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The Function of Constitutional Provisions Requiring Uniformity in Taxation

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THE FUNCTION OF CONSTITUTIONAL PROVISIONS REQUIRING UNIFORMITY IN TAXATION

By William L. Matthews, Jr.

CHAPTER VIII

INCOME TAXES

SECTION 1.

In General

The constitutionality of legislation imposing a tax on income has been so widely litigated and frequently discussed that any further pursuit of the problem tends to be repetitious, but it is impossible to appreciate fully the relation of the uniformity provisions to a modern exercise of the taxing power without some consideration of their function as it pertains to this type of tax. In fact, frequency of litigation has not minimized noticeably the difficulties inherent in reconciling this method of taxation with the fundamental law. In some instances the problem has been avoided by amending the constitution, but more often it has been necessary to work out some judicial explanation which will permit the legislature to impose an essentially distinctive tax without major distortion of existing constitutional provisions and the standards of fairness and equality in taxation expressed in them. As shown in the discussion of other kinds of taxes, the connection between the uniformity provisions and any tax legislation centers on a determination of the nature of the tax imposed, and this is especially

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See discussion supra p. 187 et seq.
true of the income tax. As emphasized before also, the normal judicial technique for deciding this constitutional problem rests squarely on a comparison of the kind of tax involved with the pertinent constitutional phraseology. Thus the opinions in the income tax cases afford ample opportunity to see the extent to which judicial thinking on constitutional questions regarding taxation is dependent on a conceptualistic and analytical method. There are two factors, however, which do cause the courts to abandon or modify traditional notions and techniques in passing on the validity of an income tax.

In the first place, the distinctive nature of a tax on income quite often forces some deviation from the practice of letting the character of the tax determine the uniformity question entirely. As long as the critical features of the statutory scheme are simple, direct and similar to some familiar tax pattern, it is possible to solve the basic legal problem of reconciling a necessary use of the taxing power with the constitution by labeling the tax. But the normal tax statute devised to reach income is sufficiently complex and different to make judicial analysis of it unusually difficult if not impossible. Nor do the courts have much success in precisely categorizing an income tax by comparing it with taxes whose nature is well-settled by precedent. In other words, the labeling technique is particularly inadequate where a distinctive type of tax is involved, and this inadequacy often results in a conscious and realistic consideration of how the constitutional provisions should be used.

In the second place, the enactment of income tax legislation frequently is the occasion for sharp political clashes among the various segments of the community, and the courts are not immune to these controversies. The constitutionality of many state income tax statutes has been litigated against a background of conflicting economic and political interests at a time when the need for revenue to meet pressing social problems and the demand for a reallocation of the tax burden were critical. The courts are not able in every instance to conceal the influence of this fact on their decisions by drawing nice distinctions as to the nature of the tax. Again, they have to determine directly or indirectly how the constitution should be used.

Although the factors described make the income tax cases a good source for ideas about the function of the uniformity provisions, it is inaccurate to suggest that the consequences of the traditional approach to constitutional uniformity are avoided generally in income tax legislation. In the cases the nature of the tax is the decisive thing more.

See discussion supra p. 54 et seq.
often than not; and, in our attempt here to isolate those implications in certain illustrative decisions which point to a clearer understanding of the role of the uniformity provisions, it seems appropriate to examine the usual judicial explanations or theories as to the nature of an income tax in such a manner as to evaluate their effect on the constitutionality of legislation imposing this type of tax.

There are at least four rather clearly defined theories as to the legal nature of an income tax: (1) An income tax is a tax on the property from which the income is derived. (2) An income tax is a tax on income as property. (3) An income tax is a property tax, but it is not the kind of tax on property which the constitution requires to be imposed uniformly, proportionally or according to value. (4) An income tax is an excise tax, or at least is *su generis*. Although all four are used to determine whether a tax on income is a property tax, each involves certain peculiarities of application which are quite important to the constitutional fate of a particular statute.

**SECTION 2.**

**As A Tax On Property**

The idea that a tax on income derived from property is a tax on property is a kind of "ultimate burden" rationalization which received considerable impetus as a result of the famous (or infamous) Pollock Cases. Obviously it is of little value where the statute purports to reach income derived from some source other than property, and it is equally inadequate as a comprehensive explanation of a tax limited to income traceable to property. Nevertheless, it has been used to bring an income tax within the scope of uniformity provisions where the wording of the constitution is explicitly or inferentially limited to property taxation.

To some extent this use is attributable to the influence of the Supreme Court just referred to, but there certainly is a basic dissimilarity—which most of the courts do not miss—between the problem of identifying a federal income tax as a direct tax in order to invoke the constitutional limitation of apportionment and the question of labeling a state income tax as a property tax in order to invoke the constitutional limitation of uniformity. An inclination to follow the highest court will not in and of itself explain the willingness of a court to adopt this theory. Rather, the idea seems to be one of the readily available con-

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333 157 U. S. 429 (1894); 158 U. S. 601 (1895).
cepts which may be used to confine and restrict legislative exercise of the sovereign power to tax.

This explanation is well illustrated in the way the theory has been used in Massachusetts, where it has been applied frequently and with unusual strictness. At least two instances are in point. In the first, the court invalidated a proposed tax on income derived from intangibles, including interest on debts and dividends from corporate stock, by construing the exaction to be a property tax. Since the statute exempted property other than intangibles, the legislation, in the opinion of the justices, contravened a constitutional provision requiring property taxes to be "proportional." In the second instance, a general graduated income tax was held unconstitutional as a property tax, although the constitution had been amended in an attempt to give the legislature full authority to impose a tax at different rates on income derived from different classes of property, provided it was uniform on the same class. The court concluded that it was not "proportional" to graduate the tax according to the amount of income received by the taxpayer. In other words, the power to classify property for the purpose of levying a uniform rate on each class, in the opinion of the court, did not include the power to graduate the tax according to the amount of income received. It was clearly the purpose of the legislature in both statutes to provide for a uniform and proportional system of taxation, first by devising a statutory scheme for reaching notoriously elusive intangibles and then to graduate an exaction on individuals according to their ability to pay.

It may be difficult to understand now a turn of judicial mind which interprets the constitution and the nature of the tax so as to eliminate two methods of taxation which have become an integral part of many states' normal tax pattern. The most plausible explanation for it is that the purpose of the uniformity provision, in the view of the particular court, is to restrict the legislature in its quest for equality and fairness in taxation to the imposition of a proportional property tax. That is, to confine the state's system of taxation to traditional types and modes and to prevent innovations which might disrupt the economic status quo. It is interesting to observe how often some phase of this general

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attitude is a part of the rationalization adopted in cases involving an income tax.

SECTION 3.

A Tax on Income As Property

The theory that an income tax is on income as property is the notion most frequently used to bring this type of taxation within the scope of constitutional restraints on property taxation. Usually, the rationalization made includes two complementary ideas: (a) anything capable of ownership is property which includes income, and (b) the word property as used in the constitution necessarily covers anything which will meet the ownership test. The complete argument is aptly put in syllogistic form in the dissent to Cullington v Chase:333

"the attack on the Income Tax, briefly stated, is thus: (a) that the Fourteenth Amendment (to the Washington Constitution) permits classification of property for purposes of taxation, but requires uniformity of taxation on property within a given class; (b) that the amendment defines property to be anything, tangible or intangible, subject to ownership; (c) that income is subject to ownership; (d) that income is therefore property constituted in one class; (e) that a graduated income tax, classifying taxpayers in groups according to the amount of their income violates the rule of uniformity and the act is therefore unconstitutional."

There is a certain illusory soundness about the logic underlying the "ownership" theory when stated in this fashion which is appealing, but there is more than ample basis for rejecting it. Typical of the authority supporting the view is Eliasberg Brothers Mercantile Co. v Grimes,339 where legislation imposing a graduated tax on incomes was invalidated on the ground that it did not comply with a constitutional provision limiting the yearly levy on property to a certain fraction of one per cent. Recognizing directly that its decision was applicable to other types of constitutional limitations, the court found that property in its constitutional sense includes things taxed which are susceptible of ownership and possession, and brought income within this meaning by pointing out that:340

"Money or any other thing of value, acquired as gain or profit from capital or labor, is property; in the aggregate these acquisitions constitute income; and in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property, and therefore is itself property."

Such an interpretation seems to ignore the fact that it may be double taxation to tax a person on all the income he receives during the year.

333 174 Wash. 363, 25 P. 2d 81, 86 (1933).
339 204 Ala. 492, 86 So. 56 (1920).
340 id. at 494, 86 So. at 58.
as property and then tax the property into which he may have converted that income; and apparently it is of little consequence that the property (income) may have left the owner's hands before the tax is paid.

The significant point, however, is not that use of the ownership theory leads to an incomplete analysis of the nature of an income tax, but that no attempt is made in cases like this to devise a sound explanation for the type of tax imposed. All the court is trying to do is apply a constitutional limitation. It is trying to determine the purpose or function of the constitutional provision; trying to use the constitutional standard in such a way as to permit or deny the imposition of a different kind of tax. It is only from this viewpoint that otherwise questionable decisions are understandable. To criticize the conclusion that an income tax is a property tax without appreciating this fact is to engage in the same pursuit for conceptual consistency which the courts follow with limited success. It is apparent, therefore, that the function or purpose of the constitution as determined from the particular provision under consideration is the critical factor underlying the decision in cases such as this. On this point the Eliasberg case is crystal clear:

"the purpose of the Constitution (is) to protect the property of the citizen against forced contribution or legislative plunder."

Similar ideas about the purpose of constitutional limitations are reflected in the leading case of Bachrach v Nelson, where the Illinois court found that the constitution would not permit an income tax graduated at progressive rates according to the amount of income earned, because "income is property" and a tax on it, like all other property taxes, must be imposed according to value so that every person and corporation will pay a tax in proportion to the valuation of his property. Since a tax on property by means of a graduated scale which increases in rate as applied to increases from property is not according to value, the legislature is limited by such an interpretation to use of the traditional \textit{ad valorem} property tax as a primary source for revenue, particularly where the pertinent constitutional provisions are mistakenly conceived to be an exclusive grant or enumeration of the state's taxing power. Thus in effect the constitutional limitation serves to prevent necessary reform and revision in the over-all tax structure, and it is

\[\text{\textsuperscript{1}}\text{Id. at 497, 86 So. at 61.}\]
\[\text{\textsuperscript{2}}\text{394 Ill. 579, 182 N. E. 909 (1932).}\]
\[\text{\textsuperscript{3}}\text{Note, Is Any Desirable Type of General Income Tax Constitutional in Illinois? 35 Ill. L. Rev. 730, 735 (1941).}\]
interesting to note in this connection that the social and economic implications in the *Bachrach* decision were fully appreciated:344

"Whether this law would be desirable from an economic standpoint or as a matter of public policy is something of which this court can take not cognizance, as we are clothed with the power and primarily intrusted with the duty of maintaining the fundamental law of the constitution."

As will be shown in developing the other theories of an income tax, there are at least two ways to overcome the consequences of the ownership theory. One is to question the court’s analysis of the nature of the tax, and the other is to evaluate the court’s understanding of the function of the constitutional limitation as well as its role as guardian of the fundamental law. Although the latter method seems to be more realistic, the former is usually adopted unless the constitution expressly provides that "the word property as used herein shall mean and include everything whether tangible or intangible subject to ownership."

In *Cullington v Chase*,345 the court found that such a provision coupled with a normal provision requiring property taxes to be uniform within a class prevented the imposition of a graduated tax on income, although the particular legislation originated through the Initiative; and stated in its preamble that existing methods of taxation, based primarily on property holdings, were inadequate, unequal and economically unsound. This clear statement led to a vigorous dissent which is worthy of close attention for what it reveals about the underlying controversy in such a case. After describing the history of taxation in Washington leading to a demand for the graduated income tax, Justice Blake put the problem bluntly:346

"As I see it, the real question presented on this appeal is whether by construction of this amendment we are going to thwart the effort of the state to throw off the strait-jacket in which it was bound."

Then he leveled an attack on the ownership theory by suggesting that it is "sheer sophistry" to include income within a broad constitutional definition of property because:347

"Even assuming that the income tax is a property tax it must still be borne in mind that the state constitution is not a grant of power; it is a limitation. So the real question is: Have the people, by the enactment of the Amendment, placed a limitation upon their own inherent power of taxation which renders them impotent to

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344 394 Ill. 579, 182 N. E. 909, 915 (1932).
346 *id.* at 368, 25 P. 2d at 86.
347 *id.* at 369, 25 P. 2d at 87-88.
I fail to see wherein there is any limitation (contained in the uniformity provision) other than that real estate shall constitute one class."

The argument that an income tax is not a property tax and that the word uniform as used in a uniform within the class provision anticipates rather than denies reasonable classification seems unanswerable. And what is more important it affirms by necessary inference that the purpose of the constitution is not to prevent the establishment of a different and more equitable method of taxation, especially where the incentive for it stems from popular demand.

In applying the theory that an income tax is a property tax a distinction is sometimes made between a tax on net income and a tax on gross income. In *Redfield v Fisher*, 348 for instance, the Oregon court held a tax on the net income of corporations an excise tax, but a tax on the gross income from intangibles in the hands of individual stockbrokers a property tax, both on the property from which the income was derived and on the income itself as property. Although the court suggested that the power to impose an excise on the privilege of doing business in corporate form does not extend to doing business as an individual, the clear point was made that a tax on gross income, like a tax on gross receipts, is but a way of measuring the value of property and therefore is a property tax. The distinction seems to rest in part on the belief that gross income gives but little indication of an ability to pay, but the courts which adopt it rely generally on the rationalization that any tax measured by receipts is a tax on the receipts directly. Obvious fallacies in this rationalization—at least where the uniformity provisions are concerned—have been pointed out in discussing franchise taxes, sales taxes, gross receipts taxes, and other taxes which may be labeled property or non-property in nature, and are equally applicable in connection with the income tax. 349

By way of contrast, at least one income tax has been sustained on the theory that income is property for the purposes of taxation. In *State v Pender*, 350 the statute was attacked on the basis that certain exemptions violated a constitutional provision requiring taxes to be uniform on the same class of subjects and that another provision limited the legislature to imposition of property taxes only. The Delaware Court denied the taxpayers contention by reasoning that the latter provision was a limitation and not a grant of power and that the two provisions taken together did not mean that taxes must be uniform on all property or that taxation of property must be in proportion to value.

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348 135 Ore. 180, 292 Pac. 813 (1930).
349 See discussion *supra* p. 377 et seq.
As a Property Tax Not Subject to the Uniformity Provision

Most income tax legislation is sustained on the basis that the tax imposed is an excise, but it is upheld as property taxation under some constitutions on the theory that the uniformity clause and other restrictive provisions apply only to certain traditional property taxes. Such a finding usually is motivated by a feeling that some permissive interpretation of the constitution is essential to a broader exercise of the taxing power. It is useful in avoiding the delicate task of defining the nature of the tax initially and in distinguishing persuasive precedent in favor of the property tax theory. In contrast to those already discussed, this theory does not involve a detailed examination of the tax, but directs attention to the meaning and purpose of the particular constitutional provision, especially that part of it which gives some indication of its scope and application. This puts the emphasis of judicial examination on the constitution where it should be, rather than on the statute.

Thus in Shields v. Williams, the Tennessee court sustained a tax on the income from stocks and bonds without taking a position as to the nature of the tax, because it found that the uniformity provision requiring "all property to be taxed according to value so that taxes shall be equal and uniform throughout the state" is limited to ad valorem property taxes and is not applicable to a tax imposed under another section of the constitution authorizing an income tax on stocks and bonds not taxed ad valorem. And in Deifendorf v. Gallett, it is clearly indicated that the crux of the matter under this theory is whether income can be considered as property for purposes of taxation within the true scope and meaning of the constitution and not whether income is some specie of property, although the court finally decided that income taxes are excises.

The Missouri court seems to have used the theory with as much understanding of its implications and significance as any other. As early as 1869 they held a tax on income not subject to a provision in the constitution requiring the taxation of property according to value, and in Ludlow-Saylor Wire Co. v. Wollbrink, used similar reasoning to sustain one of the first modern state income taxes patterned after...
the federal statute of that day. In the latter case the constitutionality of the tax was attacked under the ad valorem requirement on the theory that property included income and also under another provision requiring all taxes to be uniform on the same class of subjects. In disposing of the first contention, the court conceded that income is property because it is an ownable thing and that a tax on it is in effect a tax on the capital or labor which produced it. But they correctly emphasized that the legislature has an inherent power to legislate in any way it sees fit unless expressly restrained by the constitution, including the power to tax property not contemplated by the constitution without consideration of its value. With respect to the second contention, the court was equally certain that classification of persons and corporations according to the amount of net income earned, including a class composed of persons whose income taxes exceed those paid on their real and personal property, is not contrary to the uniformity provision because such distinctions are founded in "reason, in justice and for the utility of the public—the true criterion which should govern all legislative action." 

In a sense the instant theory offers a method for interpreting pertinent constitutional provisions in such a way as to do justice to prevalent notions about the nature of a tax without subjecting the taxing power to undue restraint. Before adopting it, however, one should appreciate fully at least two of the basic issues involved: (a) the social consequences of the tax legislation, and (b) the extent to which the constitution tends to be outmoded in its provisions relating to taxation. Both are described with considerable candor in the Ludlow case.

SECTION 5.

As An Excise Tax

The conception of the income tax as an excise is very useful in solving uniformity problems although it is difficult to define an excise so as to be certain that a tax on income is in this category. Occasionally this kind of tax is labeled sui generis or treated as a personal tax, but usually it is considered analogous to other clearly-defined excises such as license fees, privilege taxes, franchise taxes, inheritance taxes et cetera. Thus a corporate income tax is an excise on the right to do business in corporate form, and a tax on an individual's

535 Id. at 341, 205 S. W at 200.
536 Ibid.
income may well be regarded as a tax on the act of earning or receiving income. This interpretation seems to rest on the assumption that the uniformity provisions do not apply to property taxes, so that it is not necessary to define the subject or nature of the tax categorically in order to determine the effect of the constitutional limitation. In this way the theory is used to free an income tax, as well as other methods of taxation, from the restrictive effect of a constitutional provision which may require taxation according to value or not permit sufficient leeway in the classification of persons and subjects to allow effective imposition of the tax.

As a general rationalization of the function of the uniformity provisions, however, this explanation is not entirely complete. It permits the observation made many times that the nature of the tax is basic in the constitutionality of any tax. It recognizes by inference at least that a restrictive type provision strictly applied serves to limit unduly the effective use of the taxing power. It also points up the fact that there is little occasion for finally categorizing the nature of an income tax so long as it is not regarded as a property tax. But it fails to account for the important fact that some uniformity provisions seem to apply to all taxes whether excise or property. Normally this type of provision requires uniformity within a class only, so that it may be no more restrictive than an equal protection clause, but failure to discriminate in this respect is sometimes the source of considerable confusion. It is less confusing if we keep in mind this essential thing about the relation of the constitution to excise (income) tax legislation: if the nature of the tax is problematical, the effect of the restrictive type uniformity clause is determined by its scope or applicability; but, if the tax is clearly an excise, a uniform within the class provision may serve as the basis for prescribing the limits within which the legislature must exercise its power to classify and exempt the subjects of taxation. Most of the time these essentially distinct problems are treated indiscriminately.

Most of the characteristics of the excise theory as it is used to mark out the scope of a uniformity provision are apparent in the often cited case of Hattisburg Grocery Company v. Roberts, where the taxpayer contested a tax on all annual incomes in excess of a certain amount on the assumption that a tax on income is a tax on specific property, from the value of which the income must be computed; and

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559 Cook v. Tait, 265 U. S. 47 (1924).
560 Brown, op. cit. supra note 357, p. 512 at 139.
561 See discussion supra p. 406 et seq.
562 126 Miss. 34, 88 So. 4 (1921).
that a tax on income derived from property is a tax on the property from which the income is derived. Both ideas were refuted on the ground that it is a fundamental error to completely disassociate gains derived from capital and labor, or both, from the activities of the person taxed. In other words, the subject of the tax is not the specific property but the performance of an act by the taxpayer, the act of producing, receiving and enjoying income. And since the income is necessarily a product of the joint effort of the state and the individual, the former may properly impose an excise to reach a portion of it. This explanation, analytical though it is, is consistent with the privilege tax cases discussed before, and can be reconciled with the always troublesome Pollock Cases, at least with the Supreme Court's subsequent interpretation of them. More pertinent to our immediate problem, however, is the extent to which it permits a rational interpretation of the purpose of the constitutional limitation. On this point the Mississippi court is rather specific:

"The section contains no language even remotely indicating that its purpose is to withdraw from the legislature the power to tax any species of property or any of the activities of persons who enjoy the protection of the State's laws, but such would be its effect if a tax on income derived from property should be held to be necessarily a tax on the property from which the income was derived; for it would then necessarily follow that a tax on specific property derived as gain from other property, on the value of which income must be computed, would also be a tax on the property from which it is derived."

The theory is used with equal success to sustain an income tax under a more inclusive uniformity clause. Thus where the constitution provides that "all taxation shall be uniform upon the same class of subjects and ad valorem on all property" a tax on income may be graduated because it is not a property tax. And even though property subject to be taxed must be treated as a single class, such a uniformity provision does not require the tax to be the same on all classes or uniform with the tax imposed on property, for the legislature has full power to classify the subjects of taxation other than property subject only to the limitation that the classification must be reasonable and not arbitrary. Also, under this interpretation there is no objection to a progressive tax on income since the power to classify would seem to include the right to fix the ratio of graduation in rate between classes.

362 id. at 35, 88 So. at 5.
TAXATION—UNIFORMITY REQUIREMENTS

SECTION 6.

Summary

In summary, the implications of the excise theory should be pointed out briefly in connection with three other situations involving an income tax and the uniformity clause. In the first place, if it is not used, the only alternative leading to a successful distribution of the tax burden according to the ability to pay is to amend the constitution so as to permit specifically a progressive graduation of the tax. This is clearly shown in Wisconsin's experience with the income tax where the constitution was amended in 1908. In a similar way, the idea may be used to overcome an unwarranted extension of the uniformity clause by judicial precedent. This method was used in the interesting case of Reynolds Metal Company v. Martin, where the Kentucky court was confronted with a long line of cases holding that the principles of uniformity and equality called for in a section of the constitution expressly limited to property taxes applied to all taxes. Finally, if there is no uniformity clause applicable to excises directly it would seem that an income tax may be levied only subject to the equal protection clause of the Fourteenth Amendment to the Federal Constitution. In fact, it is sometimes suggested that this is the true meaning of the uniformity provision in any event.

It seems accurate to conclude that the function of the uniformity provisions in regard to income tax legislation is consistent with the result reached by the courts in considering the constitutionality of other types of taxes. The fact that an income tax is not exactly like any other kind of tax does put a strain on the technique of invoking the constitutional limitation on the basis of an analytical examination of the nature of the tax, but where a court feels constrained to do so, there is decent authority for its decision. In this way the uniformity provision can be made to serve as a barrier against a new and different method of taxation. On the other hand, it is possible to restrict effectively the scope of constitutional uniformity, and therefore its purpose or function, by concluding that an income tax is not a tax on property as defined by the constitution, or is an excise. In so doing, many courts recognize that it is not the proper function of the constitution to saddle the government with traditional and inadequate methods for raising revenue such as the ad valorem property tax. Finally, the fact that an income tax is most often thought of as an excise makes it possible to conceive of uniformity as virtually synonymous with equal protection since excises are usually subject to the kind of provision which requires uniformity within the class only.

191 State v. Frear, 148 Wis. 456, 134 N. W. 673 (1912).
269 269 Ky. 378, 107 S. W. 2d 251 (1937).
UNIFORMITY AND TAX LEGISLATION SUMMARIZED

In summarizing this analysis of the way the uniformity provisions are used in determining the constitutionality of specific tax legislation it is possible to reiterate only a few of the more important observations made in regard to (1) taxes clearly in the nature of property taxes, (2) taxes which may be labeled property or non-property (3) taxes clearly non-property in nature, and (4) income taxes.

As to the first type of legislation, it seems clear that the property tax label is used infrequently in an attempt to confine to a few taxes the restrictive effect of uniformity provisions which pertain to property taxation. The effect of these provisions on the general property tax is dependent largely on whether the legislation is attacked for want of uniformity in rate or for lack of uniformity in assessment. Strict application of the uniformity concept in either instance prevents the classification of property for tax purposes, but there is general relaxation of the traditional rule through amendment of the constitution or liberal interpretation of existing provisions. It is difficult to generalize in regard to such liberal interpretation, although its use does permit the classification of property according to kind or use, but not according to unusual distinctions between owners. Also, there is a reluctance to deviate from a narrow interpretation in the case of real property, probably on the theory that there is less occasion for finding valid distinctions as to kind or species. The single thread of consistency in all the cases dealing with property classification is the court’s concern for the importance of value, although there is little justification for keeping uniformity irrevocably tied to value beyond the traditional notion underlying the general property tax that an ad valorem system is essential to an equal distribution of the expenses of government. Practical defects in the ad valorem method are very apparent in the administration of the property tax, particularly where uniformity functions as the basis for testing the validity of the assessment made, and violations of the constitutional provision resulting from administrative classification of property are almost impossible to rectify judicially. Where the uniformity provisions are applied strictly they defeat any attempt to assess intangibles at a lower rate in order to get them on the tax rolls, and it is precisely here that the traditional function of the constitutional limitation was first challenged, although it is generally recognized now that such classification and exemption can be made. Finally, where a
uniform within the class rule is applied to property taxation, there seems to be little reason for drawing unusual distinctions as to the kind of property which may constitute a class, for this places undue emphasis on the function of the uniformity provisions as a restriction on the taxing power.

With respect to the second type of legislation, it should be recognized that nearly every kind of tax imaginable has been contested on the theory that it is subject to the constitutional restrictions generally applicable to property taxation. Usually, however, excise, occupation, privilege, license, sales, use and inheritance taxes are sustained as non-property in character; but, if the object and method of the legislation are not absolutely clear, even these may be held unconstitutional. For instance, a franchise tax can be removed from the uniformity rule on a privilege tax theory, but if the statute imposing it provides for some method of return comparable to a property tax valuation, it may be invalid. The function of uniformity is well-portrayed in cases dealing with a gross receipts tax, especially where the constitutional provision is archaic and creates a difficult situation for the legislature by denying it the power to classify property. The legislature may misconceive the extent of its power under the Federal Constitution and attempt to levy a property tax according to value measured by gross receipts so that the uniformity clause prevents the tax altogether, or at least effective classification. On the other hand, if the valuation provision is removed, and the nature of the tax is not labeled, the tax can be sustained as a tax on a business privilege. The privilege explanation is used also to uphold a tax on receipts derived from sales, as well as severance taxes and use taxes. As far as these last two are concerned, the function of uniformity is dependent on how the courts apply an ownership test or a use test in determining the nature of the tax. Both these tests are open to the criticism that they unduly emphasize the analytical method of letting the nature of the tax be decisive, and fail to account for all the factors involved in deciding whether the constitutional limitations should be invoked. It is rather clear that the Supreme Court has contributed to the confusion by suggesting that the ownership theory is conclusive as to a tax imposed by a state, although it has often refused to so hold where the question of apportioning a direct tax under the Federal Constitution was involved. Actually, there is no certain and final basis for determining the category into which this kind of tax legislation will fall in every case, for the label used is necessarily influenced by the courts willingness or reluctance to invoke a constitutional limitation on the legislature's power to tax.
In so far as taxes clearly non-property in nature are concerned, the ordinary provision requiring uniformity is not a major obstacle. This kind of legislation is characterized in a broad way as excise tax legislation, and is sustained generally on the basis that it imposes a levy on privileges rather than directly against property. Therefore it is not subject to the retributive rules of uniformity applicable to a property tax. Further, 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. Thus it is clear that an inheritance tax is not a property tax, but this does not necessarily mean that the power to impose it is unlimited, for it is sometimes suggested that a uniformity clause does not permit certain methods of progressive graduation not objectionable under the Fourteenth Amendment. In this connection, it must be admitted that a court may invade the broad field of legislative discretion in classification at some point, and the concept of uniformity is simply the nearest available weapon when such an invasion is made. In a sense, cases involving this type of taxation illustrate that most problems of uniformity are really a contest between the legislature in its exercise of a broad power to tax and the court in its exercise of an equally effective power to interpret constitutional limitations on that power. It would seem also that there is no real reason for exploring the intricate nature of various kinds of taxes or for questioning the authority to levy the particular tax, because the legislature admittedly has full power in matters of taxation. In other words, the court should narrow 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. The general rationalization used in upholding inheritance taxes is carried over and applied to legislation imposing many other kinds of taxes such as license fees, business taxes, gasoline taxes et cetera. The increasing importance of this kind of taxation reflects a judicial willingness to abandon or modify the practice of using rigid, conceptualistic tests in interpreting the uniformity provisions. Finally, there are no obvious legal or economic policies in favor of subjecting the legislature's power to levy an excise tax to a greater restraint than that imposed on legislative power generally by constitutional provisions requiring equal protection of the laws. There is no sound reason for extending constitutional uniformity to cover all forms of taxation.

With respect to income tax legislation, the function of the uniformity provisions is consistent with the analysis already summarized,
The constitution may serve as an unnecessary barrier to effective imposition of an income tax or it may permit reasonable classification and progressive graduation depending on how this essentially distinctive method of taxation is categorized. In either case, the critical problem is how to reconcile the uniformity clause with a comparatively new and different method of raising revenue which purports to achieve fairness and equality by distributing the expense of government on the basis of an ability to pay. The reconciliation is made or rejected by calling the tax a property tax (on the property which produces the income and on income as property), a property tax not subject to a particular constitutional limitation, or an excise. In any event, many courts appreciate that it is more realistic to emphasize directly the purpose and function of the constitutional limitation than it is to rely entirely on an analytical examination of the tax. This frequently results in the sound conclusion that the uniformity provisions are no more of a limitation on the state's power to tax than provisions calling for equal protection in all legislation.
PART IV

CONCLUSION AND IMPLICATIONS

CHAPTER X

UNIFORMITY AS A "RULE-LIKE" CONCEPT

This study of constitutional uniformity in taxation began with attention focused on the function and use of the state constitutional provisions and it seems appropriate to conclude it by repeating some of the observations already made and by stating those consequences and implications which point to a more realistic rationalization of the idea, especially those which are sufficiently clear to be worthy of generalization. Even in concluding it is important to keep in mind that uniformity, like many other constitutional concepts, has accurate meaning only when described in relation to a particular constitutional provision as applied to a certain type of tax statute imposed for a specific purpose, and any general statement about it tends to be misleading. Some crystallization of ideas is essential to useful analysis, however, and one really interested in piercing the "veil of sacerdotal conceptualism," must suggest some reasonably inclusive, different and realistic way of looking at constitutional uniformity.

To summarize first, the historical origins of uniformity in taxation are obscure. The idea appeared in the state constitutions because of a popular demand for elimination of the practical inequalities resulting from widespread use of the general property tax with its ever-expanding tax base, and was given constitutional rather than statutory expression because that demand coincided with a general movement to restrict the power of the legislature at a time when the country was undergoing great growth both in land settlement and in the initial change from an agricultural to a commercial and industrial economy. Although the historical origins of the constitutional provisions are obscure, their purpose is to bring about an equality of burden in taxation; but it is not always clear what kind of equality of burden is meant and surprisingly little judicial attention is given to the possible theories of burden.

From a functional viewpoint the uniformity provisions may be interpreted and described generally in terms of phraseology, scope and

306 Lowndes, Spurious Conceptions in the Constitutional Law of Taxation, 47 Harv. L. Rev. 628, 659 (1934). See discussion p. 34.
As to phraseology, there is the kind of provision which refers to a general standard for taxation and the kind which refers to an *ad valorem* rule normally applicable to property taxation. As to scope, a provision requiring either kind of uniformity may be limited to property taxes or may apply to non-property taxation, and more than one type of uniformity may be used in the same jurisdiction to reconcile two or more uniformity clauses in the same constitution. As to effect, the principal role of the provisions is to limit the power to tax, and this limiting effect is directly related to the legislature's power to classify. Thinking of the constitutional requirement in this way makes possible a comparison of the effect of the uniformity provisions and the effect of the equal protection provisions of the federal and state constitutions. In fact, the courts of the various states can be grouped into those which regard uniformity as more restrictive than equal protection, those which regard the two ideas as virtually synonymous, and those which conceive that constitutional uniformity in point of restrictive effect lies somewhere between absolute uniformity and equal protection.

The best way to isolate the use and function of the uniformity provisions is to examine their application by the courts in determining the constitutionality of specific tax legislation. The usual judicial technique of application is to categorize taxes according to their nature, and in many cases the nature of the tax is considered decisive so that no further decision is necessary. Where the kind of uniformity required by a particular constitutional provision is considered inapplicable to the kind of tax involved the critical problem is to determine the effect of the other provisions in the constitution requiring uniformity within the class, if any. Use of this technique leads to and results from an unrealistic application of the constitutional standard on the basis of the kind of tax involved or on the basis of the extent of classification permitted under the constitution. To fully appreciate the details and ramifications of this process one must visualize uniformity in relation to taxes clearly in the nature of property taxes, taxes which may be labeled property or non-property, taxes clearly non-property in nature and income taxes. This analysis has been made in a separate section of the study and is summarized there.

As to implications, every phase of this study points to the conclusion that the uniformity provisions are the prime source of a "rule-like" standard used to limit the taxing power. Such a description of the function of the provisions is not too startling and is in accord with the orthodox legal and political tradition that our state constitutions
are but a basic statement of the confines within which the government must operate. But the necessary implication in this conclusion: that the uniformity limitation is a "rule", or at least is a constitutional requirement susceptible of "rule-like" application, is worthy of the closest attention. As a rationalization of the uniformity problem, it carries with it additional implications of sufficient importance to warrant critical evaluation here.

In the first place, "rule-like" application of this particular constitutional limitation simply compounds the confusion and misunderstanding necessarily present in any uniformity situation because of the difference in phraseology, scope and effect of the various constitutional provisions. The misconception that the constitutional requirement for uniformity can be applied to any specific tax pattern as if it were a nice, precise, distinct rule for determining the effect of the tax on a given taxpayer is best reflected in the equally false idea that distinguishing characteristics of a modern, complicated tax statute can be distilled down to a point where the nature of the tax can be categorically labeled. Both are a conceptual impossibility. It is difficult to conclude whether the labeling process leads to the "rule-like" application of the constitutional limitation or vice versa, but the total result is increased confusion.

Moreover, precise application of the "rule" often leads to ridiculous results; and the drawing of fine lines of distinction between kinds of taxes or between permissible classifications in tax statutes may determine their validity, but it will not and does not alter their similarity. Judicial consistency frequently is impossible where such a method is used to explain why one tax is constitutional and another is not. The judicial patience and persistence necessary to achieve sound application of a constitutional rule to the endless assortment of taxes and types of classification conceivably possible in a modern society is more than can be expected of the courts. The most they have ever hoped for in applying these provisions in this way is an approximate equality, but such approximation as they have achieved rests on a hierarchy of judicial comparison, delination and distinction which is most confusing. A sentence or two in a constitution written a hundred years ago simply will not serve as a rule of thumb for the validity of tax statutes devised to produce governmental revenue from a complicated modern economy.

In the second place, when a constitutional standard is thought of as a rule, or is applied in rule fashion, there is a tendency to regard
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It as permanent and unchanging. This lack of flexibility is apparent in many of the uniformity cases. Since the requirement is one provided for in the constitution, the only relief from this tendency lies in the comparatively laborious process of constitutional amendment. The whole economic life of any modern community—national, state or local—changes rapidly, especially those economic factors which determine who is best able to provide any given share of the costs of government. And the cost of government itself changes so that the amount of burden to be borne equally is never the same. Unless our notions about the best way to accomplish equality of burden in taxation can be revised and revalued periodically, they become outmoded and less sensitive to the current needs of the taxpayer and his government. Witness the many instances where a state has found itself saddled with the general property tax because of a strict constitutional rule for uniformity or taxation according to value. A court may disavow this tendency in its interpretation of the uniformity provisions, but usually it will decide the constitutionality of a modern tax statute on the basis of what it said or decided about the uniformity of a different kind of tax long before.

In the third place, using uniformity as a “rule” makes for an unrealistic restriction of the taxing power. It tends to confuse the true issues rather than to clarify them by directing the court’s attention unnecessarily to the mechanical details of applying its rule. The court becomes engrossed in exploring the nature of the tax or in analyzing the basis for the classification attempted and loses sight of the purpose of the statute, the revenue needs behind its enactment, its relation to other legislation in the whole tax structure and its effect on all taxpayers in contrast to its effect on the particular taxpayer who is contesting its validity. In point of fact, when a court finds that a tax statute contravenes the uniformity provision, it is doing more than labeling the nature of a legislative imposed levy and letting the chips of legality fall where they may. It really is striking at one of the government’s most vital and vulnerable powers, the power to tax. Such action is well within the judicial power as we have always explained it, but infrequent recognition of its exercise and the consequences flowing therefrom is not conducive to realistic use of the power. Nearly all the rationalizations, explanations and reasons given by the courts for their decisions in these uniformity cases are in terms of applying narrow, specific, constitutional rules in an unimaginative and coldly, analytical manner. Both the attitude and the technique leave one with the impression that little consideration is given to the numerous other factors involved.
Admittedly, one may think of constitutional uniformity as a rule and still apply it in light of all the things, constitutionally expressed and otherwise, which should be considered in determining whether the particular exercise of the taxing power is proper, but few do it. Attention is diverted to the less important, and often insoluble problem of trying to fit a loosely worded constitutional clause to a complicated statutory pattern for raising revenue. This criticism may be one pertaining to emphasis rather than fundamental attitude or rationalization, but it is none the less important, for judicial emphasis can be quite decisive in tax cases. The struggle to modernize taxing methods in which all states have engaged at one time or the other has been waged around a conflict between the legislatures and the courts as to what is a valid exercising of the taxing power. Few new taxes, or new methods of imposing a traditional tax, have successfully avoided running the gamut of judicial interpretation without benefit of an analysis of the fiscal, economic and social factors which led to imposition of the legislation in the first instance. In jealously guarding the taxpayer from many of the benefits of scientific taxation the courts have invoked the uniformity provisions many times to find new tax legislation unconstitutional. In so doing they have relied heavily on the "rule characteristics" of the constitutional requirement.

How should the uniformity provisions be used? What is their proper function and how would it help to think of constitutional uniformity in a new way? Many of the uniformity cases have within them two suggestions leading to a more effective explanation of the uniformity provisions and their function. First, they suggest that uniformity in taxation is a broad, general objective of the constitution rather than a narrow, specific limitation. Secondly, they suggest that application of the traditional uniformity "rule" actually amounts to a judicial evaluation of the kind of tax pattern involved, the distinctive differences in classification attempted and other economic and social factors. This evaluation seems to rest in part on clear principles, but necessarily includes certain logical considerations of a court. Combining these two ideas, it is apparent that the usual difficulty in achieving uniformity might well be avoided by treating constitutional uniformity as a general objective for the legislature in its exercise of the taxing power rather than as a mere limiting rule on that power. Calling uniformity what it is, i.e., a judicially recognized and admittedly general constitutional principle, rather than what it is not, i.e., a well-defined constitutional limitation, would encourage all concerned to see if this particular purpose of the constitution is being realized in current tax legislation. If the legislatures and the courts were to so rationalize
uniformity, what would be the effect on the exercise of the taxing power and the consequence to the rights and interests of the persons and business subjected to that power?

A better orientation of the taxing power is the important implication in the suggested idea. As already shown, this orientation is described usually as fairness in taxation, which is taken to mean equality of burden or equality in bearing the expense of the government. If uniformity were recognized more directly as a goal of fairness toward which the taxing power is directed, more attention could be given to the possible methods available for achieving equality of burden. There would be more opportunity to consider the overall effect of the tax on the public in relation to other essential factors, particularly its place in the entire tax structure. It is doubtful whether true, practical, economic equality in taxation can ever be attained without full integration of the whole system of taxation. This rationalization would encourage such action rather than deter it. Of course, a court or a legislature may consider the question of fairness of burden in the application of the uniformity provisions as a rule, but the emphasis is different. The affirmative approach to uniformity helps one keep clearly in mind that broad equality of burden is the ultimate end of all taxation. With this basic thought as a guide one can make more rational decisions as to whether equality of burden is more closely related to ability to pay than to the value of that which is owned, or whether it is more closely connected to the volume of business done rather than the number of stores owned in the state, et cetera. The choice of bases for distributing fairly the burdens of taxation is a matter of policy and constitutional uniformity should be the criterion in the fundamental law toward which the policy makers move, rather than a "rule-like" barrier through which they break at their own risk. So long as the criterion is sufficiently general to be flexible, much of the confusion attributable to the rule characteristics of the provisions would be eliminated.

Aside from a natural reluctance to alter a traditional view, major objection to the rationalization proposed might center around two fears: (1) that it permits an increase in legislative discretion in determining the bases for achieving equality of burden in taxation, and (2) that under it the state taxing power is subject to considerably less constitutional restraint. Perhaps these fears can be adequately dispelled by additional reflection on the idea.

As to the first, no appreciable shift in governmental responsibility is contemplated or required in suggesting that constitutional uniformity
be thought of as an objective rather than a rule. What is suggested is simply a change in technique. The extent of legislative power or discretion would be no more and no less than it is now in respect to any legislation, tax or otherwise. The legislature would continue to initiate the particular tax, but it would so devise the pattern of its legislation as to bring about over-all uniformity and equality of burden in the entire tax structure in view of modern economic conditions. And it would so legislate with less fear of its efforts being rendered futile by the restrictive application of constitutional limitations. The courts would continue to exercise a judicial function and would retain all their usual prerogatives over legislative action. They would still determine whether the statute is compatible with the constitution and have the right to say that the taxing power is not being used to impose a tax in the fashion required by the fundamental law. They still would be the interpreters and guardians of the constitution in the sense that they could decide without legislative or popular interference whether the general objectives of the constitution as to uniformity in taxation were being met. The judicial power and function would not be encroached upon in any conceivable way. What the proposed viewpoint involves basically is that the legislature, the court and the taxpayer should become more aware of the real function of uniformity. That is, they should shift their attention and emphasis to the constitutional requirement directly and use it as a guiding, affirmative, general principle so as to minimize much of the confusion which results from endlessly trying to fit a constitutionally expressed generality to the particulars of a given tax statute as it affects the special problem of one taxpayer.

As to the second fear, one need only remember the comparisons already made between uniformity and equal protection. The trend in the decisions as to the similarity in effect of the state constitutional provisions requiring uniformity and the Fourteenth Amendment requiring equal protection has reached a point where we must conclude that they no longer complement each other, but overlap so much that the limiting effect of the uniformity provisions is no longer necessary to a well confined taxing power. Even if the uniformity provisions were stricken from the state constitutions entirely, it is rather clear that effective limitation of the taxing power would be adequately provided for by the Federal Constitution. This suggests the final observation that the primary function, and the best purpose, of constitutional uniformity as derived from the state constitutional provisions is to serve as a general objective for any exercise of the taxing power.