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CONSTITUTIONAL UNIFORMITY AS A RULE FOR
THE VALIDITY OF LICENSE TAXES IN KENTUCKY

BY WILLIAM L. MATTHEWS, JR.*

At present there is more than normal concern in this and other states with the fiscal problems involved in raising more revenue to maintain current activities of government and permit the undertaking of additional services. This need for more money is urgent at all levels of government although national and state revenues are at a new high, for so are expenses, and even municipalities are expected to finance many expensive public functions of primarily local interest these days. One way to relieve the pressure on all budget makers might be to increase the rates on existing taxes, but this method is politically inpedient if not impossible and might be of doubtful effectiveness in inflationary times.

Another possibility is the imposition of new taxes in an attempt to reach new sources of revenue, but there are obvious objections to this alternative also. At least one is how to impose new taxes and still decrease the competition for a deflated tax dollar between the various taxing units. This competition already is pronounced as evidenced by income taxes levied by both the state and federal governments, by property taxes levied by the state and city governments, and certain excises imposed by all three. The integration of competing tax structures is not entirely a problem of recent development and considerable progress has been made in recent years toward its solution, but the immediate need for more revenue certainly accentuates the difficulty.

One theoretical way open to the state and city is the greater use of license taxes for revenue purposes. Many states have already chosen this path along with other methods in their well known swing away from the property tax, and most cities are

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the site of a number of taxable businesses. Increased activity in
the method suggested is properly the function of the legislator
or alderman which he must exercise with advice from the fiscal
adviser or economist, but it would necessarily involve the some-
times difficult problem of devising license tax legislation which
is constitutional and at the same time a reasonably good revenue
producer. This potentially important and always interesting
problem is complicated to some extent in Kentucky by our
court’s insistence that Section 171 of the Kentucky Constitution,
the uniformity clause, applies to license taxes.

Our principal objectives here are to examine the constitu-
tional basis for uniformity of licenses in view of this persistent
assertion by the court, to suggest some of the consequences of
applying the traditional rule of uniformity to this kind of tax
by reviewing the more important recent cases, and to call
attention to a few of the implications in the idea, especially
those affecting a modern use of the taxing power.

A discussion of “Excise Taxes and the Uniformity Clause
in this Journal some ten years ago touched on certain
phases of this problem, and it is not proposed to cover again
maternal well investigated before, but in the intervening years
some license tax statutes and ordinances have been before the
court on the question of the uniformity of the tax, and it seems

Reeves v Adam Hat Stores, Inc., 303 Ky 633, 198 S.W 2d 789
(1947) Great Atlantic and Pacific Tea Co. v. Kentucky Tax Com-
mission, 278 Ky. 367, 128 S.W 2d 581 (1939) Accord: City of Louis-
ville v. Aetna Fire Insurance Co., 284 Ky 154, 143 S.W 2d 948
(1940) City of Danville v. Quaker Maid, Inc., 211 Ky 164, 278 S.W
980 (1925) Commonwealth v Payne Medicine Co., 138 Ky 164, 127
S.W 760 (1910) It should not be supposed on the strength of the
general observations here that the uniformity clause is the only or
main obstacle to the use of license taxes for revenue, particularly by
municipalities. For instance, the city of Louisville is now seeking re-
lief from statutory requirements that revenue from licenses and
excises must go into the sinking fund. See: Editorial, The Louisville
Courier-Journal, February 8, 1948.

Trimble, Excise Taxes and the Uniformity Clause of the Con-
stitution of Kentucky (1937) 25 Ky. L. J. 342. It will be noted that
Trimble uses the label “excise” while the writer chooses “license”
to describe the type of tax involved. There is little if any difference
in legal result attributable to the choice of terms, and it is thought
the scope of interest here can best be limited by considering only
those cases where the tax in question is called a license. As a matter
of fact, most of the cases cited by Trimble, particularly those on
which his conclusions rest, are license tax cases.
appropriate to evaluate these cases in light of the fiscal need already referred to as well as to look again at some of the older cases. Perhaps a brief discussion of constitutional uniformity in general will afford sufficient background for the limited investigation contemplated.

The provisions found in nearly all state constitutions requiring taxes to be uniform are the principal limitation on a legislature's exercise of the state's sovereign power to tax. Fortunately, the courts have recognized the impossibility of achieving absolute uniformity in taxation and seldom have applied the constitutional requirement in its literal sense, but the broad legal meanings for the concept resulting from judicial interpretation of the constitutional phrase often are not clear, consistent or capable of concise statement. It does seem certain that in the preliminary stages of decision in a case involving the constitutionality of tax legislation the uniformity of the tax in the legal sense depends in large measure on what kind of tax it is, and the validity of the legislation more often than not turns on the court's analysis of the nature of the tax. After the nature of the tax is determined its uniformity is dependent primarily on the validity of the classifications proposed in the statute.

Thus, if the tax is one on property the constitutional standard is interpreted or read in one way, if it is an excise tax, it may be levied in a different manner from a property tax and still be uniform, and if it is an income tax, or some other kind of tax not amenable to being forced into the two usual

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3See generally 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) Chapter XIV "The Power of Taxation." For an interesting discussion of the point in a state where there is no uniformity provision see: State v. Travelers' Insurance Co., 73 Conn. 255, 257, 47 Atl. 299, 300 (1900).


5Reynolds Metal Co. v. Martin, 269 Ky. 378, 107 S.W 2d 251 (1937). Cf. Brown, Constitutional Limitations on Progressive Taxation of Gross Income (1937) 22 Iowa L. Rev. 246, 247, where it is assumed that the uniformity and equality provisions do not apply if the income tax is construed not to be a property tax.
categories, still another criterion for uniformity may apply. This judicial inclination for categorization in construing state tax legislation results in part from the wording of the constitutional provisions and in part from the notion that a court's decision in a tax case must rest on analytical, conceptualistic reasoning. In any event, it is one of the basic general factors in the constitutionality of most state tax legislation and should serve as the starting point for any inquiry into constitutional uniformity as it relates to a particular kind of tax.

THE CONSTITUTIONAL BASIS FOR UNIFORMITY OF LICENSE TAXES

As just suggested the basis for applying a rule of uniformity to license taxes usually is found in the constitution, but it is not so clear in Kentucky that the idea is the result of exact constitutional expression for the only mention of uniformity in the Kentucky Constitution is in that part of Section 171 which reads

"Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

And the only relevant mention of license taxes is in that part of Section 181 which reads

"The General Assembly may by general laws only, provide for the payment of license fees on franchises, occupations and professions, or a special or excise tax;"

6 The practice of referring to all kinds of uniformity provisions as "the uniformity clause" leads to much confusion. Actually, the various provisions in the state constitutions differ considerably in their phraseology, scope and effect. Usually the uniformity clause is any one of three general types: (1) those applicable to property taxes only because of the wording used in the provision, (2) those applicable to excise taxes only because of the wording in the provision or because of judicial interpretation, and (3) those few which apply to all taxes because of the absence of specific reference in the provision. Also, any of the three types mentioned by their terms may require: (a) absolute uniformity, or (b) uniformity within a class. Normally group (1) includes those provisions which require property or ad valorem taxes to be levied according to value. Not only do the clauses vary as among the various constitutions but a number of constitutions contain more than one of the types listed. As a result, it is impossible to think clearly about "uniformity" without keeping in mind the kind of uniformity provision one is referring to.

7 Lowndes, Spurious Conceptions in the Constitutional Law of Taxation (1934) 47 Harv. L. Rev. 628, 659.
There is little on the face of these provisions to preclude a conclusion that license taxes need not be uniform for the wording of Section 171 is restricted to property taxes and Section 181 simply affirms the legislature's power to impose certain taxes, including licenses, which it unquestionably has because it is a legislature and not because of any constitutional authorization. But in a consistent line of cases, of which Reeves v Adam Hat Stores, Inc., is the most recent, the Court of Appeals has held the constitution requires license taxes to be uniform within a class.

In the Reeves case the court found an act imposing a license tax on retail merchants graduated according to the number of stores owned and operated in the state unconstitutional for want of uniformity, and in its opinion made this observation:*

“A similar act passed in 1934, as amended in 1936, was declared to be unconstitutional in Great Atlantic and Pacific Tea Co. v Kentucky Tax Commission. on the ground that it was a revenue measure and that the classification made in the act was not a natural one, but was unreasonable, and arbitrary and violated sec. 171 of our Constitution, which provides that taxes shall be uniform on all property of the same class.”

Although the court surely did not mean to imply that a license tax is a property tax, and therefore might not have meant exactly what it said, it must be admitted that some connection between the rule of uniformity in Section 171 and license taxes is clearly implied. Some of the cases, discussed more fully infra and cited supra,” assert a direct connection in this respect. What is this connection and how is it rationalized with the actual wording of the constitution? An answer can be had only by exploring further the court's expressed ideas about the basis for uniformity of licenses.

The implication of the Reeves case is more fully explained in Great Atlantic and Pacific Tea Co. v Kentucky Tax Commission, the most important modern case in point, where the court points out

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* 303 Ky. 633, 198 S.W. 2d 789 (1947).
* Id. at 634, 198 S.W. 2d at 790 (emphasis added).
* 278 Ky. 367, 378, 128 S.W. 2d 581, 587 (1939) (emphasis added).
While the provisions of section 171 of our Constitution requiring taxes to be equal and uniform, may apply in their fullness only to direct taxation of property, yet the principles of equality and uniformity must be observed in imposing license and occupation taxes. The uniformity provision does not prevent the classification of businesses, trades, professions or occupations, and the taxation of different classes at different rates, but the tax must be uniform on all subjects within the class to which it is applied, and the classification must be made according to natural and well recognized lines of distinction. The principle of equality and uniformity in taxation is one of the cornerstones of our Constitution and has been jealously guarded by the decisions of this Court in applying it, not only to statutes levying a direct tax on property, but to statutes and municipal ordinances imposing occupation taxes."

The position of the court here seems to be that section 171 is the direct source of certain principles of equality and uniformity which apply to license taxes as well as to property taxes, and these principles represent a cornerstone of the constitution which the court must protect. Without taking an unsympathetic view of the court’s conception of the constitution or its protective role with respect to that document, one may well wonder what is meant by the phrase “apply in their fullness only to direct taxation of property,” and whether constitutional cornerstones normally are derived from the precise wording of a single provision in the fundamental law. The position taken in this regard may very well be the decisive factor in the validity of the tax, a fact made quite clear in City of Louisville v. Aetna Fire Insurance Co.,⑫ where the court distinguished a potentially controlling Alabama decision on the ground that the Alabama Constitution did not require uniformity of any taxes except property taxes.

A search for the underlying reason for the license tax uniformity rule involves more than a quibble over judicial language because an understanding of the fundamental basis of the rule is essential to an accurate evaluation of its utility. Besides, if the rule is based directly on a specific section of the constitution, any change or modification in it would have to be by the laborious process of amendment, but, if the basis is traced to the court’s understanding of the constitution’s general theme regarding taxation, that understanding might be altered in light

⑫ 284 Ky 154, 157, 143 S.W. 2d 1074, 1076 (1940).
of present fiscal needs. At least it is interesting to trace the court's understanding back to a comparatively early case. As Trimble points out, it was seventeen years after the adoption of the present constitution before the Court of Appeals was asked to decide whether the uniformity rule mentioned in Section 171 applied to the kind of taxes imposed under authority of Section 181.

In the Hager case the court held a statute unconstitutional because the license tax it imposed was not uniform within the class, but pointed only to the general implications in the Constitution of 1891 and to a line of historical cases to support its position that all taxes must be uniform within the class. This frequently cited opinion is worthy of quotation at some length for its historical significance, for what it shows about the court's notion of the requirements in Section 171 and other sections of the constitution regarding fairness in taxation, and for its intimation that the historical basis for all uniformity is largely judicial. The court was explicit on the question of direct connection between the uniformity rule of Section 171 and taxes imposed under Section 181. In this respect it said.

"We do not agree with counsel for appellee that the direction in section 171 that 'taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax' applies directly or specifically to the license fees mentioned in section 181. Yet it is entitled to serious consideration as indicating a purpose that all laws imposing taxes shall operate in a uniform manner to the end that no favoritism can be shown or discrimination be practiced."

The opinion clearly recognizes the power of the legislature to classify license fees (and presumably any tax imposed under section 181) according to the class of city (constitutionally defined on the basis of population) and to classify within that class according to the trade, occupation or business concerned. But beyond this point taxes imposed under Section 181 must be uniform within the class. As to this rule the court said

"We do not believe it was contemplated by this section (section 181) that the General Assembly might impose a license fee for State purposes upon blacksmiths

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13 Trimble, op. cit., supra n. 2 at 343.
15 Id. at 8, 107 S.W at 256.
16 Id. at 12, 107 S.W at 257.
in one county and exempt blacksmiths in another,
The authority to impose these special taxes does not
carry with it the right of discrimination and exemption
in any class that is dealt with."

The opinion in the *Hager* case, however, does more than
establish for taxes imposed under Section 181 a uniform
within the class rule similar to that stated in Section 171 for
property taxes. It indicates a conscious effort on the part of
the court to find the real basis for the rule. Witness the
following rationalization. 17

"The language, "The General Assembly may by
general laws only" provide for this species of revenue,
would seem to imply that it was intended that the ap-
plication of the law should be general, operating
equally and alike upon every trade, occupation and pro-
fession that it was designed to reach. If a few, or any
number of persons less than all, who follow a design-
nated trade, occupation or profession may be exempt,
while the others are taxed, the law imposing the tax
would not be general, but special and local, and for-
bidden by sections 59 and 60 of the Constitution. This
construction is in harmony with the dominant spirit of
the constitution which provides for uniformity in almost
every subject it treats of,

And in still another place the court asserted 18

"the power of taxation is, in our judgment,
limited by some of the declared ends and principles of
the fundamental law. Among these political ends and
principles, equality as far as practicable (is) emi-
nently conspicuous. An exact equalization of the
burden of taxation is unattainable and Utopian. But still
there are well-defined limits within which the practi-
cal equality of the Constitution may be preserved, and
which therefore, should be deemed impassable barriers
to legislative power. Taxation may not be universal;
but must be general and uniform. And although
there may be a discrimination in the subjects of taxa-
tion, still persons in the same class and property of the
same kind must be generally subjected alike to the same
common burden."

Finally, the court discussed in detail a number of cases
decided before 1891 under earlier constitutions which were
completely silent on uniformity and concluded. 19

18 *Id.* at 15, 107 S.W. at 258 (emphasis added).
19 *Ibid.* The earlier cases cited here were: Schuster v. City of
Louisville, 124 Ky. 189, 90 S.W. 689 (1904); Simrall v. City of Cov-
ington, 90 Ky. 444, 14 S.W. 369 (1890); Rankin v. City of Henderson,
9 K.L.R. 861, 7 S.W. 174 (1888); Smith v. City of Louisville, 9 K.L.R.
779, 8 S.W. 911 (1888); Bullit v. City of Paducah, 9 K.L.R. 875, 3
S.W. 802 (1887)
"The authorities we have cited arose in cases involving taxation for municipal purposes; but they illustrate the rule, that is firmly embodied in the principles of constitutional law that have always obtained in this state, that taxation must be uniform and equal as nearly as it is practicable to make it so,"

In other words, taxes imposed under authority of Section 181 must be uniform within the class because uniformity is a general theme of all the sections in the constitution taken together and not because Section 171 is directly applicable, and further, the present constitution merely reflects the traditional principle basic in all taxation that all classes of persons and property should bear alike the common burden of taxation. This is indeed a desirable objective for the legislature in its exercise of the taxing power, and it may be what the court means to imply in the Reeves case and similar decisions. But calling the objective what it actually is a judicially recognized and admittedly general constitutional principle, rather than what it is not an expressly required constitutional limitation, will encourage all concerned to see if this particular purpose of the constitution is being realized in current tax legislation. It might even lead to some healthy scepticism about the actual equality and uniformity of burden in taxation which results from continued use of the traditional rule for uniformity in license taxation. Such questioning is not warranted, however, unless predicated on a reasonably accurate estimate of what the traditional requirement is. What does the court mean by "uniform within a class" where license taxation is concerned, and what are some of the consequences of judicial application of the rule?*

**Uniformity of License Taxes Within a Class**

The use of a uniform within the class concept has not minimized appreciably the court's problem of determining whether a particular tax is uniform and equal, but it has restricted the scope of the court's attention and focused its emphasis on the validity of the classifications attempted in the statute. The phraseology used to describe a valid classification is about the same at this point as it is in the numerous other instances where courts use the same technique. In order to validly
classify in a license tax statute the legislature must choose some "reasonable," "distinctive," or "natural" basis for the classification so the discrimination practiced is not "arbitrary" "unreasonable," or "capricious." In fact, the descriptive labeling of classes is so standardized that the words in and of themselves mean very little. The really decisive factors in the classification process are those essentially distinctive features of a tax class which the court has upheld in the past and should sustain as permissible again. The Court of Appeals has singled out a number of distinctions between classes which it considers controlling. Many of these are not too well defined and others are more applicable to classifications in statutes other than those imposing a license tax. Some are applicable here.

Nearly fifty years ago, in *Gordor v City of Louisville*, the court suggested at least three principles of classification in license tax legislation which it would recognize, and Trimble confirms their continued use until 1937. For our purpose they may be stated as follows (1) a license tax can be imposed upon all persons engaged in the same business without regard to the volume of business done, or (2) on a business according to the amount of business done without the rate of the tax changing as the volume of business changes, or (3) by dividing a general class into separate classes according to the volume of business done with the rate increasing with the volume of business. A brief chronological resume of the more important recent cases will show how these principles have been followed to the present time and indicate other influential factors in a valid classification.

In the companion cases of *Davis v Pelfrey* and *Johnson v City of Paducah*, the court made a clear distinction between an annual $5.00 license tax on non-resident users of automobiles and an identical tax on resident and non-resident users, where

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Madden Ky 343, 128 S.W 2d 463 (1939).

Trimble, op. cit., supra n. 2 at 346 for a thorough discussion of these principles and the cases pertaining to each.

285 Ky 298, 147 S.W 2d 721 (1941).
both ordinances were designed to reach vehicles used in "any kind or character of business, work, profession, occupation or calling within the corporate limits of the city." In the Johnson case the court thought there was a reasonable distinction between non-residents who were treated like residents and other non-residents in that the former used the city streets and contributed to the parking and traffic problem, but in the Davis case it found non-residents were treated differently from residents. The court suggested that had there been a separate ordinance imposing a similar tax on residents in the Davis case the ordinance in question would have been valid. This seems to be another way of saving there not only must be uniformity within a class, but there must be equality between classes. Actually, there is about as much reason for classifying on the basis of resident and non-resident users as there is for classifying either of those classes on the basis of who parks his automobile or contributes to traffic congestion. The really significant point, however, is that precise application of any uniformity rule is apt to lead to some mildly ridiculous result. Drawing a fine line between classes simply determines their validity, it doesn't alter their similarity. Perhaps the constitutional requirement should serve as a sign of general direction for exercise of the taxing power, rather than as an inflexible rule always available for restricting that power.

In Denton v. Potter, the court had before it the problem of determining the validity of sub-classes within the same general occupation. There, the so-called "Peddler's Act" of 1940 was successfully attacked on the ground that the license tax imposed was not uniform on all persons in the same class. The statute provided for three groups of peddlers: (1) those who traveled on foot, (2) those with a vehicle, and (3) those who sold their goods from any vehicles, booth, tent, roadside or temporary stand. Payment of a $25.00 annual tax was required of the second group, but only a fee of $1.00 for the license was required of the other two groups. The court found this feature lacking in uniformity and a fatal defect to the validity of the statute. It conceded the power of the legislature to sub-classify peddlers on the basis attempted, but it felt the failure to impose any tax.

= 284 Ky. 114, 143 S.W 2d 1056 (1940)
on two of the three sub-classes indicated unreasonable discrimination. It suggested the legislature might impose graduated rates on the sub-classes since the basis of distinction might bear some relation to the differences in the amount of business "that in all reasonable probability would be conducted by the persons in these classifications." 26

There is a difference it seems between sub-classification for the purpose of graduating a tax, and sub-classifying to impose one because the former may reflect a difference in the amount of business done. This interpretation is not an innovation because it is a necessary consequence of one of the principles suggested at the outset in this part of the discussion, but it certainly puts one to thinking about the "well-defined limits within which the practical equality of the Constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power." 27 Again, the difficulty may not be with the rule, but with the use of a broad constitutional concept as a rule.

In City of Louisville v Aetna Fire Insurance Co., 28 the court considered the validity of a Firemen's Pension Fund tax on fire insurance policies written on property located in the city at a rate of two per cent of the gross premiums. The ordinance levying the tax was contested on several grounds, one of them being absence of uniformity and equality in violation of Section 171 of the Kentucky Constitution and the Fourteenth Amendment to the Federal Constitution. The ordinance was found wanting in uniformity and unconstitutional because those persons who insured their property paid the tax and those who did not insure paid nothing. The court reasoned that the duty of a municipal fire department is the same toward all combustible property in the city and while it owes no greater duty toward property insured than it does in respect to property not insured the burden of the tax would eventually fall on the owners of insured property.

The court did not elaborate on the non-uniform feature except to refer to cases from other jurisdictions holding similar

26 Id. at 118, 143 S.W. 2d at 1058.
28 284 Ky. 154, 143 S.W. 2d 1074 (1940).
acts void for lack of uniformity and equality. A close reading of the cases referred to reveals little explanation why the court did not consider whether fire insurance companies were a valid class, or whether insurers of property were a distinctive group who would bear the burden of the tax equally and uniformly as between themselves. The court did consider appellant’s argument that the Firemen’s Pension Fund accomplished a public service and conceded it would tend toward betterment of fire service, but found the worthiness of the plan could not overcome the objectionable lack of uniformity because “taxes should be levied and collected in strict accord with constitutional provisions and arguments of convenience should not be permitted to override the constitution.”

In Hartmann v City of Louisville, a “wholesale fruit and vegetable” ordinance imposing a license fee graduated on the basis of established and non-established dealers was resisted on the usual grounds that the classification attempted was “capricious, arbitrary, discriminatory and not founded upon any natural or reasonable distinction.” The court adopted as its opinion the finding of a Special Judge below who had relied directly on the statement of an agent from the Department of Agriculture of the University of Kentucky as to the reasonableness of the classification between established and non-established dealers. The Special Judge did cite with approval a statement by the court in an earlier case to the effect that, “A classification adopted by a Legislature in imposing occupation taxes will be held constitutional if there are substantial differences between the occupations separately classified, and such differences need not be great.” The ordinance was upheld, but in view of the nature of the opinion it is uncertain whether the court would

San Francisco v Liverpool etc., 74 Cal. 113, 15 Pac. 380 (1887)
Lowry v. City of Clarksdale, 154 Miss. 155, 122 So. 195 (1929)
Continental Insurance Co. v Simrah, 131 Neb. 791, 270 N.W. 122 (1936)
Philadelphia Ass’n for Relief of Disabled Firemen v Wood, 39 Pa. 73 (1869)
American Alliance v. Board of Insurance Commissioners, 126 S.W. 2d 741, (Tex. Civ. App. 1939)


Id. at 490, 138 S.W 2d at 950.
consistently recognize the validity of a classification based primarily on the established character of a business as testified to by an expert witness. It is a possibility

In *Commissioners of Sinking Fund of Louisville v Weis,*\(^3\) still another question in sub-classification was decided. There the city imposed a license tax on "every person, firm or corporation engaged in the business of selling furniture, household goods, or wearing apparel, on a strictly installment plan and operating a regular installment business." Counsel for both litigants and the court agreed the city could classify and sub-classify trades, occupations, and professions for the purpose of licensing them, and that persons engaged in the same business could be classified and a different license tax imposed on each class if the differences between classes "spring from a reasonable basis in the nature of things", but there agreement ended. The city thought conducting a regular installment business constituted a particular method of doing business because the risk of extending credit required the charging of a higher price and that the right of repossessing the goods upon default in payment of an installment made a difference. In addition, the selling of furniture, household goods or wearing apparel, which are necessities of life, justified a special or higher tax than where the sale was of commodities not deemed to be necessaries. The taxpayer was convinced the last mentioned part of the classification was arbitrary, discriminatory, not uniform and invalid. In sustaining the taxpayer's position, the court recognized full understanding by both parties of the rules involved, acknowledged that the difficulty lay in application of the rules, and said \(^4\)

> "It seems to us that the singling out of the business of selling necessities for special licensing savors of inequity rather than reason. But the controlling factor in the judicial determination of validity is that of logical considerations of uniformity and equality."

Then the court spelled out its "logical considerations" regarding the particular tax as follows \(^5\)

> "Here is a classification of business according to the methods of operation—as between the method of ordi-

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\(^3\) 269 Ky. 554, 108 S.W. 2d 515 (1937)

\(^4\) *Id.*, at 557, 108 S.W. 2d at 517 (emphasis added).

nary merchants and the installment plan. Then those following the latter plan are divided between those merchants who handle everything but household furnishing and wearing apparel and those who sell those necessities. The first class are exempt. The second, limited class, are taxed. The appellees point out that no dealers in any other kind of merchandise than furniture or clothing, either in the ordinary or customary manner of cash and credit sales or on the installment plan, are subject to the tax. Illustrative of the injustice and absence of uniformity and reasonableness, a merchant whose major receipts are from the installment sales of jewelry, bicycles, and other things, and not having to pay the license, may be in business next door to a merchant selling furniture on the same plan who would have to pay it. On the other side of him may be a merchant who sells furniture for cash and credit and on installments, but who would not have to pay such tax because less than half of his receipts are in installments."

Except for the description of the classes, which could be obtained from reading the ordinance, the above quoted explanation gives little help to one seeking a working solution for the problems of uniformity within a class. The court seems to have been impressed by the possible inequality between classes, as suggested before, rather than by any real differences between persons in the same class which is the really troublesome problem in applying a uniform within the class rule. The court did recognize rather clearly that constitutional uniformity in the final analysis is something that is subject to judicial determination based on "logical considerations." Consciously, or otherwise, the court broke away from the traditional belief that the uniformity provision can be applied to a particular license tax, or any tax for that matter, as if it were a well-defined mechanical rule capable of being construed according to pre-conceived ideas divorced from the exigencies of current needs and problems.

Probably the most influential case of the past ten years on this problem is Great Atlantic and Pacific Tea Co. v Kentucky Tax Commission, already mentioned in another connection. Here the court was asked to determine the validity of the 1934 Chain Store Tax, as amended in 1936. The statute imposed a tax on retail stores graduated according to the number of stores in the state. The A. & P. Company, owners and operators of two hundred stores, contested the constitutionality of the statute on the theory, inter alia, that it violated Section 171 of the Kentucky

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Constitution. By way of showing lack of uniformity it contended the Kroger Grocery and Baking Company was the only other merchant owning and operating more than fifty stores in the state (which was the maximum bracket in the statute), that there were other merchants in the state having larger gross sales, gross receipts, net receipts and net income, and that both it and Kroger were operating with an annual net loss. The court summarized the points of difference between the owner of multiple units and the owner of a single store which the state urged in support of the validity of the tax as follows

"abundant capital, superior management, lower operating costs, greater efficiency in purchasing, buying for cash and thereby obtaining cash discounts, warehousing of goods and distributing same from a single warehouse to numerous stores, and cheaper advertising."

After an extended discussion of authorities, and at least some reference to all the questions presented, the court found the statute unconstitutional for lack of uniformity in that there was not a reasonable basis for classification according to the number of stores owned and operated in the state.

The opinion in the A. & P case is full of decisive, and, perhaps, questionable assertions about the law governing the statute in question, but our attention at this point is directed only to those pertaining to distinctive features in a valid classification. First, the court reviewed many of the distinctions it had upheld and denied in the past, including the three principles first asserted in the Gordon case, and then called attention to the fact "that the license taxes imposed by the statute under consideration bear no relation to the volume of business done, but are arbitrarily fixed in accordance with the number of stores operated by a single owner." Of course, the state had admitted

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7 Id. at 379, 128 S.W 2d at 587.
8 One of these was the related problem which runs through all these cases as to whether the uniformity clause applies to a license tax imposed as an exercise of the police power rather than the taxing power. The older cases are not entirely clear on this point, but Trimble and others suggest that uniformity does apply to a regulatory tax, and there is support for this conclusion in the instant case. There really is little difference between the basis for uniformity in regulatory licenses and its basis as it is being considered here, but in the cases discussed above the tax was held to be a revenue measure or its validity was litigated on that theory.
this and was resting its contention on the distinctive character of the number of stores feature, so the court had to make the following analysis:

"These same points of difference (those urged by appellee) appear between the owners of independent units. One owner has an abundant supply of capital; another a limited supply. One buys for cash and obtains cash discounts; another buys on credit. One is skillful in buying; another is unskilful. One operates his business on the cash and carry plan, while another extends credit and maintains a delivery service. Innumerable other points of difference could be pointed out. No two merchants conduct their business on exactly the same plan. It is obvious that the differences relied on as a basis for the classification are not peculiar to a group of stores under unified management or ownership. Skillfulness in buying and efficiency in management are personal attributes, regardless of whether the merchant owns one or more stores. Likewise the quantity of capital employed and the advantages flowing therefrom are not dependent upon the number of stores owned and operated. They arise from the size of the business and not from the number of stores. A classification of a business, based on a difference in number only is without substance and does not have a reasonable relation to the object of the taxing act, which is to raise 'revenue.'"

The final thought in the explanation given would seem to be the critical implication in this case. The court does not categorically read out of the classifying technique the element of size as reflected by number of stores, but it does suggest that size and taxation for revenue are not sufficiently related to make the statute constitutional.

The decision on the particular point is as good an illustration as one will find of how constitutional uniformity is used to stop the taxing power at some particular point. In fact, it might well serve as a leading case on the role of the judiciary under the constitution as it has been conceived of in this country since the beginning of the last century. The only troublesome thing is that the courts seldom if ever give any direct indication that they realize what is going on and what they are doing. All their explanations and rationalizations and reasons are made in terms of applying narrow, specific constitutional rules in an unimaginative and coldly analytical manner. Both their attitude

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and technique leave one with the impression that little consideration is given to the numerous other factors involved. Occasionally, some opinion or dissent pierces the veil which surrounds constitutional interpretation in this kind of tax cases and suggests things which should influence the court other than the application of the nice, precise rule. The dissent in the A. & P case does this and should be noticed particularly. Witness the following:

"While I realize that the method of classification employed in the so-called chain store tax in question is not the best to be had, it does not seem to me to be an arbitrary classification for license tax purposes. A sound tax measure should have some definite relation to the income of the taxpayer, since taxes are paid from income or capital. But in all such matters the legislature has been given wide latitude in determining the subjects to be taxed and the manner in which the taxes are to be applied.

Progress has been made in recent years in the field of taxation toward the goal of levying and collecting taxes in accordance with the ability of the taxpayer to pay. Property taxes, which are as old as organized government, and which have long been condemned, have been giving way rapidly to the more modern types of business, income and excise taxes, of which the measure in question is one. This change, however, has not kept pace with the rapid changes in our social and economic structure which incidentally accounts in no small part for the confusion and chaos in the field of taxation. Kentucky has been in the forefront in attempting to adopt a more equitable tax structure, though she still has some way to go along the road."

By way of summarizing this brief look at the basis for uniformity of licenses and the more important recent cases, it is suggested that the decisions of the court taken as a whole have within them the ingredients for a different and useful way of thinking about constitutional uniformity. In the first place, the opinions in these cases contain more than a hint that uniformity in this instance is a broad, general objective of the constitution rather than a narrow, specific limitation. Secondly, they suggest that application of the usual uniform within a class rule actually amounts to a judicial evaluation of the distinctive differences in classification which rest in part on clear principles, but necessarily include certain logical considerations of the court. Finally, when these two ideas are combined, it is apparent

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40 Id. at 382, 128 S.W. 2d at 589.
that the usual difficulty in achieving uniformity is not caused by the application of the rule to a particular statute but by the use of a general constitutional objective as a rule for the validity of any tax. If the legislature and the court were to so rationalize constitutional uniformity, what would be the effect on the exercise of the taxing power and the rights or interests of the persons and businesses on whom that power works? Some limited speculation and comparison in this respect, as a final phase of this discussion, may be helpful.

**Some Implications and Objections**

A better orientation of the taxing power is one implication in the suggested idea of treating constitutional uniformity as a general objective rather than a limiting rule. This orientation is usually described as fairness in taxation, which the courts take to mean an equality of burden or an equality in bearing the expense of government. If the legislature and court were to recognize uniformity 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. The traditional way of looking at the constitutional requirement has resulted in an approximate equality only, and the approximation is determined from the viewpoint of the particular taxpayer who questions the validity of the tax. Its use affords little opportunity to consider the over all effect of the tax on the public in relation to other essential factors, such as the place of the tax in the entire tax structure.

In imposing a license tax, for instance, the legislature should consider carefully whether the owners of certain businesses should bear their share of the total burden of taxation equally as between themselves merely as owners, or as owners of a particular kind of business, or as owners of a particular kind of business of a certain size operated in a certain way. This is something that should be given as much direct attention as possible before the tax is imposed rather than left to a belated and often extended determination by the courts. Of course, a

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4 Pierce v. State, 229 Iowa 170, 294 N.W. 237 (1940); Walker v. City of Richmond, 173 Ky. 26, 189 S.W. 1122 (1916); Huron-Clinton, etc. v. Board of Supervisors, 304 Mich. 328, 8 N.W. 2d 84 (1943); Com. v. Repplier Coal Co., 348 Pa. 372, 35 A. 2d 319 (1944).
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 rule method tends to confuse the true issue rather than clarify it by directing the court's attention unnecessarily to the mechanical details of application. 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 a more rational decision 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. 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 technical "rule-like" barrier through which they break at their own risk.

Another implication is that an affirmative and general objective usually is more flexible than a rule, and constitutional uniformity used in the proposed way would allow the legislature or court to revise and revalue periodically their ideas about the best way to accomplish equality of burden in taxation. The whole economic life of any modern community, be it local, state or national, changes rapidly, especially those essentially economic factors which determine who is best able to carry any given share of the costs of government at any given time. One only needs to look about him to confirm this fact, and, as previously suggested, the cost of government itself changes from time to time so that the amount of burden to be borne equally is never the same. If the particular constitutional standard for taxation—in this instance the one applicable to license taxes—is thought of and applied as a rule, there is an almost irresistible tendency on the part of all concerned to treat the standard as fixed and unchangeable. This is a fatal characteristic of all rules, and while one may disavow the tendency on his part, he still will rely on Hager v Walker, or the Gordon case in determining the constitutionality of a modern chain store tax. The best way to make a constitutional provision flexible, changeable, usable and a fair standard against which
to measure the validity of modern tax legislation is to remove from it as many of its rule characteristics as possible.

Except for a natural hesitancy about giving up traditional notions, the two major objections to the general thesis suggested here probably would be (1) that the legislature already has too much discretion in determining the equality of burden in taxation and this method would only increase that discretion, and (2) that the only effective restraint on the taxing power of the state would be reduced materially. Both of these possible objections are sufficiently important to warrant brief analysis here.

Most of the fears implicit in the first objection can be dispelled by additional reflection on the nature of the idea in question. Using uniformity as an objective rather than a rule requires only a change in technique and does not contemplate any shift in responsibility or discretion. The amount or degree of discretion in the legislature would be no more and no less than it now has in tax legislation, or any other legislation for that matter. The legislature would continue to initiate the particular tax, but it would so devise the legislation as to bring about over-all uniformity and equality of burden in the entire tax structure in view of modern economic conditions. The court would retain all of its traditional prerogatives over legislative action. It would still be the judge of whether the tax statute is compatible with the constitution, and have the final say as to whether the taxing power is being used to impose a tax in the fashion contemplated by the fundamental law. It would continue to be the guardian of the constitution in the sense that it could determine without legislative or popular interference whether the general objectives of the constitution in this particular respect were being met. Its power would not be encroached upon in any conceivable way. All the idea involves, really, is that both the legislature and the court would become more aware of something they are already doing to some extent. That is, they would shift their attention and emphasis to the constitutional standard directly and use it so as to minimize some of the confusion which results from trying to fit a constitutionally expressed generality to the particulars of a given tax statute as it affects the special problem of one taxpayer. The relation
of the legislature and the court to each other regarding the present discretion of either would not be altered by such a shift.

The second objection is more valid and inevitably leads one into a comparison of the state constitutional requirement for uniformity with the federal constitutional requirement for equal protection of the laws. A number of courts in recent years have concluded there is little if any difference between the effect of a state constitutional provision requiring uniformity within the class on the state taxing power and the effect of the equal protection clause of the Fourteenth Amendment. Without taking the time or space to fully consider the accuracy or implications of such a conclusion, it is possible to point to a Kentucky decision which is helpful in putting the instant objection in proper perspective. In *Reynolds Metal Company v Martin*, a specially appointed court considered and sustained the constitutionality of the income tax in this state. Although the critical aspect of the case as presented pertained to the nature of an income tax, the meaning of uniformity within a class was considered and much of the pertinent authority as to what is a valid classification under the state constitution as compared with the federal constitution was reviewed. The *Reynolds* case removes all doubt that "The standards for classification under our State Constitution are the same as those under the Fourteenth Amendment to the Federal Constitution." If this categorical statement can be taken at its face value, any fears about unrestrained taxing power as a result of the suggestions made above are not too important because the state, through its legislature, would still be limited in the imposition of a tax by the equal protection clause. This fact suggests the final observation that the only function, as well as the best purpose, of constitutional uniformity may be to serve as the general objective for any exercise of the taxing power.

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"State, etc. v City of Avon Park, 108 Fla. 641, 149 So. 409 (1933) State v Mirabal, 33 N.M. 553, 273 Pac. 928 (1928) Ex Parte Shaw, 53 Okla. 654, 157 Pac. 900 (1916) State ex rel Davis Smith Co. v Clausen, 65 Wash. 156, 117 Pac. 1101 (1911).


"Id. at 395, 107 S.W 2d at 260."