be overruled, he made some unusual statements both about constitutional construction and the nature of certain kinds of taxes. He said in part:

"Under settled principles of constitutional interpretation, these provisions of our Constitution should be treated as a limitation upon the powers of taxation. Since the Constitution prescribes what taxes may be levied, it impliedly prohibits any other kind of taxation not therein provided for. To specify is, to exclude is a maxim of interpretation. The Constitution specifies what taxes may be imposed. Therefore, no taxes may be levied which are not specified."

As a matter of fact the Arkansas Constitution contained a uniformity provision no different from that found in many state constitutions. It provided that: "All property subject to taxation shall be

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219 191 Ark. 63, 84 S. W. 2d 91 (1935).

220 *Id.* at 71, 84 S. W. 2d 95 (1935).

221 191 Ark. 63, 77 84 S. W. 2d 91, 98 (1935).
taxed according to value; that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State." To this general provision was added a more specific requirement that "No one species of property, from which a tax may be collected, shall be taxed higher than another species of property of equal value, provided, the General Assembly shall have power from time to time, to tax hawkers, peddlers, ferries, exhibitions and privileges. As to the nature of certain kinds of taxes it was said:

"Moreover, the line of cases last referred to should be overruled for still another reason. Fundamentally courts should be interested in realities and not nomenclatures. Realities are ignored in each of the cases referred to. An inheritance tax is a tax on property and not a hybrid tax. Likewise a severance tax is a tax on property, and not a cross-breed tax. Demonstrably certain is an income tax one on property and not an excuse tax as decided by a majority of this court in Sims v. Ahrens and Stanley v. Gates, supra. The two last mentioned cases are true hybrids, the offspring of illogic and misnomer.

"The sales tax is a property tax beyond questions, cavil or doubt, when measured by constitutional law and logic. The true rule is a tax on sale of an article is a tax on the article itself"

Not the least startling feature of such an attitude regarding the function of the uniformity provision, to say nothing of the remarks about inheritance, income, and severance taxes, is the fact that it was expressed in 1935, at a time when the state government of Arkansas, like many others, was faced with a grave financial crisis. On this point Johnson, C. J., said:

"Necessity of raising revenue should never be considered so urgent as to warrant courts to either ignore or rewrite the Constitution. For seventy-five years we treated article 16, section 5, as a limitation upon the Legislature's taxing power, and I perceive no good reason for overturning the wisdom of the ages and not only opening, but destroying the flood gates of taxation, and I fear the ultimate results."

It is safe to say that few judicial opinions contain so much "contrary dictum" in so few sentences as this "concurring" one. It represents the ultimate in the way of restrictive interpretation and narrow definitions made in the name of uniformity

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222 ld. at 71, 84 S. W. 2d at 95.
223 Ibid.
224 191 Ark. 63, 77, 84 S. W. 2d 91, 98 (1935).
225 ld. at 78, 84 S. W. 2d at 98.
Severance Taxes and Use Taxes

Statutes which impose a tax on the severance or production of property and on the use of property are two other types of legislation in which property value is taken as a measure of the levy. Both are sometimes contested on the theory that a tax on the right to extract natural resources or the right to put property to a particular use is a tax on ownership and therefore a property tax. The same general tests in terms of the nature of the tax are applied to this type of legislation, and the distinctions discussed above relating to property tax theories and privilege tax theories also are applied by the courts in upholding or invalidating these statutes. Thus the courts in one line of cases uphold a "gross production" tax equal to two percent of the gross value of the production of certain minerals as a tax on the business of mining or producing minerals, and find that a statute providing that every person engaged in the business of operating a coal mine shall pay a "license or privilege tax" in an amount equal to two cents per ton on all coal mined is not a property tax upon the coal, but an occupation tax on the business of mining measured by the tonnage. Similarly, a tax on crude oil equal to one per cent of the market value, a severance tax on oil and gas measured by the number of gallons, and a tax on the business of mining and drilling oil measured by the value of the articles produced as shown by gross proceeds of their sale, with a different rate for different products, do not violate the constitutional limitations applicable to property taxes. The court so held in *Floyd v Miller Lumber Company*, where the statute provided in very broad language for the tax on the business of "severing from the soil or water for commercial purposes natural resources" including timber, ores, and other minerals. However, Mr. Justice Wood dissented in the *Floyd Case* giving rather eloquent expression to the property tax theory. He said:

"The owners of the lands and waters containing the various natural resources are, by virtue of such ownership, also owners of the natural products at which this act was leveled. Those products give to the lands, as shown by the facts alleged, and which are by the demurrer admitted to be true, their only value. The only possible use that can be made of these products is by severing them..."
from the soil and water for commercial purposes. To deprive the owners by law of this use would be virtually a confiscation of their property, and to tax this use is to tax the only available purpose or use which the property has. Some of the timbers to be cut, as shown by the facts, are on lands situated on islands that are not susceptible of cultivation, and much of it is on tracts that can never be available for homestead or agricultural purposes. There the timber thus situated cannot be and is not to be used for fencing purposes, or ornamental shade trees, or other uses about a home and farm. Likewise, the various other natural products named cannot be used and have no value whatever, unless they are severed from the soil and water for commercial purposes. Such is the plain common sense meaning of the words of the statute. Since the act levies a tax on the business of severing from the soil or water for commercial purposes natural resources its lays upon owners of such resources a tax burden which restricts them from the free enjoyment and use of these resources. It follows that a tax on the attributes of ownership is a tax on the property itself."

Generally the reasoning suggested by the dissent in the Floyd Case is followed in the line of decisions which hold that severance and production taxes are property taxes, although considerable emphasis is placed on the way the tax is levied or assessed. The latter factor is evident in the case where a statute required all corporations organized under the laws of the state for the purpose of mining to pay a tax on each ton of copper and iron ore mined, shipped or disposed of. The tax was held a property tax because the levy was in lieu of all taxes or assessments upon the capital stock, personal property, and real property of the corporation. The same result was reached where a statute providing for the taxation of the gross products of all mines being worked required the state board of equalization to assess the value of the gross products like any other property.

In Thompson v McLeod, the Mississippi Court placed its decision squarely on the reasoning pointed out by Mr. Justice Woods. The legislature passed a statute imposing a tax of a certain amount per cup or box for the privilege of carrying on the business of extracting turpentine from standing trees. The court found that the tax was a property tax within the meaning of the constitutional provision that property shall be taxed in proportion to its value, and further that since the land was already taxed that the statute was invalid because it provided for double taxation. In describing the tax the court asserted:

"The act under review does not levy a privilege tax on the right of selling resin or gum from the tree as originally ex-

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281 State v. Lakeside Land Company, 71 Minn. 283, 73 N. W. 970 (1898).
282 Miller v. Buck Creek Oil Company, 38 Wyo. 505, 269 Pac. 43 (1928).
283 112 Miss. 383, 73 So. 193 (1916).
284 112 Miss. 383, 388, 73 So. 193, 194 (1916).
tracted, but the privilege, if any, which is taxed is the privilege or right of the owner or lessee of pine trees to 'extract' turpentine from standing trees. It is true the act in other language refers to it as a business—a business of extracting turpentine from standing trees. The imposition of such a tax is not on a business, but on the property involved."

Then the court interjected into its decision an aspect of the familiar argument that to tax the ownership of property is to tax the property by saying rather unusually.237

"This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck its grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to pull the ripe pecans from his pecan orchard, or to enjoy a drink of pure water from the cool spring of the old homestead."

SECTION 6

The "Ownership" Theory

In spite of its frequent use, the idea that a tax levied by reason of ownership is a tax on the property is just as unsatisfactory a test in "uniformity" cases as the other tests described above, and its application results in just as many conflicting opinions as to whether specific tax legislation is subject to the constitutional limitations on the power to tax. A court is just as apt to find that a statute imposes a privilege tax after applying the "ownership" rule as it is under any other criterion, and vice versa. In Lutz. v Arnold,238 for example, the court had before it a tax imposed by a statute providing that every person residing in the state should pay a fee for the right to exercise any one or more of the following privileges: signing, executing, and issuing intangibles; selling, signing, transferring, renewing, removing, consigning, mailing, shipping, trading in and enforcing intangibles; receiving the income, increase, issue, and profits of intangibles; having and possessing the right to transmit the same by will, and of making gifts of them and of having the right to allow such property to pass to other persons by descent under the laws of the state; and for the right to have such intangibles separately classified for taxes. The legislation studiously avoided making the intangible property itself the subject of the tax, and therefore it was attacked on the grounds that the privileges named were privileges of ownership, and because of this the statute was an invalid attempt to tax property contrary to the rules of uniformity. The court found the tax was an excise because the

237 Ibid.
238 208 Ind. 480, 193 N. E. 840 (1935).
statute on its face did not attempt to impose a tax on the property, because it fixed the rate of the tax and the method of measuring the amount, and because the tax was not payable until the privileges set out in the act were actually exercised. As for the argument that the privileges represented incidents of ownership the court said:

"The tax imposed may be said to be an excise upon the particular privilege or privileges enumerated in doing certain things. There is a distinct difference between the mere ownership of property and the performance of certain acts of business. It is contended that the act in question does not tax the exercise of any privilege, but the right to exercise the incidents of ownership, and the right to devote the property to the only use to which it is adopted. We do not assent to this contention. The same contention could be made of the gasoline tax and other like taxes. The only use the owner of an automobile can have is to operate it, but in order to operate it, the gasoline must be used and the tax on the gasoline is an excise tax."

Other states have passed so-called intangibles tax statutes in recent years, and the courts have sustained them by calling them excises as was done in the Lutz Case without any indications that the ownership idea should control.

On the other hand, there is little to distinguish the Lutz Case from Hixon v. School District except that a precisely opposite result is reached. In the latter case the statute imposed on the state treasurer and county treasurers a tax of one per cent of the face value of all warrants paid by them, and required the amount to be deducted from the warrants and deposited in the state treasury to the credit of the old-age pension fund. The court found the tax was not a privilege or an excise tax but a tax on property. Adopting clearly the "attributes of ownership" proposition in its decision, the court found:

"In substance and in legal effect the tax is a tax on property. No definition of property can be framed which does not include the right of ownership. Property, therefore, in its broad and legal sense, is not only the physical thing which may be the subject of ownership, but is the ownership itself. The essential attributes of ownership are the right of dominion, possession, enjoyment, and disposition. A warrant represents a certain value in money. Ownership of the warrant involves the right to receive and possess the money. This right is an attribute of ownership, and therefore of property; and a tax on its exercise or enjoyment is a tax on property."

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239 208 Ind. 480, 488, 193 N. E. 840, 844 (1935).
241 187 Ark. 554, 60 S. W. 2d 1057 (1933).
242 Id. at 559, 60 S. W. 2d at 1028.
In point of fact there is as much reason for calling this tax on warrants a business or privilege tax as there is in the Lutz Case for saying that the transfer of intangibles, et cetera, by any individual constitutes a “doing of business” sufficient to establish “a distinct difference between the mere ownership of property and the performance of certain acts of business.” In the same way it is difficult to see that the attributes of ownership enumerated in the Hixon Case, i.e., dominion, possession, enjoyment and disposition, are not, for all practical purposes, taxed successfully in the Lutz Case. Use of the “ownership” rule is just another way of engaging in analytical conceptualism and gains a court nothing more than the satisfaction of having something to point to in justification of the result reached in the particular case. At least it does not provide the legislator or taxpayer with any realistic standard to use in judging the legal effect of specific tax legislation, or of the uniformity provisions. Perhaps it is impossible to formulate a definitive test, but this one is vulnerable to the criticism made before that a test concerned exclusively with the nature of the tax fails to reflect all the factors involved. Not the least important of these additional factors is whether the court thinks the constitutional limitation on the power to tax should be invoked.

There is no better illustration of the logic the courts are prone to engage in when applying these rigid conceptualistic tests than the Supreme Court’s decision in Dawson v Kentucky Distilleries and Warehouse Company. In 1920, the legislature of Kentucky passed a statute which imposed a so-called annual license tax upon every person engaged in the business of manufacturing whiskey or “in the business of owning and storing” it in bonded warehouses within the state. The levy provided for was a tax of fifty cents a gallon upon all whiskey either withdrawn from bond or transferred in bond from Kentucky to a point outside that state. The case came to the Supreme Court on direct appeal from the District Court’s finding that the tax was on property. It was admitted that if the tax was a property tax, it violated Kentucky’s constitutional provision requiring uniformity. Mr. Justice Brandeis delivered the opinion of the Court and sustained the lower court’s finding. Largely through a process of elimination he found that the tax, as had been stated by the District Court, really was upon “the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i.e., consumption, sale, or keeping for future consumption or sale.”

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243 255 U. S. 288 (1921).
244 255 U. S. 288, 294 (1921).
finding this act to be the subject of the tax, Justice Brandeis con-
cluded: "To levy a tax by reason of ownership of property is to tax
the property."

It is even more interesting to see how the "business or occupation"
theory, which the legislature had expressly provided for, stood up
under Justice Brandeis' examination. He found the tax had none of
the ordinary incidents of an occupation tax because a particular lot
of whiskey could pass through a dozen or more bonded warehouses
without one of them being required to pay the tax. Only the ware-
houseman who had the whiskey on storage at the time of its removal
from bond or transfer in bond to another state had to pay the tax.
Further, the business of merely owning and storing whiskey in bond
was not made taxable for so long as the whiskey was stored in bond
within the state it was free of the tax. Likewise he found the tax was
not imposed upon the business of owning, storing, and removing
whiskey from bond for the tax "would become payable on account of
whiskey removed, although there had not been storage for any ap-
preciable time; thus, the tax would be payable on whiskey if it had
been removed from the warehouse immediately after the approval of
the act." Nor, in his opinion, was the tax one on the business of
removing liquor owned for the tax was payable in respect to any lot
of whiskey removed, and "a single transaction does not constitute
engaging in the business, be it that of buying and selling whiskey or
in the business of otherwise using it." Thus it is seen that the
legislation failed to achieve the purpose intended by the legislature
on a great many counts.

It would be presumptuous to question the decision of Mr. Justice
Brandeis directly on the facts in the particular case. However, in
view of the Lutz Case, and others like it where the privilege theory
is used to sustain legislation hardly distinguishable from the instant
statute, and the general confusion which has resulted from applica-
tion of the "ownership" formula, the present effect of the Dawson Case
is an entirely different matter. The Supreme Court has had a similar
opportunity to pass on the nature of certain kinds of taxes in its
effort to formulate an answer to the question: what is a direct tax?
The cases on which its theory is based have been treated thoroughly
many times, and an exhaustive reexamination of them is not necessary
at this point, but a brief review is essential to a better understanding
of the Brandeis opinion and the discussion of taxes which may be
labeled property or non-property

255 U. S. 288, 293 (1921).
246 Id. at 294.
Prior to the Pollock Cases of 1895, it was reasonably clear that the Supreme Court considered only capitation taxes and taxes on land as direct within the meaning of the Constitution. Beginning with the dictum to this effect in the Hylton Case, the idea was followed in a number of well-known cases. In Pacific Insurance Company v Souls, the court held that a tax on incomes of insurance companies was an indirect tax. In Veazie Bank v Fenno, a tax on state bank notes was held an indirect tax and the Hylton Case again was relied upon. In Scheley v Rew, an inheritance tax was classified as indirect, and in Springer v United States, the same result was reached on an income tax imposed on individuals. In the last named case the court said:

"Our conclusions are that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate"

In all these cases the similarity between the problem of apportionment under the Federal Constitution and the problem of uniformity under the state constitutions is very apparent. In both situations the constitutional provision serves as the principal limitation on the taxing power, and the wording of the provisions has led the courts to adopt a method of classifying taxes according to their nature in applying the limitation.

When the Supreme Court declared the income tax law of 1894 unconstitutional in the Pollock Cases, it not only started an endless controversy about what that decision actually held, but it created considerable uncertainty as to the legal nature of taxes in general. Most of this uncertainty stemmed from a phrase in the opinion of Chief Justice Fuller when he asked the question:

"Can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership, and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?"

Whether the phrase: "although imposed merely because of ownership"

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247 Hylton v. United States, 3 Dall. 171 (U. S. 1796).
248 7 Wall. 433 (U. S. 1868).
249 8 Wall. 331 (U. S. 1874).
250 23 Wall. 533 (U. S. 1869).
251 102 U. S. 586 (1890).
252 Id. at 593.
253 157 U. S. 429 (1895); 158 U. S. 601 (1895).
254 158 U. S. 627-628 (1895).
was an essential part of the decision is a moot question, but it was
taken up by later courts and developed into a decisive basis for
classifying taxes. In *Nicol v Ames*, the first case after the income
tax decision, the Court passed on the constitutionality of a tax levied
upon sales at business exchanges. It held that the tax was on the
"privilege, opportunity or facility offered at boards of trade or ex-
changes for the transaction of the business mentioned in the act." This
was a rather unusual way to sustain the tax and resulted from the
Court's interpretation of the decision in the *Pollock Case*. If, as the
court implied, a tax on property as such was a direct tax then a tax
on sales logically would have been a direct tax although it had always
been considered an excise. Finally in *Knowlton v Moore*, the Court
came face to face with its previous decisions emphasizing the "own-
ership" interpretation of the *Pollock Cases*. The statute involved im-
posed a succession tax upon legacies or distributive shares of per-
sonality passing at death, and counsel argued that there were certain
inherent rights of ownership, and that to tax these rights was to tax
the property owned. Further, it was contended that the right of
transmission upon death was such a right. This argument was based
on the assumption that the first step in establishing that a tax is direct
is to show that it is a property tax. It differs little from the argument
advanced so often in the "uniformity" cases. Although the court
reasserted the proposition previously implied in the *Nicol Case that a
tax on property because of ownership is a direct tax, it held that an
inheritance tax was not upon an inherent right of ownership to trans-
fer property after death. Instead it found that the tax was on a pri-
vilege. Two years later, in *Patton v Brady*, the Court again found
that a tax upon manufactured tobacco in the hands of a dealer was
an excise tax and not a tax on property as such. With very little
elaboration of its doctrine other than to quote definitions of excises the
Court continued to find that few, if any, taxes were direct.

In *Thomas v United States*, a stamp act on sales of certificates
of stock was called a privilege tax because the sale of stock was but
a particular business transaction in the exercise of the corporation's
privilege to dispose of property in the form of certificates. In *Spreckele
Sugar Refining Company v McClam*, a tax upon the gross annual
receipts of any corporation carrying on the business of refining sugar

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173 U. S. 41 (1900).
178 U. S. 608 (1902).
184 U. S. 608 (1902).
192 U. S. 397 (1904).
192 U. S. 363 (1904).
was held an excise, and in *Flint v Stone Tracy Company*,\(^{200}\) previously discussed, the corporation income tax was upheld as an excise upon the privilege of engaging in the insurance business. In *Brushaber v Union Pacific Railroad Company*,\(^{201}\) in which the Sixteenth Amendment was interpreted, Chief Justice White carefully maintained that from the time of the *Hylton Case*, "it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership;" and in *Stanton v Baltic Mining Company*,\(^{202}\) it was held that a tax on the product of mines was not a direct tax on property because inadequate allowance was made for exhaustion of the body of ore, but that it was an excise on the mining operations.

Thus, then, was the general background on the Supreme Court's theory of a direct tax at the time of the *Dawson Case*. To put it another way, when the Court decided that the Kentucky statute imposed a property tax and therefore was in violation of the uniformity provision of the Kentucky Constitution, it had said for a number of years that a tax levied on property because of ownership was a direct tax, but when presented an actual act of Congress for analysis had always decided that the tax was an excise. In spite of the Court's verbal adherence to the "ownership" theory, it had never found a tax levied by the Federal Government to be a tax on property since the *Pollock Cases*. In *Knowlton v Moore*,\(^ {263}\) the argument that a tax on an inherent right of ownership was a tax on the property was denied; and in *Billings v United States*,\(^{264}\) and *Pierce v United States*,\(^ {265}\) both decided before the *Dawson Case*, the Court had expressly pointed out the difference between a tax levied merely because one owned property and a tax levied on the use of property. The court in the *Dawson Case* gave the Kentucky tax a label it had never been willing to use under the Federal Constitution. The fact that Justice Brandeis cited two cases decided by the Court of Mississippi in support of his proposition that "to levy a tax by reason of ownership of property is to tax the property" is an interesting point in this respect.\(^{266}\) One of these cases was *Thompson v McLeod*, discussed at length above,\(^ {207}\) where the court found that the right to extract turpentine from standing trees

\(^{200}\) 220 U. S. 107 (1911).
\(^{201}\) 240 U. S. 1 (1916).
\(^{202}\) 240 U. S. 103 (1916).
\(^{203}\) 178 U. S. 608 (1902).
\(^{204}\) 292 U. S. 261 (1913).
\(^{205}\) 232 U. S. 288, 294 (1913).
\(^{206}\) 255 U. S. 290 (1920).
\(^{207}\) See discussion at p. 395 et seq.
was the only use to which the property could be put and that a tax on that right was a property tax.

If it is possible to rationalize the Dawson Case with the other Supreme Court cases pertaining to the nature of taxes, it is on this basis: that a tax levied on the only use to which property can be put is a tax levied by reason of ownership and therefore a tax on the property. This is the explanation of the case implied by Mr. Justice Stone a few years later in Bromley v. McCaughn.\(^2\) In that case the Court sustained a tax on gifts inter vivos as an excise. Mr. Justice Stone rested his opinion squarely on the long line of cases in which the Court had consistently used the excise theory to eliminate the need for apportioning the tax. As to these cases and their relation to the "ownership" doctrine, he said:\(^3\)

"It is true that in each of these cases the tax was imposed upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner regardless of the use or disposition made of his property."

When citing the Dawson Case he commented as follows:\(^4\)

"Even if we assume that a tax levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property, and hence a direct tax requiring apportionment, that is not the case before us."

Finally Justice Stone made a highly significant statement as to the basis of the distinction made by the Supreme Court in all the cases discussed:\(^5\)

"The persistence of this distinction and the justification for it rest upon the historic fact that taxes of this type were not understood to be direct taxes when the Constitution was adopted and, as well, upon the reluctance of this Court to enlarge by construction, limitations upon the sovereign power of taxation by Article I, section 8, so vital to maintenance of the National Government."

It cannot be denied that the use of the "ownership" theory in the Dawson Case enlarged by construction the limitations upon the sovereign power of taxation contained in the uniformity provisions, a power vital to the state governments. On the other hand, it is apparent that courts which are reluctant to enlarge the limitation can find ample high authority for using the label "excise" rather than the label "property."

\(^2\) 280 U. S. 121 (1929).
\(^3\) 280 U. S. 124, 137 (1929).
\(^4\) Id. at 138.
\(^5\) Id. at 173. Emphasis added.
Summary

As was stated at the outset in this discussion of taxes which may be labeled property or non-property, there is no certain and final basis for determining into which category a tax will fall in every case. In spite of a tendency to engage exclusively in an analysis of the nature of the tax, the courts undoubtedly realize the significance of the labeling technique. As Justice Stone pointed out in explaining a comparable situation under the Federal Constitution, a decision defining the nature of the levy imposed by any particular tax statute is necessarily influenced by the court's willingness or reluctance to invoke a constitutional limitation on the legislature's power to tax. However, the courts are not guided entirely by whim, and most of them follow certain influential factors regarding the nature of taxes. Although these factors are broad and general, they are reasonably well defined and bear repeating by way of summary.

The courts apply two tests to determine in a general way whether a tax is one levied on property or is an excise, privilege or occupation tax. One test emphasizes the method of levying the tax and the other stresses the object or purpose of the tax. In applying these tests the courts hold that a tax on capital stock is a privilege or franchise tax unless it is levied in a manner so similar to taxes on property as to represent just another tax on corporate property. If the legislature chooses to measure the amount of the tax by a percentage of gross receipts as a more direct indication of the amount of business done or privilege enjoyed, the courts sustain the legislation as a privilege or occupation tax unless the statute contains some earmark of a property tax such as a provision making the levy in lieu of all other taxes. The courts meet any argument that a tax measured by gross earnings or gross receipts is really a tax on those receipts and earnings directly, and therefore a property tax, by pointing out that the true object or purpose of the legislation is to impose a tax on the corporate privilege and that gross receipts are merely used to measure the tax. This explanation or theory as to the nature of a gross receipts tax is not contrary to those Supreme Court cases which call such a tax a property tax because the primary concern of the Court in those decisions is to establish a distinction between taxes obviously levied on gross receipts derived in part from interstate commerce, and taxes which are enacted by the States in a legitimate exercise of their power to tax. In respect to this particular problem, a state can exercise its legitimate power to tax by imposing a tax on a business or privilege as well as by taxing
property. In either case the purpose of the tax, although measured by receipts derived in part from interstate business, clearly is not to burden interstate commerce. Use of the business tax theory rather than the property tax theory will circumvent the constitutional limitation of uniformity applicable to property taxation.

The courts find that a tax levied on receipts from the sale of property is similar to other taxes measured by gross receipts and they test and sustain the legislation imposing it in a similar way. In fact, they recognize that the privilege theory underlying the sales tax, gross receipts tax, and other business taxes makes this type of legislation one of the best available to the legislature in its quest to reach sources of revenue otherwise protected from taxation by the uniformity provisions.

The courts sustain severance and production taxes levied on the privilege of extracting natural resources or putting property to some other use, and find that such taxes are non-property in character on the theory that the legislation imposes an excise, privilege or business tax rather than a tax on the property extracted, produced, or used, as such. There are a good many vigorous judicial opinions to the contrary, however, based on the idea that a tax on the attributes of ownership is a tax on the property itself. Whether this “ownership” test is of great value, or whether it will be applied by every court is problematical. It is used in Mississippi to invalidate a tax levied on the privilege of extracting turpentine and resin from standing trees, but not used in those states which sustain a tax levied on virtually all the uses to which intangible property is put because of ownership. The doctrine was adopted, and therefore is strengthened, by the Supreme Court in the case of Dawson v Kentucky Distilleries and Warehouse Company. However, the Supreme Court has been unwilling to use the “property tax” label when passing on the nature of many taxes under the Federal Constitutional provision requiring the apportionment of direct taxes, and its decisions afford ample authority for sustaining many kinds of taxes as excises.
CHAPTER VII

TAXES CLEARLY NON-PROPERTY IN NATURE

SECTION 1.

In General

Legislation imposing taxes clearly non-property in nature is characterized in a broad way as excise tax legislation. Its outstanding features, as pointed out in the analysis just made of taxes which may be labeled property or non-property, are that it imposes a levy on privileges rather than directly against property, and that it is not subject to the same restrictive rules of uniformity applicable to property taxation. In a sense the real reason for so designating a tax is implicit in these two ideas for they indicate the effect of the constitutional limitation requiring uniformity in taxation on this type of legislation and the method used by the legislature to avoid this restriction. Moreover, as was the case with taxes clearly in the nature of property taxes, the effect of the constitutional limitation is felt at a later point in the court's decision. That is to say, when a court rules on the constitutionality of this type of legislation, its concern with the nature of the tax is secondary to a consideration of problems of classification and exemption. To put it in still another way, if there is a critical question as to the nature of the tax which will permit the court's decision to go either way, the effect of the constitutional restriction is apparent immediately; but, if the nature of the tax is clear, the constitutional provision merely serves as a basis for prescribing the limits within which the legislature must exercise its power to classify and exempt the subjects of taxation.

The cases involving this type of legislation present few problems that have not been mentioned or discussed previously, but they do place greater emphasis on questions pertaining to the legislature's power to tax. Also, some of the cases afford a good opportunity to understand more fully the answer to three questions which run through all phases of this study. What feature in a statute makes the tax non-property in nature and therefore not subject to an absolute rule of uniformity? How far may a legislature go in classifying subjects in the imposition of an excise tax without violating the uniformity provision? What are some of the questions of policy underlying the levy of excises according to one rule of uniformity and taxes on property according to another rule?
SECTION 2.

The Inheritance Tax: A Typical Excise

In spite of an occasional historical contention to the contrary, an inheritance tax is the clearest sort of excise or privilege tax in the legal sense. This is true although property is the item of wealth involved and serves as the means for measuring the tax. Whether it is found that the subject of the tax is "the interest which ceased by reason of death," or the "privilege of inheriting," or "the transmission of property," or the "right of succession," the tax is not on property, and that is the important thing when testing the statute for uniformity. As was stated by the Supreme Court in Knowlton v. Moore, an inheritance tax is a death duty and "predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy."

A more elaborate statement regarding the nature of an inheritance tax as well as the constitutional basis for the legislature's power to impose such a tax is made by the court in In Re Morris Estate. After tracing the history of death duties, the court said:

"The fallacy in the argument of counsel for the Executors is in assuming that the tax is a tax upon property, and therefore should be uniform and levied in conformity with the requirements of the Constitution. If we concede his premise, we should have no difficulty in arriving at his conclusion. The theory on which taxation of this kind on the devolution of estates is based and legality upheld is clearly established and is founded upon two principles: 1st, A succession tax is a tax on the right of succession to property, and not on the property itself. 2nd, The right to take property by devise or descent is not one of the natural rights of man but is a creature of the law. Should the supreme law abolish such rights the property would escheat to the government or fall to the first occupant. The authority which confers such rights may impose conditions upon them or take them away entirely. Accordingly it is held that the States may tax the privilege, grant exemptions, discriminate between relatives and between these and strangers, and are not precluded from the exercise of this power by constitutional provisions requiring uniformity and equality of taxation. Neither is it necessary to the validity of the tax that the State Constitution should contain a specific delegation of power authorizing the Legislature to impose such...

272 Knowlton v. Moore, 178 U. S. 41, 49 (1899).
273 State v. Hogg, 128 Tex. 568, 72 S. W. 2d 963 (1934).
274 In Re McKennon's Estate, 25 S. D. 369, 126 N. W. 611 (1910).
275 Dixon v. Ricketts, 26 Utah 215, 72 Pac. 947 (1903).
276 Knowlton v. Moore, supra note 272, p. 125, at 47.
277 138 N. C. 259, 50 S. E. 682 (1905).
278 Id. at 262, 50 S. E. at 683.
taxation. The power of the Legislature over the subject of taxation is absolute unless restricted by the Constitution of the State or Nation. Upon the grounds we have stated inheritance or succession tax laws have been uniformly held to be valid and to infringe no constitutional provisions, Federal or State.”

From the clear assertions made here, it is possible to formulate a partial answer to the questions posed above. Whether it is the only answer remains to be seen. Under the doctrine of the Morris Case, if the statute clearly shows that the tax is imposed on a right which is a “creature of the law”, it is not a tax on the property. Similarly, the same authority which creates that right or privilege can tax it. Since the legislature has the power to tax, it can grant exemptions or “discriminate,” and is not “precluded from the exercise of this power by constitutional provisions requiring uniformity and equality of taxation.” In other words, if the state can grant a right or privilege, it not only can tax the privilege, but, as a matter of basic constitutional interpretation and policy, it can exercise that power to grant exemptions and to discriminate without violating the constitutional provision for uniformity. The implications of this doctrine are worthy of the closest attention.

It is indeed misleading to conclude that a legislature’s power to impose this type of legislation is entirely unlimited in every case. Although the broad statement in the Morris Case that succession tax laws in no way infringe upon the constitutional provisions of the Federal or State Constitutions probably is true when applied to the general principles underlying the nature of the tax, it is not entirely accurate in describing the effect of some uniformity provisions on the legislature’s power to discriminate. In this respect it is clear that the equal protection clause of the Fourteenth Amendment to the Federal Constitution is not a major barrier to a reasonable exercise of the state legislature’s power to classify, but, in a few instances at least, certain provisions in an inheritance tax statute may violate the uniformity provision of the state constitution. An interesting example of this kind of situation arises when the legislation includes a progressive rate feature. The solution of the problem presented by such a feature is complicated to some extent by the decisions of the Supreme Court on the point.

The doctrine and language used in the Morris Case appeared initially in Mr. Justice McKenna’s opinion in Magoun v Illinois Trust and Savings Bank, where the Supreme Court upheld a comparatively early inheritance tax statute enacted in Illinois. In this case the Court

—170 U. S. 283 (1897).
found that an inheritance tax statute which established classes on the basis of remoteness of relationship to the decedent, and provided rates graduated according to the value of the inheritance did not violate the Fourteenth Amendment to the Federal Constitution. In addition the Court found that a statutory scheme for the progression of rates did not violate the equal protection clause. On this critical point the Court said:

"It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily made, and hence that an inheritance of $10,000 or less pays 3 per cent, and that one over $10,000 pays not 3 per cent on 10,000 and an increased percentage on the excess over $10,000 but an increased percentage on the $10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of ten thousand and one dollars by the deduction of the tax receives $99.04 less than one who is given a legacy of $10,000. But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment."

On the question of whether this progression feature violated the uniformity provision of the Illinois Constitution the Court adopted the finding of the Illinois court that it did not. The Court did not actually examine the question exhaustively for itself.

After the Magoun Case was decided the courts in a number of states upheld similar provisions in inheritance tax statutes by simply repeating the reasons given by the Supreme Court in this decision which were paraphrased in the Morris Case opinion quoted above. Not too long after the Magoun Case was decided the Supreme Court undermined that decision somewhat by intimating in Knowlton v Moore that the fact the state has the right to control the transmission of property by devise or succession has nothing to do with the power of the state to tax transmission of the property any more than the power to create corporations, and to give them the right to do business, would empower a state to disregard its Constitution in taxing such business. Furthermore, the language of the court in the Knowlton Case, where the question of the effect of the uniformity clause in the Federal Constitution was raised, left the impression that the federal inheritance tax statute, which included a progressively graduated rate feature similar to the statutes enacted in a number of states, would violate the requirements of uniformity under the state constitutions.

\(^{290}\) Id. at 300.

\(^{291}\) See for instance: Re Manes Estate, 32 Colo. 527, 77 Pac. 853, (1904); Appeal of Nettleton, 76 Conn. 235, 56 Atl. 565 (1903); In re Foxes Estate, 154 Mich. 5, 117 N. W. 558, (1908); State ex rel Taylor v. Guilbert, 70 Ohio St. 229, 71, N. E. 696 (1904); Hummacker v. State, 129 Wis. 190, 168 N. W. 627 (1908).
This combination of factors opened the way for considerable controversy in the state courts as to the effect of the uniformity provisions on the legislature's power to classify and discriminate in levying an inheritance tax. The particular problem of progressive rates was further complicated by the fact that it could not be solved merely by determining the nature of the tax. Even if the legislature was conceded broad powers to classify, the imposition of a progressive rate might exceed its power as limited by the uniformity provision. Under those circumstances the court in *In Re McKennan's Estate*, examined in some detail the constitutionality of a progressively graduated inheritance tax statute from the standpoint of uniformity in taxation as required by South Dakota's Constitution.

The uniformity requirement in that constitution appeared in the so-called Bill of Rights section, and again in the revenue section where its application clearly was limited to taxes on property. The "Bill of Rights Clause" provided: "No tax or duty shall be imposed without the consent of the people or their representatives in the Legislature, and all taxation shall be equal and uniform." After careful study, the court found that this provision did not prevent the legislature from providing for classification and progression if the classification and progression were based on a proper foundation and resulted in substantial uniformity and equality. In fact, the court pointed out that in the case of inheritance taxes there could be equality only where there was classification and asserted that such classification must be based "on some reasonable ground—some difference which bears a just and proper relation to the attempted classification." In this regard the court construed the constitutional provision so that it was no more restrictive than the ordinary provision requiring uniformity within the class.

Nevertheless, in spite of the liberal interpretation given the "out of place" uniformity clause, the court found that enactment of the progressive inheritance tax statute exceeded the legislature's power to "discriminate." In so finding the court not only prescribed limits for the legislative power, but also cast some light on the questions of policy involved in reconciling the legislature's power to impose a tax clearly non-property in nature with a liberal constitutional standard for uniformity.

To begin with the court found that the clause requiring all taxation to be equal and uniform meant that the tax burden imposed should
fall alike on all persons in substantially the same situation, and that within the boundary of this limitation were broad fields of legislative discretion which should not be invaded by the courts. Further, the court thought that it was clearly a greater privilege for a person having no natural claims upon the deceased to inherit his property, because during the life of the deceased his family might have helped acquire the property and undoubtedly would have been legally required to support him. Too, the court had no trouble finding that because of the public policy against allowing large fortunes to be held together by an undivided transmission upon the death of the owner, it was a greater privilege or right to take a large inheritance than a small one. The court was willing to extend this idea to include the additional premise that the privilege or right to take could be greater not only in proportion to the value of the inheritance, but also out of proportion to such value. Thus it could be said that it was a greater privilege to take the second $10,000 of an estate than the first $10,000.

To this point the court found no conflict between the policies underlying the taxation of the privilege and those represented in the concept of uniformity. However, when a comparison in methods of progression was made, the conflict was found and a line was drawn. The court pointed out that there were two possible methods of letting the rate progress from transmissions of less value to those of greater value. In the first, the higher rate, in case of transmission of a greater devise or bequest, was levied on the whole value of property transmitted. This was the method adopted in the instant statute. In the second, the increased rate applied only to the excess, in value of property transmitted, over the amount subject to the next lower rate. This was the method adopted by statutes in other states.

The first method was rejected on the ground that it created inequality in taxation. Although the court became involved in some rather tortuous mathematical demonstrations to prove its point, two general reasons were set forth for rejecting the first method progression. First, it was found that under that method the recipient of a larger amount of inheritance was less able to pay a larger rate of tax than the recipient of a smaller amount. This was considered a clear violation of uniformity although the Supreme Court in the Magoun Case expressly stated that such a result was not unequal under the Fourteenth Amendment to the Federal Constitution. Secondly, although the court admitted that the legislature could place a limit in value above which all transmissions would go to the state, it found that there must always

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2See discussion p. 408 et seq.
be an increase in net benefit whenever there is a greater transmission if a progressive tax rate imposed on that benefit or privilege is to be uniform. Thus the court in *In Re McKennan's Estate* drew a nice and precise conceptual line beyond which the legislature could not go.

SECTION 3.

*Implications in In Re McKennan’s Estate*

What is the value of the *McKennan Case*? Did the court really succeed in laying down an effective guide for levying an inheritance tax so the burdens of taxation would be uniformly borne by taxpayers similarly situated? Are there any tangible principles in the case on which to predicate helpful and realistic concepts for judging other types of taxes that are clearly non-property in character? It is suggested that this case, in spite of the pains taken by the court to produce an exact and final test for the meaning of uniformity under the circumstances, contributes very little to the quest for certainty in this type of problem. At most it merely demonstrates how a uniformity provision, even when liberally construed, can be used to declare unconstitutional a tax statute which includes a provision the court considers unfair.

On the other hand, the courts must invade the broad field of legislative discretion at some point to restrict that discretion in light of the relevant constitutional language. The point is that the concept of uniformity is little more than the nearest available weapon when such an invasion is made. The *McKennan Case* is as good a case as one will find to illustrate that most legal problems of uniformity in taxation are really a contest between the legislature in its exercise of a broad power to tax and the courts in their exercise of an equally effective power to interpret constitutional limitations on that power. Theoretically at least the taxpayer is entitled to have his share of the burdens of taxation determined by this contest. Whether that burden is really uniform and equal or not depends on many things besides the restricted issues involved in the constitutional controversy. To this extent the uniformity provisions cloud the issue and serve little practical purpose or function.

A tendency to complicate unnecessarily the problem of uniformity is another weakness in some of the earlier cases like the *Morris Case* and *McKennan Case*. Probably because the requirement for uniformity is a constitutional requirement, the courts in these cases seem to go out of their way to rationalize the tax statute with their notion of
uniformity by engaging in lengthy and involved examinations of the nature of the tax, theories underlying its imposition, and the way it is levied. As a result, the importance of the uniformity provisions is overemphasized because there is no reason to believe these provisions were written into the constitutions for the purpose of subjecting the taxing power to broad and general limitations. When a court attempts to establish a distinctive doctrine as to the nature and theory of an inheritance tax, as was done in the *Morris Case*, or to draw fine lines of distinction between two methods of imposing a progressive rate, as was done in the *McKennan Case*, it may lose sight of the fact that constitutional provisions should not be construed so as to limit unduly the legislative power to raise revenue. It is impossible to find an exact and precise meaning for the concept of uniformity even when it is expressed in the constitution, and the constitutional language establishing such an elusive idea in the fundamental law should be construed so as to allow the state to exercise the power it clearly has. Such a result certainly is possible in the case of inheritance tax statutes without the courts becoming too concerned with peculiar theories of justification, and without distorting constitutional language.

To put the proposition in terms of an answer to the questions raised at the beginning of this phase of the discussion, all the courts need to find is that the tax is not a property tax. There is no reason for exploring the intricate nature of various kinds of taxes, or for questioning the authority or power to levy the particular tax because admittedly the legislature has full power in matters of taxation. This power stems from a logical division of the attributes of sovereignty among the three branches of government and is not dependent on express constitutional mandate although it may be stated there. By characterizing the tax as clearly non-property in nature, the court not only limits the effect of constitutional provisions applicable only to property taxes, but it eliminates all problems of authority and power except those having to do with restrictions imposed by the particular constitutional language on the State's general power to tax. When it has done this the court is free to consider directly the problem of how far the legislature may go in its proper exercise of the State's sovereign right to tax. In other words, the court narrows the judicial problem to a determination of the extent to which the legislature, under the constitution, can discriminate between persons and subjects in imposing a tax that is clearly non-property in nature.

In the absence of an unusual constitutional provision, there is little to be gained by construing a requirement for uniformity as more restrictive in this respect than provisions for equal protection of the
laws. Although express constitutional language may require a different rule of uniformity for property taxes, there is nothing so oppressive about the power to levy excise taxes as to create a need for limitations on its exercise over and above those limitations imposed on all legislative power by the equal protection clauses of the Federal and State Constitutions. As a matter of fact, modern economic conditions often make it necessary to exercise the power to tax in a comparatively unlimited fashion if the state governments are to achieve the full potentialities of their other sovereign powers.

The somewhat simpler approach to the constitutional status of inheritance tax statutes outlined above is followed in a number of jurisdictions. Thus it is held that a collateral inheritance tax is simply an excise tax uniform in rate as to the whole class of collaterals and strangers, which satisfies the requirement of uniformity. And, since an inheritance tax is not a property tax, the statute imposing it may provide for classification and graduation. Similarly, the fact that the amount of an inheritance tax depends on the value of the property transmitted does not make it invalid since “it is usual and proper to proportion the amount of an excise to the value of the privilege taxed,” and an inheritance tax is valid because “it is an excise and not within the uniformity clause.” Even if a classified and graduated inheritance tax is subjected to the rule of uniformity contained in the constitution, it is still constitutional, because “that clause does not limit the power of the legislature in levying excises and inheritance taxes beyond those limitations contained in the Fourteenth Amendment to the Federal Constitution.”

SECTION 4.
Other Excise Taxes

The general theories used by the courts in the line of cases just mentioned are carried over and applied to legislation imposing many other kinds of taxes which are clearly non-property in nature. The increasing importance of license taxes, business taxes, gasoline taxes, automobile registration taxes, and many other types of excises in state systems of taxation in recent years is attributable in no small part to a willingness of the courts to find that the legislature’s power to impose such taxes is not unduly limited by the constitutional provisions

287 State v. Hamlin, 86 Me. 495, 30 Atl. 76 (1894).
291 State v. Cline, 91 Kan. 416, 137 Pac. 922 (1914); McCannon v. State, 33 Okla. 145, 125 Pac. 1063 (1912); State v. Hogg, 128 Tex. 508, 72 S. W. 2d 593 (1934); Dixon v. Ricketts, 26 Utah 215, 72 Pac. 947 (1908).
289 In re Estate of Heck, 120 Ore. 80, 250 Pac. 735 (1926).
requiring uniformity in taxation. As long as the courts were unwilling to abandon the practice of using rigid conceptualistic tests in interpreting these provisions, and questioned closely the nature of the tax in this type of legislation, a highly productive source of revenue was denied to the state governments.

Of the many kinds of excises imposed in the various states, license taxes are the least likely to be declared unconstitutional by the courts. Even historically this type of levy was recognized by the courts as a tax that was not subject to the constitutional restrictions applicable to property taxes. It was on this ground that drummer's license fees, license taxes on auctioneers, license fees on the canning of oysters, city license taxes on merchants, and many other similar exactions were first upheld although numerous exemptions and classifications were made by the legislature in imposing them. For example, a tax on peddlers graduated by the manner in which they traveled, whether on foot or in one or two horse wagons, was not considered a tax on the goods sold and therefore within the purview of the constitutional provisions requiring the taxation of property according to value. In the same way a license tax graduated according to the value of the marketable product, or the value of retail stock, or the number of cows a dairyman kept was not held invalid for lack of uniformity. More recently the number of examples of valid license tax statutes one can find in the state reports is practically endless. Differing from the pure license taxes only in the descriptive wording used in the statutes are many business and occupation taxes, some of which were discussed in detail above, and they are widely sustained also. For instance, an annual tax of an arbitrary amount levied on every person selling liquor either at wholesale or retail is not an unequal tax on property, and a tax on lewd houses does not offend the uniformity clause due to the classification made because it is a tax on a business.

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Footnotes:

102 In re Drew v. Tifft, 79 Minn. 175, 81 N. W. 839 (1900); State ex rel Garth v. Sitzler, 143 Mo. 287, 45 S. W. 245 (1898); Opinion of the Justices, 81 N. H. 552, 120 Atl. 629 (1923); Copes Estate, 191 Pa. 1, 43 Atl. 79 (1899).

103 Ex Parte Robinson, 12 Nev. 263 (1877).


105 State v. Applegarth, 81 Md. 293, 31 Atl. 961 (1895).

106 Re Martin, 62 Kan. 638, 64 Pac. 43 (1901).

107 Re Watson, 17 S. D. 486, 97 N. W. 463 (1903).


109 Salt Lake City v. Christensen Company, 34 Utah 38, 95 Pac. 523 (1908).

110 Birmingham v. Goldstein, 151 Ala. 473, 44 So. 113 (1907).

111 Straub v. Gordon, 27 Ark. 625 (1872); Parson v. People, 32 Colo. 221, 76 Pac. 666 (1894); Burch v. Savannah, 42 Ga. 596 (1871); State Tax Commission v. Hughes Drug Company 219 Ky. 432, 293 S. W. 944 (1927); Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 675 (1886).
Some comparatively recent cases which follow closely the historical position of the courts as to the constitutionality of license and business taxes illustrate rather clearly the effect of the uniformity provisions on this type of tax legislation. In Virginia, for example, a city license tax on each gasoline pump is constitutional on the theory that there is nothing in the constitution to prevent the legislature from classifying filling station operators in imposing a license tax. In Arizona the court takes the position that "even though the license fee be treated as a tax and not a police regulation, it is an excuse and not a property tax, and under the authorities the rule that all taxes upon the same class of property shall be uniform does not apply." In Mississippi the courts find that a manufacturers or producers tax levied at the rate of one percent on the value of the manufactured products is an excise and not a property tax controlled by the constitutional provisions that taxation shall be uniform and equal throughout the state, and that property shall be taxed in proportion to value. And in Alabama the court goes so far as to hold that a license tax on radio dealers graduated according to the size of the city in which the dealer does business is constitutional although the dealers in the cities between 10,000 and 15,000 population are omitted entirely. In this case the position was taken that the license fee was uniform as to all dealers in a city of a given size and that there was no imperative requirement of the constitution that taxes, other than taxes on property, should be uniform or equal provided they are imposed uniformly and equally on all dealers doing business in the designated locality. Such an interpretation strips the uniformity provision of all its restrictive effect except for a sort of geographical equality.

Another doctrine or theory used by the courts to sustain tax legislation on the ground that it is clearly non-property in nature is that the thing taxed is the use to which the property is put rather than the property itself. There is little to choose between a privilege theory and a use theory except that one or the other may reflect more accurately the actual intention of the legislature as indicated by the wording of the particular statute. Both theories are part of the same idea that an excise tax is not intended to reach the res or thing which constitutes property, but that the true subject of the tax is some act on the part of the owner of the property. That act may consist of

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307 Henry v. Shevinsky, 239 Ala. 293, 195 So. 222 (1910); See also Virginia v. Whiting Oil Company, 167 Va. 73, 187 S. E. 498 (1935).
exercising a privilege or it may consist of using property in a particular way. In either case, the act, or succession of acts, is the thing taxed, and such a tax is not a property tax.

Because of the argument that a tax on the use of property amounts to a tax on the property itself, the courts often consider it necessary to find that the use taxed is a general or impersonal use. That is, that an excise is a tax on the general use of some facility maintained by the state rather than a tax on a particular use of particular property owned by the taxpayer. Under this kind of rationalization, the idea of privilege and the idea of use are virtually one and the same. Thus is the variation of the use theory usually found in the cases where the courts sustain taxes on gasoline and automobiles as taxes clearly non-property in nature.

Normally the courts hold that a tax upon the use of gasoline, or upon a specific use of gasoline such as its use in propelling motor vehicles on the public roads, is an excise, and the legislature in imposing such a tax may classify persons as well as property and established graduated or arbitrary rates. It is of little legal significance that the gasoline itself is used to measure the amount of the tax, usually at a certain number of cents per gallon. In Altitude Oil Company v People, for instance, the court held that a tax of an arbitrary amount per gallon on petroleum products "offered for sale or use or consumption for power purposes in propelling motor vehicles" was an excise. The tax, in the opinion of the court, is not levied on the petroleum products as such, but merely upon that part of the property which is devoted to the purpose named in the statute, and therefore it is no violation of uniformity to measure the amount of tax by the quantity of property sold rather than by the value of the property.

In Standard Oil Company v Brodie, the court shows the relation of the use concept to the traditional privilege theory, and points out why a gasoline excise logically is not a tax on the gasoline as property. The Arkansas statute provided that all persons "who sell gasoline, kerosene, or other products to be used by the purchaser thereof in propelling motor vehicles over the highways of the...\(^{5,7}\) Bowman v. Continental Oil Company, 256 U. S. 642 (1920); Trinity Farm Construction Company v. Grossjean, 291 U. S. 466 (1934); Sparling v. Refunding Board, 189 Ark. 189, 71 S. W. 2d 182 (1943); Standard Oil Company v. Brodie, 153 Ark. 114, 239 S. W. 753 (1922); Altitude Oil Company v. People, 70 Colo. 452, 202 Pac. 180 (1921); Garfil v. Bracken, 195 Ind. 551, 45 N. E. 312 (1924); Metropolitan Ferry Company v. Commonwealth, 225 Ky. 45, 7 S. W. 2d 506 (1928); Burke v. Bass, 123 Neb. 297 242 N. W. 796 (1932); George E. Breece Lumber Company v. Mirabel, 31 N. M. 613, 287 Pac. 699 (1930); O'Berry v. Meeklenburg County, 198 N. C. 357 151 S. E. 680 (1930); State v. Sioux Falls, 60 N. D. 330, 244 N. W. 365 (1932), 70 Colo. 152, 202 Pac. 180 (1921).
"It is easy to discover in the language (of the statute) an intention on the part of the lawmakers to impose a tax not on property, but on a privilege, so as to bring the enactment within constitutional limits. The tax is not imposed on the sale or purchase of gasoline, nor on the gasoline itself, nor even on the use of the gasoline. On the contrary, the final and essential element in the imposition of the tax is that the gasoline purchased must be used in propelling a certain kind of vehicle over the public highways. In the final analysis of this language it comes down to the point that the thing which is really taxed is the use of the vehicle of the character described upon the public highway, and the extent of the use is measured by the quantity of fuel consumed, and the tax is imposed according to the extent of the use as thus measured. If it had been intended merely to tax the gasoline or its use, it should have been wholly unnecessary to describe the character of the use or the place where it was to be used; and the fact that the lawmakers incorporated these elements in laying the basis of the taxation shows unmistakably that it was intended to impose a tax upon the use of the public highways by the method described. It is clear that the tax is not imposed on the seller, nor upon the gasoline while in his hands and this of itself makes it manifest that there was no intention to levy a tax upon the sale of gasoline or upon the gasoline itself."

It is apparent from the logic of the Brodie Case that the critical question in the use theory is whether the tax is imposed on the right "use." Under the Supreme Court's doctrine in Dawson v Kentucky Distilleries and Warehouse Company, discussed above, that a tax on the only use to which property can be put is a tax on the property, a court must be careful to find that the tax is not levied on an exclusive or "only use." In the Brodie Case the court did this by asserting that the real subject of the tax was the use of the vehicle rather than the use of the gasoline. In Garfil v Bracken, the court takes a more tenable position by pointing out that the gasoline can be used in a number of ways other than the particular use which the statute makes the subject of the tax. In this case the court based its decision mainly on the fact that the owner of the gasoline could continue to own it indefinitely without becoming liable for the tax, or use it in a manner other than that mentioned in the statute. There are other ways of avoiding the implications of the Dawson Case doctrine. The courts in Alabama and Florida have used a combination of the privilege theory, the use theory, and a "police power theory" with interesting results.

In Alabama the legislature enacted a statute which imposed an arbitrary tax of a certain sum per gallon on every distributor, retailer,
and storer of gasoline in the state. A "storer" was defined as any person who shipped the commodity into the state in tank car quantities, stored it, or withdrew it from storage for any purpose. The last feature differed very little from the tax imposed in the Dawson Case on whiskey removed from bond, but the tax was sustained as an excise in State v Montgomery, where the court made the following distinction:

"There is a clear distinction between (1) an excise tax upon the business, occupation or privilege of owning, storing and withdrawing gasoline, imposed not only for revenue, but also because it is a dangerous explosive, and within the police power of the state, and (2) a tax upon the separate acts of the owner in taking his property out of storage for his own use; for this is a property tax."

This idea that an excise on the storage of gasoline is imposed as a regulatory measure under the police power as well as for the purpose of raising revenue was adopted by the Florida court in Jerome H. Sheip Company v Amos where a tax similar to the one imposed by the Alabama statute also was sustained. In addition the court in this case made a rather thorough study of the statute from the standpoint of sustaining the tax on a use theory Speaking generally on the point the court said: 315

"The tax under consideration is not an excise upon the mere right to acquire and possess property. Nor is it an excise upon the only use to which gasoline may be put, nor upon a power indispensable to use or enjoyment, for gasoline is in common use without being stored. Even if the possession of gasoline be regarded as an inherent or natural right, the storage of such a commodity is certainly not such a right as is immune from regulation. There is no inherent right to use dangerous property without restraint. The state has the power to regulate that species of use of it, as well as the sale of it, by the imposition of an excise either in the exercise of the police power, the taxing power or both.

"Since property is the sum of all the rights and powers incident to ownership, the imposition of excises upon those powers might conceivably be carried to the point where it would amount to a direct property tax, abnormal difference in degree ultimately resulting in a distinction in kind. But this tax is upon only a single one of those rights, the right to store the property. All other rights, which collectively constitute ownership, may be enjoyed free of tax. The tax is therefore well within the category of an indirect tax upon use."

In this part of its decision the Florida court was merely asserting a well-established doctrine for the Supreme Court had held a number of years before that an excise upon the use of gasoline by sale, consumption or storage was not a property tax. 316 There still was the

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312 228 Ala. 93, 151 So. 856 (1933).
313 100 Fla. 863, 130 So. 699 (1930).
314 Id. at 878, 130 So. at 705.
Dawson Case to distinguish, however, because of the similarity between storing gasoline and removing whiskey from bond. In this respect the court said:

"The essential difference between the Kentucky tax and the tax now under consideration is that the present act of storing the commodity, which is a species of 'use,' and not its future withdrawal, which is merely a change in the form of possession, not amounting to a taxable use, is made the criterion of our tax."

It is rather difficult to rationalize this interpretation with Justice Brandeis' explicit statement in the Dawson Case that the removal from bond was the only use to which the whiskey could be put. What the Florida court probably meant was that there are "uses" which are the legitimate subject of an excise tax, and there are "uses" which are not. The problem for the legislature is to know what is a taxable "use," and therein lies the weakness of the use theory. A theory which depends on such an unusual play on words for its validity tends to complicate the legislature's problem rather than to simplify it.

In addition to illustrating some of the complications of the use theory, the opinion in the Sheip Case contains a clear statement regarding constitutional limitations on the power of the legislature to impose excise taxes where the constitutional provision for uniformity is given a limited effect. On this point the court said:

"In the direct imposition of a State excise upon taxable privileges, the legislature exercises a power of extensive scope. Organic requirements as to uniformity and valuation applicable to ad valorem taxes, do not apply to excises, since the latter are not regarded as a tax within the meaning of constitutional limitations requiring uniformity of rates and just valuations. In the imposition of excises the only organic limitations upon the state are that due process, equal protection and contract rights shall not be burdened nor Federal functions interfered with. Therefore there must be a reasonable basis of classification, and there must be geographie, as distinguished from intrinsie, uniformity."

Encouraged by a liberal attitude on the part of the courts toward constitutional restrictions on the imposition of excises, as evidenced by the language of the Sheip Case, the state legislatures have enacted statutes levying exactions on many kinds of privileges. They seem to realize that the privilege theory is the safest basis for sustaining a tax as clearly non-property in nature. It is on this ground that automobile license taxes are held constitutional as a tax levied on the privilege of

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317 100 Fla. 863, 870, 130 So. 699, 702 (1930).
318 See discussion p. 399 et seq.
319 100 Fla. 863, 879, 130 So. 699, 706 (1930).
using the public highways, and mortgage or stock registrations fees are sustained as levied on the privilege of recording. A mere listing of some of the more interesting excises that have been sustained gives ample evidence of the broad powers the legislature has in this respect once the effect of the constitutional requirement for uniformity is limited by the courts. For instance, in Georgia a tax on automobile dealers graduated according to the population of the county and levied without regard for the horsepower of the automobile, profit made by the dealer or any other fact bearing a relation to the business in valid. In Idaho a tax on the gross earnings of a public motor carriers classified by the capacity of the vehicles operated is a valid excise imposed on the privilege of using the highways. In Washington a tax on the privilege of using within the state any article of tangible personal property purchased after a certain date is not invalid for want of uniformity. In Georgia the court has sustained a tax on cigarettes for personal use measured by the number of cigarettes, on the ground that the tax is an excise on the privilege of possessing cigarettes and not a tax on property.

The really remarkable thing about the privilege idea is that it opens the way for almost unlimited selection of subjects of taxation by the legislature. In finding that an annual tax on traveling stores did not contravene the uniformity provision, the Tennessee court emphasized this point by saying:

"The power of the legislature to declare and tax privileges is unlimited. Its discretion in this respect cannot be restrained or controlled by the courts."

Some courts, however, do not subscribe fully to this unequivocal statement for they are able to restrain the legislative power to some extent by defining the conditions under which a privilege may be taxed. In Fort Smith v. Scruggs, the court points out the real reason for taxing the privilege of using the highways, and implies that a privilege

220 Wiseman v. Madison Cadillac Company, 191 Ark. 1021, 88 S. W. 2d 1007 (1936); Opinion of the Justices, 250 Mass. 591, 148 N. E. 880 (1925); Bevard v. Baughman, 167 Md. 55, 173 Atl. 40 (1934); State v. Lawrence, 108 Miss. 291, 66 So. 715 (1914); Lillard v. Melton, 103 S. C. 10, 87 S. E. 121 (1915); Re Hoffert, 34 N. D. 271, 118 N. W. 29 (1914); State v. Mhabel, 33 N. M. 553, 273 Pac. 928 (1928); Ex Parte Shaw, 53 Okla. 64, 127 Pac. 900 (1916); Portland Van and Storage Company v. Hosne, 139 Ore. 131, 9 2d 122 (1932).


223 Smallwood v. Jeter, 32 Idaho 169, 94 Pac. 149 (1926).

224 Vancouver Oil Company v. Henneford, 184 Wash. 9, 49 P. 2d 914 (1935).


227 70 Ark. 549, 69 S. W. 679 (1902).
must meet certain specifications before it can be taxed. The court said:

"Counsel says that a tax on the use of an article is a tax on the article itself. While this may be true of a piano, bedstead or cooking stove, the use of which involves no injury or detriment to the public, it is different as to wheeled vehicles for they are made to be used upon roads and streets. The chief necessity for keeping improved streets is that they may be used for the passage of wheeled vehicles and the wear of the streets is caused by the passage of such vehicles over them making necessary constant and expensive repairs. For this reason, no doubt, the legislature considered it equitable and just that the owners of such vehicles should in addition to the general tax upon their property, pay something for the privilege of using the streets as driveways, the amount paid to go towards keeping the streets in good repair."

In Savers v Smith, the court holds that earmarking of the revenue for highway maintenance is essential to the validity of the statute on the theory that such a provision indicates the tax is imposed in relation to the value of the privilege. Such a theory of relation to value amounts to a sort of judicial limitation on excise taxes comparable to the constitutional limitation imposed on property taxes.

SECTION 5.

Summary

From the foregoing analysis it is reasonable to conclude that the ordinary provision in a state constitution requiring uniformity in taxation is not a major obstacle to the legislature in imposing taxes clearly non-property in nature. If the statute levying such a tax indicates by its provisions that the subject of the tax is a privilege or a taxable use, there is sufficient basis for a judicial finding that the tax is not a property tax. If the tax is not a property tax, the legislature has unlimited power to classify. At least there are no obvious reasons for subjecting the legislative power in this regard to a greater restraint than that imposed on legislative power generally by constitutional provisions requiring equal protection of the laws. As for the policy underlying this interpretation which results in the levy of property taxes according to one rule of uniformity and taxes clearly non-property in nature according to another, the answer is quite simple. The state's sovereign power to tax is, and should be, unrestricted except where the constitution specifically limits that power. There is no counteracting policy, either legal or economic, which demands that the constitutional limitation of uniformity should be extended to cover all forms of taxation generally

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328 Ibid.
329 101 Ohio St. 132, 128 N. E. 88 (1920).