CHAPTER V

A Comparative Analysis of the Uniformity Limitations

A. ORIGIN AND DEVELOPMENT

As pointed out in the introduction, this monograph has two major purposes. First, it should provide an understanding of the existing state constitutional limitations concerning uniformity and equality in taxation. Second, it should provide material for study in a revision of those state constitutional limitations. Both of these purposes were served by the empirical analysis of the judicial gloss given the constitutional provisions. That analysis, in Chapter III, forms the larger part of this monograph. The present section will trace briefly, and in a very general manner, the origin and subsequent development of the several types of basic uniformity clauses.¹ Some knowledge of this historical development will serve, primarily, to provide light for the second purpose of the monograph. This writer recognizes that an analysis and evaluation of the economic, political, and social factors underlying this skeletonic description would be helpful. However, such a study is not deemed absolutely essential, and several factors preclude this writer from including it in this monograph.

The existing uniformity clauses, so-called, have been classified according to phraseology. The following nine basic Types were found:

I. Property shall be taxed according to its value.
II. Property shall be taxed in proportion to its value.
III. The legislature may impose proportional and rea-

sonable assessments, rates, and taxes upon all persons and estates within the state.

IV. There shall be a uniform rule of taxation.

V. Taxation shall be equal and uniform.

VI. The legislature shall provide by law for a uniform and equal rate of assessment and taxation.

VII. Taxes shall be uniform upon the same class of subjects.

VIII. Taxes shall be uniform upon the same class of property.

IX. There shall be a fair distribution of the expense of government.

This classification merely reflects the existing basic uniformity clauses, and it should be emphasized that the Types are hypothetical. For example, the actual uniformity clauses found in the four states classified as Type II states will vary in their precise phraseology from the hypothetical Type II clause. Also, some of the predecessors of the existing clauses, no longer in use, cannot conveniently be fitted into any of the nine Types used for this study. Throughout this discussion, the writer will use the hypothetical Types for a common reference, but note will be taken of the several variations of each clause which have appeared.

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At the time the Union was formed, ten of the original thirteen states (Connecticut, Delaware, Georgia, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia) had constitutions which contained no provisions either framed in terms of "uniformity" or "equality" or interpreted as providing an effective uniformity limitation. However, the constitutions of three of the original states (Maryland, Massachusetts, and New Hampshire) contained provisions which have proved to be the source of effective uniformity limitations even though
they were not framed in the "uniform and/or equal" terminology. Of these three, the Maryland Constitution contained a variation of the basic Type IX uniformity clause, the provision reading:

Every person in the state ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property. . . .

In the constitution of Massachusetts there was a provision similar to basic Type III, reading:

[The legislature may] impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons, residents, and estates lying within the said commonwealth. . . .

The New Hampshire Constitution contained two provisions, one of which was substantially identical to the Type III clause in the Massachusetts Constitution, and another which was a second variation of the Type IX clause found in Maryland. The latter clause read:

Every person of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he therefore is bound to contribute his share in the expense of such protection.

Thus it appears that historically the first of the so-called uniformity clauses were Types III and IX, even though those types are not phrased in "uniform and/or equal" terminology. Massachusetts and New Hampshire still retain the Type III uniformity clause without change, although, as will be pointed out, New Hampshire has avoided the effect of

\(^2\) Supra, p. 554. The present section is based on the historical notes included in the separate studies of the several states in Chapter III.

\(^8\) Supra, p. 172.

\(^4\) Supra, p. 181.
that clause to some degree by special constitutional amendment.

The first two states admitted to the Union after its forma-
tion were Vermont (1791) and Kentucky (1792). Vermont
included in its constitution a variation of the Type IX uni-
formity clause, substantially identical to that originated by
New Hampshire. The Vermont provision has remained
unchanged, and is in effect today. The first Kentucky Consti-
tution had no provision relating to uniformity. At the same
time that Vermont and Kentucky were admitted as new states,
Delaware adopted a new constitution (1792). However, no
provision relating to uniformity was included in that constitu-
tion; consequently, Delaware remained among those states
having no uniformity clause of any kind.

With the admission of Tennessee into the Union in 1796,
there appeared what has been characterized as the "first real
uniformity provision." This characterization is accurate only
if one considers terminology apart from effective limitation.
As the state studies in Chapter III have shown, the Type III
"proportionality" clause found in Massachusetts and New
Hampshire provides a very strict property-tax uniformity
limitation. Indeed, although this first Tennessee clause did
use the terms "uniform" and "equal," it was a provision with
a very special and limited character, requiring a quantitative
rather than a qualitative uniformity. The provision read:

All lands liable to taxation, in this state, shall be taxed equal
and uniform, in such manner, that no one hundred acres shall
be taxed higher than another, except town lots, which shall
not be taxed higher than two hundred acres of land each.

5 Supra, p. 573.
7 Supra, p. 66.
This original Tennessee provision does not easily fall within any of the nine basic types of today's uniformity clauses. However, terminology-wise, this provision is the predecessor of the basic clauses Types V and VI.

Following this innovation in the Tennessee Constitution of 1796, there was no new development until the period from 1818 to 1821. The four states admitted to the Union prior to 1818 (Ohio in 1803; Louisiana in 1812; Indiana in 1816; and Mississippi in 1817) and the three states adopting new constitutions prior to 1819 (Georgia in 1798; Kentucky in 1799; and Connecticut in 1818) did not include in their constitutions any provisions which might be characterized as uniformity clauses.

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However, each of the three states entering the Union during the period from 1818 to 1821 (Illinois in 1818; Alabama in 1819; and Missouri in 1821) did incorporate a uniformity clause into their respective constitutions. None employed the terms "uniform" or "equal," but used the term "value" which is characteristic of basic clauses Types I and II. Specifically, the Illinois Constitution of 1818 introduced the first version of the Type II basic uniformity clause. It read:

... the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession. 8

Alabama followed in its constitution of 1819 with a second variation of basic Type II, which read:

All lands liable to taxation in this state shall be taxed in proportion to its value. 9

8 Supra, p. 117.
9 Supra, p. 94.
The Alabama provision is more limited in scope than the Illinois clause, being limited to real property taxes. A third variation of basic Type II was introduced in the Missouri Constitution of 1820:

All property subject to taxation shall be taxed in proportion to its value.\(^{10}\)

The Missouri version of Type II was more akin to the briefer Alabama clause, but broader in application, being applicable to the taxation of all property. The fourth of these new states, Maine, introduced in its constitution of 1819 the original version of the Type I basic uniformity clause:

All taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof. . . .\(^{11}\)

Thus, within a three-year period, the two basic uniformity clauses characterized by the use of the word “value” (Types I and II) were introduced by Maine (“according to value”) and Illinois (“in proportion to value”), with Alabama and Missouri following Illinois in the use of the word “proportion.”

A very definite trend was established in 1818-1821 by these four states. Since that period, with three exceptions (Michigan, Iowa, and Nebraska), every newly admitted state has included some type of uniformity clause in its original constitution. Indeed, of the three exceptions, two adopted new constitutions within thirteen years or less (Michigan, 1837-1850; Nebraska, 1867-1875) which did contain some form of uniformity clauses. In addition, steady inroads have been made among those ten original states having no uniformity clause of any type, so that, at the present

\(^{10}\) Supra, p. 417.

\(^{11}\) Supra, p. 58.
time, only two (Connecticut and New York) remain without any such provision.

Following the innovations in Illinois, Alabama, Missouri, and Maine there was little further development before 1838. New constitutions were adopted in Delaware (1831), Virginia (1830), and Mississippi (1832), none of which contained uniformity clauses, thus leaving unchanged the status of each of the three states. Tennessee adopted a new constitution in 1834, and in doing so abandoned its original “quantitative” uniformity clause previously described, which was applicable only to the taxation of realty. In its place a second version of basic Type I was inserted, the first version having been introduced by Maine. Of most importance was the manner in which the Type I clause was coupled with “equal and uniform” terminology. The revised Tennessee provision now read:

All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state.\(^{12}\)

Thus, Tennessee retained the “equal and uniform” language, but now subordinated it to a basic clause of the “value” type. This subordinate clause was soon to be separated and to stand as a primary clause in other states, thus establishing the basic Type V provision in full force. Tennessee also included in its 1834 constitution a supplementary provision, later adopted by a number of other states, which specified:

No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value.\(^{13}\)

Upon admission to the Union in 1836, Arkansas’ original constitution included a basic uniformity clause which was a

\(^{12}\) Supra, p. 65. Emphasis added.
\(^{13}\) Supra, p. 65.
third variation of the type originated by Maine in 1819, *i.e.*, Type I. However, like Tennessee, Arkansas tacked the words "uniform and equal" onto this ad valorem type provision, with this important distinction that in the Arkansas provision the words "uniform and equal" clearly referred to "valuation." The Arkansas provision read:

All property subject to taxation shall be taxed according to its value, that *value* to be ascertained in such manner as the General Assembly shall direct, *making the same* equal and uniform throughout the state.\(^\text{14}\)

Adhering closely to the Tennessee uniformity structure, the Arkansas Constitution\(^\text{15}\) also included the supplementary provision concerning rates, referred to above.

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The period from 1838 to 1851 (with activity concentrated in the years from 1845 to 1851) saw the first use of uniformity clauses phrased in "equal and uniform" language such as is used in existing uniformity clauses. In 1838, the original Florida Constitution was drafted, and it included a provision which is the distinct predecessor of basic Types V and VI, though closer in phraseology to Type V. The provision read:

The General Assembly shall devise and adopt a system of revenue, having regarded to an equal and uniform mode of taxation throughout the state.\(^\text{16}\)

The Florida Constitution did not come into effect until 1845, because it was not until that year that Florida was admitted to the Union.

Also, in 1845 we find the first clear formulation of Type V. In that year Louisiana adopted a new constitution, which was

\(^{14}\) *Supra*, p. 49. Emphasis added.

\(^{15}\) *Supra*, p. 49.

\(^{16}\) *Supra*, p. 274.
actually drafted in 1844, and for the first time adopted a uniformity clause. That clause was the first version of Type V, and it read: "Taxation shall be equal and uniform throughout the state." But the Louisiana basic clause did not stand alone, and we have here the first example of several overlapping uniformity clauses being included in a single uniformity structure. Louisiana's basic clause, Type V, was accompanied by the version of the Type II clauses ("in proportion to value") first introduced in 1820 by Missouri. In addition, there was the special supplementary clause concerning rates first introduced in 1834 by Tennessee.

In the same year in which the new Louisiana Constitution came into force, 1845, Texas was admitted to the Union, and in its constitution followed the Louisiana pattern in so far as both the Type V "equal and uniform" clause and the Type II "proportionality" clause were included. However, the Tennessee type provision concerning rates was omitted.

During the period of the Florida-Louisiana-Texas innovations, Pennsylvania (1838) and New Jersey (1844) adopted new constitutions, but no uniformity clauses of any kind were introduced. Michigan (1837) and Iowa (1846) were admitted as new states, but neither of those two states included in its original constitution any form of a uniformity clause. On the other hand, when Rhode Island adopted a new constitution in 1843, it joined those states having uniformity clauses, and included a third variation of the Type IX basic clause: "... the burdens of the state ought to be fairly distributed among its citizens."

Within six years of the Florida-Louisiana-Texas development, both Types IV and VI of the basic uniformity clauses

17 Supra, p. 387.
18 Supra, p. 387.
19 Supra, p. 387.
20 Supra, p. 254.
21 Supra, p. 592.
had been introduced. Upon being admitted to the Union in 1848, Wisconsin included in its original constitution the first version of Type IV: "The rule of taxation shall be uniform. . . ."22 In 1851 Indiana, in adopting a new constitution, introduced the precise phraseology of Type VI, which is a modified version of the 1838 Florida provision:

The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal. . . . 23

The prior Indiana Constitution had not contained any form of uniformity clause.

During this period of the Wisconsin-Indiana innovation, from 1848 to 1851, there was considerable other activity. California and Virginia followed the pattern set by Texas in 1845, and combined a Type V clause with a Type II provision. This was done by California in its original constitution24 when admitted to the Union in 1850, and by Virginia in the same year when a new constitution25 was adopted.

Michigan also adopted a new constitution in 1850, and in doing so joined for the first time the ranks of those states with uniformity clauses. A second version of Type IV, similar to the 1848 Wisconsin provision, was introduced, this version reading:

The legislature shall provide by law a uniform rule of taxation, except on property paying specific taxes.26

This provision, with its "except" clause, established a unique situation in Michigan, as described in the Michigan study in Chapter III. On the basis of the "except" clause taxes are

22 Supra, p. 234.
23 Supra, p. 281.
24 Supra, p. 107.
25 Supra, p. 542.
26 Supra, p. 197.
classified for purposes of uniformity into ad valorem and specific rather than property and nonproperty.

Ohio's new constitution of 1851 contained that state's first uniformity clause. This provision was a third variation of basic Type IV, similar to those clauses already used by Wisconsin and Michigan. The provision read:

Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money.\(^{27}\)

Note that the Ohio clause, while predominantly a Type IV clause, also contains language characteristic of the Type I ad valorem clause.

In 1848 Illinois adopted a new constitution. The Type II clause ("in proportion to value") which Illinois had originated in 1818 was retained. However, it was amended, so that we now find a fourth version of Type II in use. The provision, as rephrased, read:

The General Assembly shall provide for such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property. . . . \(^{28}\)

This flurry of activity during the period from 1845 to 1851 set the pace for the last half of the nineteenth century. Until 1900 there was a steady adoption of uniformity provisions which, with one important exception to be noted, were simply variations on the types of uniformity clauses already introduced by 1851.

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In 1852, Louisiana adopted a new constitution, but made no change in its prior uniformity structure, notably consisting

\(^{27}\) *Supra*, p. 221.
\(^{28}\) *Supra*, p. 117.
of the first version of Type V, introduced in 1845. Kentucky (1850) and Iowa (1857) also adopted new constitutions without changing their prior status. That is, Kentucky and Iowa had not yet included any form of uniformity clause in their constitutions.

Minnesota was admitted to the Union in 1858 and its constitution contained the following unique provisions:

All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state.\(^\text{20}\)

Supplementing this basic clause was a new version of the Type I clause first introduced by Maine in 1820:

Laws shall be passed taxing all [property] according to its true value in money.\(^\text{30}\)

Minnesota later abandoned its unique basic uniformity clause to which the court had given a most restrictive interpretation. As shown in the Minnesota study, in Chapter III, the provision caused no end of trouble. Fortunately, no other state adopted it.

The next succeeding four states to be admitted to the Union were Oregon (1859), Kansas (1861), West Virginia (1863), and Nevada (1864). All continued the trend started by Florida in 1838 by using a basic uniformity clause phrased in terms of "equal and uniform." Oregon, leaving nothing to chance, included in its constitution of 1859\(^\text{31}\) both a Type V clause (introduced in 1845 by Louisiana and Texas) and a Type VI clause (introduced in 1851 by Indiana). Thus, Oregon combined two clauses, both in "uniform and equal" language. This is fairly unusual, although it is evident that

\(^{20}\) Supra, p. 392.

\(^{30}\) Supra, p. 392.

\(^{31}\) Supra, p. 455.
the combination of a "uniform and equal" clause with one or more "value" clauses was quite common. Kansas, in its 1861 constitution, and Nevada, in its 1864 constitution, were satisfied with a single clause, namely, the first version of Type VI introduced by Indiana in 1851.

West Virginia, like Oregon, was not satisfied with a single provision. Its 1863 constitution contained the original Type V clause, first introduced in 1845 by Louisiana and Texas. Unlike Oregon, the second West Virginia provision was the third version of a Type II proportionality clause, first introduced by Missouri in 1820. In addition, a third provision was included, the special provision concerning rates introduced by Tennessee in 1834. Thus, the West Virginia structure of 1863 was identical to the complex structure first introduced in 1845 by Louisiana. Remember that in 1850 Virginia had copied the Texas structure, which, unlike Louisiana's, was limited to a combination of Type V and Type II. However, in a new constitution adopted in 1870, Virginia added the supplementary provision concerning rates, so that its structure was now identical to that in Louisiana and West Virginia.

Florida adopted new constitutions in 1861 and 1865 but left its uniformity clause of 1838 unchanged. However, when adopting a new constitution in 1868, Florida modified its original clause, the predecessor of both Types V and VI, so that it now conformed to the version of Type VI introduced by Indiana in 1851. At about this same time four "old" states joined the parade, and in adopting new con-

32 Supra, p. 307.
33 Supra, p. 333.
34 Supra, p. 261.
35 Supra, p. 262.
36 Supra, p. 261.
37 Supra, p. 542.
38 Supra, p. 274.
stitutions also acquired for the first time uniformity clauses. They were Mississippi (1869), South Carolina (1865, 1868), North Carolina (1868), and Georgia (1868).

The new Mississippi Constitution of 1869 added another example of a multi-clause structure. Principally, the structure consisted of the Type V clause, introduced in 1845 by Louisiana and Texas, joined by the 1820 Missouri version of the Type II ad valorem clause. This was a combination which was to become quite popular. In addition, the Mississippi Constitution contained a third clause, which was a mixture of a Type IV clause, such as introduced in 1848 by Wisconsin, with Type I language:

Property shall be assessed for taxes by uniform rules, according to its true value.

A similar approach was taken by South Carolina. When that state adopted a new constitution in 1865 and acquired its first uniformity clause, a new variation of Type I, a single provision was sufficient. It read:

All taxes upon property, real and personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such a tax.

However, within a few years South Carolina adopted another constitution (1868), and in that constitution there was the most redundant uniformity structure yet to be found. The Type I clause introduced in 1865 was retained. Three other clauses were added. A Type VI clause, introduced by Indiana in 1851, was combined with the 1820 Missouri version of the Type II ad valorem clause. The fourth provision was the variation of Type IX, introduced by New Hampshire.

89 Supra, p. 249.
40 Supra, p. 249.
41 Supra, p. 338.
42 Supra, p. 338.
North Carolina and Georgia were satisfied with less redundant uniformity structures. In its new constitution of 1868, North Carolina included a single uniformity clause, the version of the Type IV "uniform rule" provision first used by Ohio in 1851. Georgia also settled for a single uniformity clause, and in its new 1868 constitution included the following:

Taxation on property shall be ad valorem, and uniform on all species of property taxed.

This clause does not comfortably fit into any of the basic classifications heretofore used, and it was never adopted by any other state.

During this period, Arkansas indulged in considerable constitutional revision. As pointed out above, the original Arkansas Constitution of 1836 contained a variation of the Type I ad valorem clause, supplemented by the special provision concerning rates first introduced by Tennessee in 1834. A new constitution adopted in 1861 left the situation unchanged. However, in its next new constitution, adopted in 1868, Arkansas altered its uniformity structure, abandoning the provisions introduced in 1836 and adopting the Ohio 1851 version of the Type IV "uniform rule" clause. But this change lasted for only a very brief period. In 1875, another new constitution was adopted, and Arkansas reverted to its original uniformity clauses, which are still in force today.

Action was taken by Nebraska in 1875. That state was first admitted to the Union in 1867, but the original constitution did not include a uniformity clause of any kind. However, in 1875, a new constitution was adopted and it included

48 Supra, p. 558.
44 Supra, p. 364.
45 Supra, p. 50.
46 Supra, p. 166.
the version of the Type II "in proportion to value" clause introduced by Illinois in 1848.

Before continuing the chronological development, it is interesting to note a trend which developed following the introduction of the clauses containing "uniform and/or equal" terminology during the period from 1845 to 1851. When a Type V or Type VI clause was adopted it was not at all unusual for the state to adopt also one of the "value" clauses. Types I and II. When a Type IV "uniform rule" clause was adopted, we find quite often that within the basic uniformity clause itself was inserted "ad valorem" terminology which before 1845 had been sufficient standing alone to constitute the basic uniformity clause.

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The year 1874 marks a very important date in the historical development of uniformity clauses. As the precursor of an era of liberalization, Pennsylvania introduced the original basic uniformity clause Type VII. This was the first uniformity clause to add to the words "taxes shall be uniform" the phrase "uniform within classes." Pennsylvania, one of the original thirteen states, had no uniformity clause of any kind in its original constitution. When a new constitution was adopted in 1874, the following provision was inserted:

All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax. . . .

The Pennsylvania study in Chapter III showed that the introduction of this uniformity clause had no effect upon the effective uniformity limitation in Pennsylvania. However, the clause did expressly provide for a limitation which there­tofore had been implied.

Pennsylvania's action was followed immediately by

47 Supra, p. 461.
Missouri in 1875. When Missouri was admitted to the Union in 1820, it had been one of the originators of the Type II “in proportion to value” clause. The first version was introduced in 1818 by Illinois, a second version in 1819 by Alabama, and a third version in 1820 by Missouri. The Missouri version was adopted by several states, as this review has shown. In its new constitution of 1875, Missouri retained its Type II proportionality clause, but added the Type VII clause originated by Pennsylvania the prior year.\(^48\) The word “all” which modified the word “taxes” in the Pennsylvania clause was omitted. This combination of Type II with Type VII resulted in a great deal of confusion, as the Missouri study in Chapter III indicated, because the court found the two provisions in conflict. In determining the effective uniformity limitation a priority was given the Type II clause, with the effect of negating the newly introduced Type VII clause. However, this conflict was resolved in 1945 by constitutional amendment which removed the source of conflict. In its new 1945 constitution Missouri deleted the Type II provision and inserted in its place a provision expressly authorizing the classification of property.\(^49\)

The experience of Georgia has been very similar to that of Missouri. As indicated above, Georgia adopted its first uniformity clause in 1868, providing that “Taxation on property shall be ad valorem, and uniform on all species of property taxed.” When adopting a new constitution in 1877, Georgia modified this original provision so that it was phrased in substantially the same words of the Missouri 1820 version of Type II. Then, like Missouri, a second provision was added in the 1877 constitution, the Type VII clause originated by Pennsylvania. Continuing the similarity, the resulting conflict in the Georgia judicial opinions was resolved by a 1938

\(^{48}\) Supra, p. 419.

\(^{49}\) Supra, p. 425.
amendment to the Georgia Constitution which deleted the Type II clause.\textsuperscript{50}

The pattern established by Pennsylvania, Missouri, and Georgia was also adopted by Colorado. Upon being admitted to the Union in 1876, Colorado included in its original constitution\textsuperscript{51} the Pennsylvania Type VII provision. Colorado, like Pennsylvania, but unlike Missouri and Georgia, was satisfied with the single clause. At approximately the same time that the Type VII clause was being introduced, action was also taken in New Jersey and California. The New Jersey Constitution was amended in 1875 by the adoption of the 1868 Mississippi version of the Type IV "uniform rule" provision.\textsuperscript{52} Prior to 1875, New Jersey had no uniformity clause of any kind. In 1879, California adopted a new constitution, and in doing so simplified its prior structure. As indicated above, when admitted to the Union in 1850, California had incorporated both a Type V and Type II clause in its constitution. In the new 1879 constitution, the Type V clause was deleted, leaving only the Type II proportionality clause.\textsuperscript{53}

In marked contrast to the preceding forty years, there was no activity in this field during the decade of 1879-1889. This period of inactivity was ended with the entrance of six states into the Union from 1889 to 1890 (Montana, North Dakota, South Dakota, Washington, Idaho, and Wyoming). Two of these six states, Montana in its constitution of 1889\textsuperscript{54} and Idaho in its constitution of 1890,\textsuperscript{55} followed, in part, the example of Pennsylvania and adopted a Type VII clause. However, in each of those states the Type VII clause was ac-

\textsuperscript{50} \textit{Supra}, p. 364.  
\textsuperscript{51} \textit{Supra}, p. 349.  
\textsuperscript{52} \textit{Supra}, p. 217.  
\textsuperscript{53} \textit{Supra}, p. 107.  
\textsuperscript{54} \textit{Supra}, p. 428.  
\textsuperscript{55} \textit{Supra}, p. 378.
companied by a basic clause of another type. The second Montana provision was the Type VI "uniform and equal" clause originated in 1851 by Indiana. The second Idaho provision was the variation of the Type II proportionality clause originated in 1848 by Illinois. The studies of these two states, in Chapter III, revealed a conflict similar to that found in Missouri and Georgia where the Type VII clause was combined with a potentially strict clause. However, the studies show that the Montana and Idaho courts resolved the conflict in diametrically opposed manners.

The remaining four of these six states adopted pre-1874 type uniformity clauses. In its constitution of 1889 North Dakota introduced a new version of the Type IV provision, which contained, as well, words characteristic of Type I:

Laws shall be passed taxing by a uniform rule all property according to its true value in money.\(^56\)

This version of Type IV is quite similar to that originated by Mississippi in 1869. Both South Dakota in its 1889 constitution\(^57\) and Wyoming in its 1890 constitution\(^58\) relied primarily on the Type V "equal and uniform" clause first introduced in 1845 by Louisiana and Texas. However, the South Dakota Constitution contained a second clause drawing on the combined characteristics of Types V, I and II:

All taxes shall be uniform upon all real and personal property, according to its value in money, to be ascertained, . . . so that every person and corporation shall pay a tax in proportion to the value of his, her or its property.\(^59\)

No other state has ever adopted this rather unusually phrased provision.

\(^{56}\) Supra, p. 562.
\(^{57}\) Supra, p. 576.
\(^{58}\) Supra, p. 270.
\(^{59}\) Supra, p. 567.
Washington also included two uniformity clauses of different types in its 1889 constitution. There was the now familiar combination of a Type VI clause, originated by Indiana in 1851, with the 1820 Missouri version of a Type II proportionality clause. It is interesting to note that only Wyoming retains today the strict “equal and uniform” type clause, while North Dakota, South Dakota, and Washington have all adopted a “uniformity within classes” provision originated in 1911 by North Dakota.

At the time these six states were admitted to the Union the only other activity in the field of uniformity in taxation clauses was in Kentucky. In its new constitution of 1891, Kentucky adopted a new version of the Type V clause first originated in 1845 by Louisiana and Texas. The provision read:

Taxes shall be uniform upon all property subject to taxation within the territorial limits of the taxing authority. . . .

Before this time, Kentucky had no uniformity clause of any kind in its constitution.

Subsequent to 1889-1891, there was only intermittent activity on this front for nearly twenty years, to be exact, until 1911, when North Dakota introduced another new basic type of uniformity clause. Five states took some action of interest. On adopting its new constitution in 1897 Delaware followed the lead of Pennsylvania. Originally, Delaware had no uniformity clause of any kind, but in its 1897 constitution incorporated a Type VII clause originated in 1874 by Pennsylvania. Three more states were soon added to the rapidly growing list adopting the Pennsylvania type clause. Virginia and Minnesota converted to the “uniformity

60 Supra, p. 572.
61 Supra, p. 549.
62 Supra, p. 359.
within classes” type provision after having first adopted the stricter type clauses. In 1902, Virginia adopted a new constitution and substituted the Type VII clause\(^63\) for its prior Type V “equal and uniform” clause, which had been supplemented by a Type II proportionality provision. In 1908, Minnesota adopted its so-called “wide open” tax amendment which abandoned its prior uniquely phrased provision which had been the source of so much trouble and confusion, and adopted the Type VII clause.\(^64\) Oklahoma, when admitted to the Union in 1907, incorporated a Type VII clause in its uniformity structure.\(^65\) In contrast to the “liberalizing” action taken during this twenty-year period by Delaware, Virginia, Minnesota, and Oklahoma, Utah adopted two of the stricter type clauses. Admitted to the Union in 1896, Utah incorporated in its constitution a Type VI clause, originated in 1851 by Indiana, supplemented by the 1848 Illinois version of Type II “in proportion to value” clause.\(^66\)

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In 1911, North Dakota introduced the newest, and most liberal, of the several types of uniformity clauses. As indicated above, North Dakota, on being admitted to the Union in 1889, had adopted a version of the Type IV “uniform rule” clause. Twenty-two years later North Dakota amended its constitution and adopted the original Type VIII clause:

Taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax.\(^67\)

By 1935, six other states (Arizona, Kentucky, South Dakota, 

\(^{63}\) *Supra*, p. 542.  
\(^{64}\) *Supra*, p. 393.  
\(^{65}\) *Supra*, p. 447.  
\(^{66}\) *Supra*, p. 342.  
\(^{67}\) *Supra*, p. 563.
Washington, North Carolina, and Maryland) had adopted this type of uniformity clause.

Arizona incorporated the provision in its original constitution upon being admitted to the Union in 1912. The remaining five states converted to Type VIII from a more strict uniformity clause. In 1915, Kentucky abandoned its version of Type V which it had adopted in 1891, having had no uniformity clause before that time. By amendment of its constitution, Kentucky substituted a Type VIII clause. South Dakota also abandoned a basic Type V clause when it amended its constitution in 1918 and joined its sister state, North Dakota, in relying on a Type VIII clause. Like North Dakota, South Dakota had adopted the stricter type uniformity clause on being admitted to the union in 1889.

About the same time that Arizona, Kentucky, and South Dakota were adopting verbatim the North Dakota clause, Maryland amended its constitution (1915) and incorporated therein a basic uniformity clause which may be classified as Type VIII, but which differs substantially from the North Dakota phraseology. The provision reads:

... all taxes ... shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respective taxing powers may have directed to be subject to the tax levy. ... 71

Several years later, Washington (in 1930) and North Carolina (in 1935) amended their constitutions and adopted verbatim the original North Dakota clause. Washington converted from a combination of the Type VI clause,

68 Supra, p. 545.
69 Supra, p. 550.
70 Supra, p. 568.
71 Supra, p. 554.
72 Supra, pp. 559, 573.
supplemented by a Type II proportionality provision. North Carolina had previously had a version of the Type IV "uniform rule" clause as a basic uniformity clause.

During this period of the growth of the Type VIII clause, two states joined the substantial number of states having a basic clause of Type VII as the primary uniformity provision. Oregon was one of those states which had redundantly combined two uniformity clauses of Types V and VI, doing this in its original 1859 constitution. In 1917, the Oregon Constitution was amended to substitute a single provision, a Type VII clause, as its basic provision.\(^73\) Louisiana converted from its Type V clause, which it had originated in 1845, when it adopted a new constitution in 1921 and included a Type VII clause.\(^74\) Thus, the trend to adopt one of the two "uniformity within classes" type provisions was continued at a steady pace. As a result, at the present time thirteen states have a provision of the type originated in 1874 by Pennsylvania, Type VII, and seven have the North Dakota innovation, Type VIII.

This trend towards adopting one of the "uniformity within classes" provisions, however, is only one branch of this "liberalizing" trend. The second branch occurred concurrently with the origin and growth of the liberal Type VIII clause. In a number of states the liberalization was brought about without an abandonment or change of a strict type uniformity clause. The method has been to leave the strict type provision unchanged, and amend the effective uniformity limitation of the state by adding a constitutional provision expressly sanctioning special treatment for a class or classes of property, usually intangible property, notwithstanding the basic uniformity clause. This technique was introduced in 1913 by Maine. Maine has a Type I clause, and the court

\(^73\) Supra, p. 457.

\(^74\) Supra, p. 390.
had ruled that property taxation was governed by a strict degree of uniformity: requiring absolute uniformity in rates and the use of the ad valorem method. In 1913, the Type I clause was left unchanged, but a new provision provided that special "rate" might be applied to intangible property.\(^{76}\)

Very similar situations are found in Nebraska, Kansas, Florida, Utah, and South Carolina. Nebraska had a Type II proportionality clause, and the effective uniformity limitation required the strictest degree of uniformity in the taxation of property: universality, absolute uniformity in rates, and the use of the ad valorem method. A 1920 amendment left the basic uniformity clause intact, but limited its application to the taxation of tangible property, with taxes to be "uniform as to class" and "by valuation upon all other property." The result is that intangibles may be classified for rates.\(^{76}\)

Kansas, Florida, Utah, and South Carolina all have a Type VI uniformity clause requiring "a uniform and equal rate of assessment and taxation." With the exception of Kansas, all required the strictest degree of uniformity in property taxation. In Kansas exemptions were permitted. In 1924, both Kansas and Florida provided by amendment for special treatment of intangible property.\(^{77}\) In Kansas only the rule requiring absolute uniformity in rates has been relaxed, and probably the same can be said of Florida. In 1930, Utah removed intangibles from the scope of the strict uniformity clause, and a fair reading of the amendment indicates that the taxation of intangibles is no longer limited by any of the three strict rules.\(^{78}\) In 1933, South Carolina also used an amendment to provide for special treatment of intangible property, but like Maine apparently the only relaxation of

\(^{75}\) Supra, p. 58.
\(^{76}\) Supra, p. 167.
\(^{77}\) Supra, pp. 273, 307.
\(^{78}\) Supra, p. 342.
strict uniformity is that a single special rate may be applied to such property.\textsuperscript{79}

Action taken in Nevada in 1942 also is of interest at this point. Nevada had a Type VI uniformity clause, and an amendment in 1942 also provided for special treatment of intangible property. But in Nevada the special treatment consists of requiring the exemption of intangibles from any taxation.\textsuperscript{80} It is interesting to note that of the six states presently having a basic uniformity clause of Type VI all but Indiana have provided in this manner for the taxation of intangible property to be removed from the scope of the uniformity limitation. However, in Indiana such an amendment was unnecessary, because, as the study in Chapter III showed, an unusual interpretation of the uniformity limitation has in fact permitted the exemption of intangibles from the general property tax and their separate taxation by a tax, conveniently characterized as a nonproperty tax not subject to the strict property uniformity limitation.\textsuperscript{81}

In Ohio, the special treatment proviso has a much broader scope. Prior to 1928, the Ohio court had given a Type IV "uniform rule" clause the strictest interpretation. In 1928, an amendment limited the application of that basic clause to taxation of "land and improvements," with the result that taxes on all personal property—not just intangibles—need only be uniform within classes.\textsuperscript{82} California made an abortive attempt in 1924 to provide special treatment for intangible property. In 1933, success was had with a broad amendment which, in fact, limited the Type II proportionality clause, formerly interpreted to require the strictest degree of uniformity, to the taxation of real property. The amendment

\textsuperscript{79} \textit{Supra}, p. 337.
\textsuperscript{80} \textit{Supra}, p. 333.
\textsuperscript{81} \textit{Supra}, p. 303.
\textsuperscript{82} \textit{Supra}, p. 222.
expressly permits the classification of all personal property for rates, its exemption from taxation, and the use of different methods of taxation.\(^8\)

But this technique of modification through amendments providing for special treatment has found its broadest scope in West Virginia. The basic uniformity clause in that state is Type V, "taxation shall be equal and uniform." The effective uniformity limitation in that state required the strictest degree of uniformity. However, in 1932, West Virginia amended its constitution, and qualified the basic clause by this phrase: "subject to the exceptions in this section contained." The "exceptions" in fact included a classification of all property, real and personal, into defined classes subject to different maximum rates. The rules concerning universality and ad valorem method were left unchanged.\(^8\)

Since 1911, which marked the origin of the Type VIII basic clause and preceded by only two years the use of "special treatment" amendments, only a single exception to the liberalizing trend has occurred. New Mexico was admitted to the Union in 1912, and its original constitution contained a new version of the Type VI uniformity clause: "The rates of taxation shall be equal and uniform upon all subjects of taxation. . . ." Two years later, in 1914, there was a comprehensive revision of the New Mexico uniformity structure. The basic uniformity clause was now an unusual combination of Type VII, first originated in 1874 by Pennsylvania, and Type II. The provision reads:

Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class.\(^8\)

Thus, like several other states having a basic clause of Type

\(^8\) Supra, p. 106.
\(^8\) Supra, p. 261.
\(^8\) Supra, p. 440.
VII, this potentially liberal provision was coupled with a clause which could potentially restrict the operation of the liberal provision.

* * * * *

The preceding chronological review of the origin and growth of the so-called uniformity clauses reveals three definite periods. The first period might be called the period of inactivity, and extended from 1789 (the origin of the Union) to 1818. This period is characterized by a lack of any form of uniformity clause. The second period extends from 1818 to 1896, and might be called the restrictive period. This middle period is characterized by the adoption of the several basic types of uniformity clauses which may be called strict provisions—Types I through VI, and several clauses of peculiar phraseology no longer used by any state. The third period may be called the period of liberalization, and extended from 1874 to 1945. This period has two branches. First, there was the adoption of the two basic clauses, Types VII and VIII, which may be categorized as potentially liberal provisions, originating respectively in 1874 and 1911. The adoption of the Type VIII clause coincided with the beginning of the second branch of the "liberalization" trend; in 1913, there began the practice of introducing constitutional amendments providing for special treatment of enumerated classes of property, notwithstanding the presence of a strict type of uniformity clause which was left unchanged. Since 1945, there has been no activity of any kind in this field, which leaves us to speculate concerning the future course of events, since this summary will show that the counteracting third period has placed the situation in a near balance.

During the first period, from 1789 to 1818, twenty states entered the Union. Only five of those twenty states had pro-
visions of any kind in their constitutions which might be called uniformity clauses. Of the original thirteen states, ten (Connecticut, Delaware, Georgia, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia) had no clause, one (Maryland) had a basic clause of Type IX, and two (Massachusetts and New Hampshire) had a "strict" clause. Three states were admitted in the next decade, 1790 to 1800. One state (Kentucky) had no clause, one (Vermont) had a Type IX clause, and one (Tennessee) introduced the first version of a clause actually phrased in the words "uniform and equal," which was a "strict" clause. During the next two decades, to 1818, four states were admitted to the Union (Ohio, Louisiana, Indiana, and Mississippi) but none had any form of uniformity clause.

In 1818, the year marking the beginning of a second period, the trend of the first period came to an abrupt halt. Since that time, twenty-eight states have entered the Union. Only three (Michigan in 1837, Iowa in 1846, and Nebraska in 1867) of those states have failed to include some sort of uniformity clause in its constitution. And in no case has any state which had a uniformity clause of some kind removed that clause without substituting another. Indeed, by 1897, only three of these eighteen states having once had no uniformity clause still remained without such a provision. They are Connecticut and New York of the original ten, and Iowa from among the others. This conversion occurred substantially during the heart of the second period of "strict clauses," from 1840 to 1875.

The second period, characterized by the creation and adoption of the potentially strict uniformity clauses (Types I through VI), was begun in 1818-1820 by four new states (Illinois, Alabama, Maine, and Missouri). Each of those four states adopted some version of either Type I or Type II.
However, this was not typical of the period. A trend was clear by the 1850’s. Not only was a potentially strict basic uniformity clause adopted, but the trend was heavily weighted in favor of adopting two or more of the several potentially strict type clauses, quite often combining one of the clauses actually phrased in terms of “equal and/or uniform” (Types IV through VI) with an ad valorem type clause (Types I and II).

Three states (Massachusetts, New Hampshire, and Tennessee) had adopted strict clauses before this second period had begun. Thus, combined with the four states above, this meant by 1830 seven states of the twenty-four then in the Union fell within the “strict clause” group. One other state (Arkansas) joined the trend in the 1830’s, but the greatest concentration of activity during this second period occurred from 1840 to 1870. During the 1840’s four more states (Louisiana, Florida, Texas, Wisconsin) adopted a strict clause, three of the states being new states and the fourth converting from “no clause.” Now twelve of thirty states fell within the “strict clause” group, an increase from about 29% to 40% since the period began.

The “strict clause” became even more popular during the next two decades. In the 1850’s seven states (Virginia, Ohio, Indiana, Michigan, California, Minnesota, and Oregon) fell in line and adopted one or more strict uniformity clauses. Three of those seven states were new states—all of the new states admitted during the 1850’s. Four of those seven states were old states converting from “no clause.” The next decade saw the continuance of this strong trend. During the 1860’s seven more states (Georgia, North Carolina, South Carolina, Mississippi, Kansas, West Virginia, and Nevada) adopted one or more strict uniformity clauses. The division of those seven states was the same as in the 1850’s, but during the 1860’s there was not a single state which chose to “adopt” no
uniformity clause at all. Thus, by the end of the 1860's twenty-six states fell within the "strict clause" group. There were now thirty-seven states in the Union, which meant that the "strict clause" group constituted approximately 70% of the total states. This was close to the peak of this trend, although as the period ended in 1896 there was a minute percentage gain.

The 1870's saw the tapering off of the second period. During that decade only two states (New Jersey and Nebraska) adopted a strict uniformity clause. Both states converted from "no clause" status. Balanced against this gain of two was a loss of two states (Georgia and Missouri) to the embryo period of "liberalization." Those two states adopted the new "uniformity within classes" type of provision. The 1880's saw a clean gain of three states (North Dakota, South Dakota, and Washington) for the "strict clause" group, all three being new states. Again in the 1890's three more states (Kentucky, Wyoming, and Utah) adopted strict uniformity clauses. Two of these three were new states, one was an old state converting from "no clause."

The second period in the development of the so-called uniformity clauses came to an end with the adoption of a strict clause by Utah in 1896. And this was the peak of the trend toward the development of the strict type uniformity clause. Now there were thirty-two states having such a clause, and only forty-five states in the Union. Thus, about 71% could be grouped among the "strict clause" states. Since 1896, only one state (New Mexico in 1912) has adopted a "strict clause," and that state was to convert to the liberal provision within two years. Beginning in the early 1900's there was a steady erosion of the "strict clause group," so that today only twenty-three states have a basic uniformity clause of the potentially strict type. Moreover, this does not take into account the trend among those twenty-three states
to amend the effective uniformity limitation by special treat­ment amendments. But even considering the twenty-three states, this means that the percentage of states classifiable as "strict clause" states is only about 48%—a considerable loss from the peak 71%.

The erosion of this substantial group of states having some form of a "strict type" uniformity clause can be credited to the new force of liberalization given its initial impetus in 1874. At the very time when the second period in the de­velopment of uniformity in taxation was reaching its summit and gaining adherents in the greatest numbers a strong re­action had set in, and the third period of development of the so-called uniformity clauses overlapped in its origin the demise of the "strict clause" period. This third period has two branches, and is characterized as a period of "liberaliza­tion." The first branch has its root at the beginning of the period, and is the introduction of a potentially liberal clause framed in terms of "uniformity within classes." Two types of clauses are here considered, Type VII (uniformity within the same class of subjects) and Type VIII (uniformity within the same class of property). The second of these two liberal types of clauses was not introduced until 1911, and thus preceded by two years the second branch of the period of liberalization, which has been the trend to deal with the uniformity problem where necessary by "special treatment" amendments to the constitution.

In 1874, Pennsylvania introduced the Type VII clause, which was adopted by three other states during the 1870's (Missouri, Colorado, and Georgia). One of these four states (Colorado) was a new state, one was an old state converting from the "no clause" status (Pennsylvania), and two were old states converting from the "strict clause" status (Missouri and Georgia). After this there was a slow, but steady, in­crease in the number of "liberal clause" states during the next
thirty years. One state (Montana) adopted the liberal Type VII clause during the 1880's, that state being a new state. Two states (Delaware and Idaho) were added to this growing group during the 1890's, one being a new state and the other converting from "no clause." Three states (Virginia, Minnesota, and Oklahoma) adopted the liberal clause during the period from 1900 to 1910. One was a new state, and two of the states converted from a "strict clause."

During the second decade of the 1900's the growth of the "liberal clause" continued rapidly. Two states (Oregon and New Mexico) continued the trend by adopting the Type VII clause. Both of these states were converting from a "strict clause." During the same period, North Dakota originated the Type VIII clause in converting from a "strict clause" and four other states (Maryland, Kentucky, South Dakota, and Arizona) immediately adopted it. One of the four was a new state, two were converting from a "strict clause," and the fourth converted from a Type IX clause.

During this same decade, 1910 to 1920, Maine began the second branch of the liberalization trend by leaving its strict uniformity clause untouched, but introducing an amendment providing for special treatment of some property, thus modifying to a degree the effective strict uniformity limitation.

The remainder of the third period of development of the so-called uniformity clauses is characterized essentially by the trend to follow the lead of Maine and deal with the problem by special treatment amendments. In the 1920's one state (Louisiana) adopted a Type VII clause, converting from a strict clause, but no state adopted a Type VIII clause. In the 1930's two states (North Carolina and Washington) converted from a strict clause in adopting the Type VIII clause. Since the action taken by North Carolina in 1935, no state has converted to either a Type VII or Type VIII clause.
This period from 1920 to 1940 marked the rapid growth of the special treatment amendments. During the 1920's, four states having a "strict clause" (Nebraska, Ohio, Florida, and Kansas) adopted a constitutional amendment providing for special treatment for enumerated classes of property, the strict clause to the contrary notwithstanding. Similarly, four states (South Carolina, California, West Virginia, Utah) took such action during the 1930's. The only action taken since that time has been a special treatment amendment adopted in 1942 by Nevada.

However, the enumeration of the adoptions by thirteen states of the Type VII clause, originated in 1874 by Pennsylvania, does not accurately reflect the status of uniformity clauses since, of the first six states to adopt such a clause prior to 1890, four joined it with one of the strict clauses: Missouri, Georgia, Montana, and Idaho. Seven states have adopted a Type VII clause since that time, and only one (New Mexico) combined it with a strict clause. The experience of the four states combining the liberal and strict provisions has well illustrated the confusion which stems from such a combination, and during the development of the second branch of this period of liberalization, two states (Missouri in 1945 and Georgia in 1938) have amended their constitutions to delete the strict clause.

Since 1945, no action has been taken, either to continue the liberal period, or revive the strict period. Thus, in brief, the tendency originally was to omit any reference in the state constitutions to uniformity and equality in taxation. However, this tendency soon gave way to the trend which marks the second period—a tendency to insert in the constitution a clause which provided, on its face, for a strict degree of uniformity and equality in taxation. It should be noted that these strict clauses were phrased in various ways, many omitting any reference to the terms "uniform or equal" and relying on
“according to” or “in proportion to value.” At the same time, during this second period there was a tendency to complicate the uniformity structure by the inclusion of several clauses, any one of which might have served as a source of the strict degree of uniformity limitation. Before this second period had ended a third had already begun—the trend to return to the original effective status. But, there was this important difference. Originally, there was no requirement of strict uniformity because of the absence of any express uniformity provision. Now the result was to be reached by express provisions phrased in terms of “uniformity within classes.”

In summary, we find that twenty-three states retain today the basic uniformity clause of a potentially strict type. This is a considerable recession from the one-time high of thirty-two. Twenty states now have a basic uniformity clause of a potentially liberal type, and to these twenty must be added the three states which remain without a uniformity clause of any kind, and the two states having a Type IX clause. Thus, there appears to be a near balance of twenty-three to twenty-five. However, this does not take into account the fact that ten of the twenty-three strict states have modified to some degree their effective limitation by special treatment amendments. Thus, there remain only thirteen states having the strict clause standing alone. However, a severe imbalance has not yet been created, and there is great room for development. Especially is there room for development in light of the disparity which oftentimes exists between literal and effective uniformity limitations. Moreover, it must be remembered that even among the so-called strict and liberal states, there are several varying degrees of effective uniformity limitations.
B. A SUMMARY COMPARISON OF EFFECTIVE AND LITERAL LIMITATIONS IN TERMS OF PARTICULAR RULES OF UNIFORMITY

An attempt will now be made to make certain generalizations concerning the meaning of the several types of uniformity clauses, as classified according to phraseology,¹ with primary interest being in the uniformity limitation applicable to the taxation of property. The state by state analysis in Chapter III should have impressed one with the fact that the effective uniformity limitation is quite often determined not only by almost imperceptible gradations in the phraseology of the basic uniformity clauses themselves, but as well by other provisions in the constitution of a given state. These other provisions are either alternate uniformity clauses or provisions dealing with some particular rule of uniformity for the taxation of property. In addition, the complex historical growth of the uniformity provisions, described in the preceding section of this chapter, emphasizes the danger of referring to “the” requirement of uniformity and equality found in state constitutions, for such a reference is latent with potentially misleading conclusions. Not only do the words of the basic uniformity clauses vary considerably, but the combinations of provisions which make up the uniformity structures of the several state constitutions are seldom identical.

Nevertheless, as long as one bears in mind the dangers of generalizations in this area, it will be helpful to recapitulate in general terms the effective uniformity limitations as compared with the literal uniformity limitations. Two distinctly different approaches will be used in making this analysis. First, the particular rules of uniformity derived from

the general uniformity clauses will be summarized. Secondly, a comparison will be made of the uniformity structures of the several states taken as a whole.

1. A "Rule by Rule" Summary Analysis

Throughout this monograph, four basic inquiries have been made into the operative effect of each state's uniformity structure. First, does the uniformity clause apply to all taxes, or only property taxes? Second, is there a rule of universality? In other words, must all property, except that designated as exemptible by the constitution, be selected for taxation? Third, what does the uniformity clause require in respect to the effective rate of a property tax? Or more precisely, must all property taxed by a single taxing authority be assessed for taxation at the same ratio of valuation and subject to the same percentage rate so that an absolute uniformity is required of the effective rate? Or, to the contrary, is only a uniformity within classes required? Fourth, does the uniformity clause require that property be taxed only by the ad valorem method, or may specific taxes be used? The answers to each of these questions in respect to each type of uniformity clause, as classified according to phraseology, will now be summarized.

a. Application

Do the uniformity clauses apply to all taxes, or only to the taxation of property? The results as to this question are, for the most part, not unexpected. For example, among those states (Arkansas, Maine, and Tennessee) having a Type I basic clause (Property shall be taxed according to its value), and those states (Alabama, California, Illinois, and Nebraska) having some version of a Type II clause (Property shall be taxed in proportion to its value), it would have been surprising, indeed, startling to have found a ruling that such
provisions applied to other than property taxation. There were no surprises.2

Similarly, one would expect that a Type III basic uniformity clause (The legislature may impose proportional and reasonable assessments, rates, and taxes upon all persons and estates within the commonwealth) would in all likelihood apply only to property taxes. Such is the case in Massachusetts.3 However, a very unusual situation exists in New Hampshire, the second of the two states having this type of basic clause. As shown in the New Hampshire study,4 in that state only “property” taxes are permissible, and, consequently, all taxes are subject to the proportionality limitation. However, the apparent rigidity of that situation was relieved in 1903 by an amendment of the constitution. Before 1903, only the ad valorem general property tax was permissible. Under the 1903 amendment a second category of “property” taxes is permissible, namely, taxes on “other classes of property,” as opposed to the taxation of “estates.” The latter is the characterization given the ad valorem general property tax. The practical effect of this amendment is to permit the imposition of most taxes, but not quite all, usually characterized as nonproperty taxes in the other forty-seven states. However, these taxes upon “other classes of property” are still limited by the proportionality clause. Here, too, an impossible rigidity is avoided by an interpretation which admits that there is no necessity of a “correlation” of the uniformity requirement among the several “property” taxes. Nevertheless, the result is that these taxes upon “other classes of property” are subject to a degree of uniformity somewhat stricter than that required of non-property taxes in the other states. This unique situation must

2 Supra, pp. 51, 59, 67, 96, 109, 118, 168.
3 Supra, p. 173.
4 Supra, p. 182.
be kept constantly in mind when making any comparative survey, because the characterization of any tax, for example, an income tax, as a "property" tax is the prime requisite for its existence in New Hampshire. To the contrary, in most states the problem is one of characterizing an income tax as a nonproperty tax in order that it may be upheld.

Among those states having some version of the Type IV basic uniformity clause (A uniform rule of taxation), three states (New Jersey, Ohio, and Wisconsin) limit the application of the clause to property taxes—however, all such taxes are limited. In New Jersey and Ohio the phraseology of the respective provisions is expressly framed in reference to the taxation of property. However, the same result was reached in Wisconsin where the clause is not so phrased. The fourth state having a Type IV clause is Michigan. There we found a unique application of the basic uniformity clause. For purposes of uniformity all taxes in Michigan are classified as either ad valorem or specific. The Type IV clause applies only to ad valorem taxes. Thus, the clause, while limiting only property taxation, does not limit all such taxation. All nonproperty taxes are characterized as specific taxes, but property taxes may be either ad valorem or specific, depending on the method of taxation. Thus, all nonproperty taxes and some property taxes are specific taxes, while only some property taxes are ad valorem taxes. Specific taxes are limited by a separate uniformity clause which only requires that such taxes "shall be uniform upon the classes upon which they operate." This distinction is unique, in that all other states the basic distinction for purposes of uniformity is between property and nonproperty taxes. Consequently, contrary to the usual situation, the method of taxing property is not governed by the uniformity limitation, rather the ap-

Supra, pp. 218, 224, 235.
Supra, p. 198.
Applicable rules of uniformity are determined by the method used to tax property. The result in Michigan, as in New Jersey and Ohio of this group, was foreshadowed by the particular phraseology of the Michigan version of the Type IV clause: "The legislature shall provide by law a uniform rule of taxation, except on property paying specific taxes. . . ." (Emphasis added.)

Unanimity is found among those ten states having either a Type V basic uniformity clause (Taxation shall be equal and uniform) or a Type VI clause (The legislature shall provide by law for a uniform and equal rate of assessment and taxation). Neither of these basic types has been held applicable to other than property taxation. Of course, the words of the Type V clause do not necessarily preclude a larger scope of operation, although the result is probable in view of the literal strictness of the provision. Wyoming is the only state which has a Type V clause standing alone, unaccompanied by any supplementary provisions similar to other basic types. Indeed, the word "taxation" in the Wyoming clause is modified by the word "All," which is not the case in the other three states having this type basic clause (Mississippi, Texas, and West Virginia). The result was more certain under the Type VI clause, considering phraseology alone. Moreover, five of the six states having this type clause (Florida, Indiana, Nevada, South Carolina, and Utah) coupled in the same sentence with the basic clause a provision requiring the just valuation of all property. Kansas, the sixth state in this group, did not incorporate the supplementary clause into its basic uniformity clause.

The greatest diversity in result, as might well have been

7 Supra, p. 271.
8 Supra, pp. 250, 255, 263.
9 Supra, pp. 275, 282, 334, 339, 344.
10 Supra, p. 308.
expected, was found among the thirteen states having a Type VII basic uniformity clause (Taxes shall be uniform upon the same class of subjects). This clause could very well be applied to all taxes without regard to the nature of the tax, and no unusual rules would necessarily result from this application. However, if this type clause is held applicable to all taxes, one may more logically reach the result that a strict uniformity governs the taxation of property by holding that property constitutes a single "subject" of taxation. In seven of these thirteen states the courts have ruled that the clause applies to all taxes. The seven are: Delaware, Georgia, Minnesota, Missouri, Oklahoma, Oregon, and Pennsylvania. And, contrary to what might be expected, among these seven states are found some of the most liberal interpretations given the property tax uniformity limitation. Thus, in Delaware, Minnesota, Oklahoma, Oregon, and, with some reservation, Pennsylvania, only a uniformity within classes is required of property taxes. In Georgia and Missouri the strictness of the property tax uniformity limitation stemmed from supplementary provisions which were interpreted to mean that property was to be a single "subject" of taxation. These supplementary provisions have since been deleted by amendment. No clear ruling on the question of application has been made in New Mexico and Virginia. However, in both of those states at least some degree of classification is allowed in effective rates, although other strict rules of uniformity apply.

The remaining three states having a Type VII clause are Colorado, Idaho, and Montana. In those states, the uniformity clause applies only to property taxes. And here we

12 Infra, p. 678.
13 Infra, p. 678.
14 Supra, pp. 442, 544.
15 Supra, pp. 350, 380, 430.
find excellent illustrations of diametrically opposed judicial attitudes toward the uniformity in taxation concept. In Montana classification of property for effective rates is permissible. To reach this conclusion, the Montana court relied on the Type VII clause which it said sanctioned such legislative discretion notwithstanding a Type VI clause also found in the Montana constitution. An opposite tack was taken by the Idaho court. The Idaho constitution also contained a supplementary provision which might have conflicted with a liberal interpretation of the Type VII clause. But the Idaho court, which ruled that the strictest degree of uniformity applies to property taxes, saw no potential conflict. Rather, the court simply referred to the Type VII clause as “a” uniformity clause, applicable only to property taxation, and necessarily requiring of its own force a strict uniformity. All types of uniformity clauses were simply lumped together, ignoring marked differences in phraseology. In Colorado the court has indicated that the Type VII clause limits only property taxes, and lip service has been given to the power of the legislature to classify property for effective rates. There has been very little judicial development on the matter, and a subsequent constitutional amendment expressly provides for the classification of personal property.

One would naturally expect that the words of a Type VIII basic uniformity clause (Taxes shall be uniform upon the same class of property) would limit its application to property taxes. However, such was the case only in Arizona, Maryland, North Dakota, South Dakota, and Washington. To the contrary, in both Kentucky and North Carolina the courts have started from the premise that the clause limits all taxes. The only result of this position is that the courts

10 See the discussion, infra, pp. 660-662.
17 Supra, pp. 545, 555, 564, 569, 574.
18 Supra, pp. 551, 559.
of those two states simply erected unnecessary obstacles which it then became necessary to avoid.

Finally, in Vermont the Type IX basic uniformity clause has been held to be applicable to all taxes. There has been no clarification of the problem in Rhode Island, the only other state having this type clause. In any case, in neither state has this particular rule played a role of any importance because of the liberal content of the property tax uniformity limitation.

b. The requirement of universality

The next question to be considered is whether the legislature may exempt classes of property from taxation. Conversely stated, is there a rule of universality. In making a comparative study of the effective uniformity limitations as to this particular rule one must be very careful to avoid generalizations which may be misleading, because in a great many cases the rule of universality (or, the lack of such a rule) will stem expressly from some supplementary provision of the uniformity structure of a given state.

There is some apparent diversity in result among those three states (Arkansas, Maine, and Tennessee) having a Type I basic uniformity clause. Both Arkansas and Tennessee require universality in the taxation of property. To the contrary, in Maine there is no requirement of universality. However, in the constitutions of both Arkansas and Tennessee there are elaborate provisions dealing with the exemption of constitutionally designated classes of property. In Maine, the constitution does not enumerate exemptible classes of property. Nevertheless, the Maine court has held that exemptions must be on a statewide basis so that there must be a

19 Supra, p. 593.
20 Supra, pp. 54, 68.
21 Supra, p. 62.
correlation between state and local exemptions, although correlation is not necessary as between state and local property tax rates. It is of further interest that in Tennessee the exemption of all representative intangible property is now permissible under a "double taxation" rationale, although such property may be taxed. As for the source of the universality limitation, in both Tennessee and Arkansas the courts have indicated that the requirement might well be derived from the basic uniformity clause itself. Nevertheless, in each state there are other provisions which are sufficient to support a rule of universality even in the absence of a ruling that the requirement that "property be taxed according to its value" means all property must be taxed.

Again, a diversity in results is found among the four states having a Type II basic clause. There is no requirement of universality in Alabama, but the opposite holds true in California, Illinois, and Nebraska. However, in California an amendment was adopted in 1933 expressly removing this requirement insofar as personal property is concerned. In the two states (Massachusetts and New Hampshire) having a Type III basic clause, one finds an interesting similarity in the status of this rule. In neither of these states is there a requirement of universality. However, in both states the power of the legislature to exempt classes of property is limited to a considerable extent. In New Hampshire, the reasonable classification test is coupled with a test of "just reason" and "public welfare." In Massachusetts, exemptions are limited to those "not impairing the force" of the constitutional principle of proportionality.

The diversity in results continues among the four states (Michigan, New Jersey, Ohio, and Wisconsin) having a

22 Supra, p. 99.
23 Supra, pp. 113, 126, 169.
24 Supra, pp. 176, 189.
Type IV basic uniformity clause. In Michigan, with its unique situation, the applicability of the uniformity clause is determined by the "rate-base" structure, i.e., the method of taxation of property. Since the uniformity clause applies only to property taxed ad valorem, there is no requirement of universality derived from the requirement of "a uniform rule" of taxation. Thus, even as to property selected for ad valorem taxation, subclassifications may be made for the purposes of exemptions. 25 In New Jersey there is no rule of universality, 26 and the same now holds true for Wisconsin. However, in Wisconsin this result was reached only after extended controversy and conflict among the cases. These conflicts were reconciled in 1906 with a definitive ruling that the "uniform rule" requirement does not demand that all property be taxed. 27 The fourth of these four states has reached an opposite result. In Ohio the court has ruled that the words "uniform rule" demand universality. 28 That result was reached even though a universality requirement was spelled out in supplementary words. This situation in Ohio was changed by amendment in 1929. Since that time, there is no requirement of universality for personal property, but as to realty there remains some doubt which has not yet been settled.

Turning now to those four states (Mississippi, Texas, West Virginia, and Wyoming) having the Type V uniformity clause, we continue to find diversity in results as to this particular rule of uniformity. In both Texas and West Virginia, there is a requirement of universality, which the courts have said is derived from the basic uniformity clause, even though the limitation is also found in supplementary provisions. 29 To

25 Supra, p. 212.
26 Supra, p. 218.
27 Supra, p. 245.
28 Supra, p. 227.
29 Supra, pp. 257, 266.
the contrary, in Wyoming there is no requirement of universality.\textsuperscript{30} However, this is so only because the power to exempt classes of property from taxation is spelled out in a supplementary provision. Indeed, the Wyoming court has indicated that this express clause makes an exception to the rule of uniformity embodied in the requirement that "taxation shall be equal and uniform," which would otherwise require universality. In Mississippi, no requirement of universality is found, but there has been no indication whether or not the power of exemption is an exception to the requirement of uniformity and equality in taxation.\textsuperscript{31}

Among the six states (Florida, Indiana, Kansas, Nevada, South Carolina, and Utah) having a Type VI basic uniformity clause there is a greater similarity in result. As pointed out before, in the constitutions of all of these states, except Kansas, the basic uniformity clause is coupled with a provision in the same sentence providing for a "just valuation" of property. In Florida, Nevada, South Carolina, and Utah there is a clear requirement of universality.\textsuperscript{32} It is true that in all of those four states the courts have at times relied upon the "just valuation" clause as well as other supplementary provisions to reach this conclusion; nevertheless, they have all given indications that the requirement would in any case be derived from the basic uniformity clause itself. The universality requirement in those four states has been avoided to some degree, for example, as in Nevada where by amendment since 1942 it has been required that intangibles be exempt from taxation. Similarly, by an amendment of the Utah Constitution in 1930 intangibles are no longer subject to the requirement of universality.

In Kansas, we find a direct conflict with the interpretation

\textsuperscript{30} Supra, p. 272.
\textsuperscript{31} Supra, p. 252.
\textsuperscript{32} Supra, pp. 278, 335, 340, 345.
given this type of clause by the above states. The Kansas court has ruled that this provision does not require universality. However, in Kansas exemptions must meet, in addition to the test of reasonable classification, a test of "public interest." But the most interesting result among this group of states is found in Indiana. In that state we find a sharp distinction being made between the "selection" of property for taxation and the "exemption" of property from taxation. The court has ruled that once the legislature has selected a general class of property for ad valorem taxation, any attempt to "exempt" a part of that general class—however reasonable that sub-classification might appear to be as a class—is a violation of the requirement that there be a "uniform and equal rate of assessment and taxation" because such "exemptions" produce "inequality" in the tax burden. However, one is not unwarranted in concluding that the court has in fact permitted the exemptions of intangibles from the ad valorem general property tax. It reasoned that the uniformity clause does not limit the power of the legislature to "select" a general class of property, such general class being less than the whole which it might "select" as object for the general property tax. This sharp, and perhaps overly refined line of distinction, as was described in the separate state study, stemmed from the attempts to devise new ways of taxing intangibles in Indiana. The legislature, recognizing the need to reach all intangibles by a lower rate tax, and being restricted by the requirement of absolute uniformity in effective rates, enacted a separate intangibles tax which contained an in lieu provision removing, in effect, all intangibles from the general property tax. The intangibles tax itself was upheld by the process of designating it a nonproperty tax, not upon intangibles themselves, but upon certain named

33 Supra, p. 310.
34 Supra, p. 303.
privileges. The in lieu provision was then upheld by the process of designating the same as being nothing more than a "withdrawal" of intangibles from the general class of property taxables. This power of "withdrawal" was said to be simply one aspect of the power of "selection," thus there was no restriction placed upon the "withdrawal" by the uniformity clause. Consequently, a "withdrawal" was said to be something other than, and not synonymous with, "exemption." This distinction was based to some degree on the rationale that the general class of property "selected" was to be based upon the character or nature of the property, not upon its use as are the "exemptions."

c. Uniformity and effective rates

The third question to be considered, in comparing the effective uniformity limitations as to the particular rules of uniformity, concerns the degree of uniformity which is required of effective rates. That is, may a classified property tax be levied?

As might be expected, in all of the states (Arkansas, Maine, and Tennessee) having a basic clause of Type I (Property shall be taxed according to its value) that provision is interpreted as requiring absolute uniformity in the effective rate applicable to all property taxed by any one taxing authority. In Arkansas and Tennessee there is a supplementary provision dealing directly with this problem, but the requirement is said to be derived from the basic uniformity clause as well. In Maine, the situation has been altered to some degree by an amendment providing for special treatment of intangible property. Such property may be taxed at a different "rate" from that applied to other property actually taxed.

35 Supra, pp. 55, 86.
36 Supra, p. 61.
Among those four states (Alabama, California, Illinois, and Nebraska) having the Type II clause (Property shall be taxed in proportion to value) a uniformity of result was also found, disregarding subsequent amendments making express inroads on this limitation. In each of the states an absolute uniformity in effective rates was required. However, in California an amendment now provides that personal property is to be excepted from the operation of the uniformity clause and it may be classified for application of different rates.\(^{37}\)

Similarly, in Nebraska there has been a modification by amendment adopted in 1920 providing for the classification of intangible property for the application of rates.\(^{38}\) As for the development in Illinois on this point, we find one of the most interesting situations revealed by the entire state by state analysis. The Illinois court has constantly given lip service to the doctrine that absolute uniformity of effective rates is required. Nevertheless, it was shown that in fact the Illinois court has sanctioned a *de facto* system of classification of property for the purpose of applying different *ratios of valuation*, consequently permitting to some degree a classified property tax even though an absolute uniformity is actually required as to the percentage rate.\(^{39}\) True to form, the unanimity of result as to this problem continues in Massachusetts and New Hampshire, the two states having a Type III clause. In both of these states, an absolute uniformity in effective rates is required.\(^{40}\)

Turning to those four states having basic uniformity clauses of Type IV (A Uniform Rule of Taxation), or some variation of that clause, we find some diversity in the effective limitations. In two states (Ohio and Wisconsin) absolute

\(^{37}\) Supra, p. 113.

\(^{38}\) Supra, p. 170.

\(^{39}\) Supra, p. 129.

\(^{40}\) Supra, pp. 179, 190.
uniformity in effective rates is without any question required, the requirement being derived from this type clause. 41 However, in Ohio by an amendment adopted in 1929, personal property has been expressly removed from the scope of the operation of the uniformity clause and such property may be classified for the application of different effective rates. An opposite result was found in New Jersey, where it has been held that classification of property for rates is permissible. 42 It should be pointed out that since 1947 it appears that real property in New Jersey constitutes a minimum class by force of an express amendment to the uniformity provision. In the fourth state of this group, Michigan, we have the unique situation already referred to in the preceding discussion of universality. In Michigan, the uniformity clause of Type IV limits only property taxed ad valorem. As to such property an absolute uniformity in effective rates is required. As to that property taxed by a "specific" property tax, the only requirement is that the rates be uniform within classes. 43

A uniformity in results was also found among those four states (Mississippi, Texas, West Virginia, and Wyoming) having a Type V clause (Taxation shall be equal and uniform), and those six states (Florida, Indiana, Kansas, Nevada, South Carolina, and Utah) having a Type VI clause (The legislature shall provide by law for a uniform and equal rate of assessment and taxation). In all of those states it was ruled that an absolute uniformity in effective rates was required by such uniformity clauses. 44 However, in the Kansas study 45 the pattern was disturbed by an anomalous case decided in 1949 in which the court apparently relaxed or, at

41 Supra, pp. 227, 245.
42 Supra, p. 219.
43 Supra, p. 213.
44 Supra, pp. 253, 259, 266, 272, 279, 303, 311, 335, 340.
45 Supra, p. 320.
least, ignored the strict uniformity requirement in upholding a tax on the property of private car companies. It was pointed out that the single case hardly warranted a conclusion that the Kansas court has reversed the interpretation formerly given to the basic uniformity clause, but that the case simply stands as an interesting anomaly illustrating the manner in which the strict uniformity limitations have caused much difficulty. Because of the inflexibility of this strict limitation a substantial number of these ten states have seen fit to partially avoid the result. This has not been done by the adoption of a more liberal type of uniformity clause. Rather, in each case, the procedure has been to retain the same uniformity clause while adopting an amendment providing for special treatment of named classes of property. Thus, for example, in West Virginia (of Group V) an amendment adopted in 1932 classifies all property and provides for a different maximum rate to be applied to each of the classes.46

Indeed, in five of the six states having a Type VI clause an amendment has been adopted which alters to some degree the effective uniformity limitation. Since 1924, in Florida it has been permissible to classify intangibles for different rates.47 In Indiana, there has been no amendment; however, the interpretation referred to in the universality discussion has permitted the “exemption” of intangibles from the property tax and the imposition thereon of a “nonproperty” tax, the rate of which obviously differs from the general property tax rate.48 Since 1924, in Kansas an amendment has expressly provided for the classification of intangible property for rates.49 In Nevada no modification has been made as to rates; however, as noted above, all intangibles must be ex-

46 Supra, p. 268.
47 Supra, p. 280.
48 Supra, p. 285.
49 Supra, p. 323.
empt by authority of a 1942 amendment. A 1932 amendment to the South Carolina Constitution provides for the classification of intangibles for a different “rate” from that applied to other property. And in Utah a 1930 amendment provides for special treatment of intangibles by classification for application of different rates.

In summary, of the twenty-three states which have basic uniformity clauses ranging from Type I through Type VI, only one state, New Jersey, permits property to be classified for the purpose of applying different effective rates. Otherwise, there was a unanimity of agreement that those types of uniformity clauses require an absolute uniformity in effective rates, which, however, has been avoided in nine states by amendments withdrawing to varying degrees certain classes of property (usually intangibles) from the scope of the uniformity clause. In addition, there is the unique situation in Michigan which results in the absolute uniformity in rates requirement being only “partially” applicable; that is, only as to property taxed ad valorem. Finally, there is the very unusual development in Illinois where a de facto classification system has been sanctioned, the continuation of which could well make a farce out of the apparent strict uniformity limitation.

Turning now to those twenty states having basic uniformity clauses of either Type VII (Taxes shall be uniform upon the same class of subject) or Type VIII (Taxes shall be uniform upon the same class of property), we find a result as completely in favor of classification—at least by way of lip service—as was the result against classification under the basic clauses of Types I through VI.

Of the thirteen states having a Type VII basic uniformity

50 Supra, p. 333.
51 Supra, p. 341.
52 Supra, p. 347.
clause, only one, Idaho, has clearly ruled that an absolute uniformity in effective rates is required, but in the Idaho Constitution there is a plenitude of uniformity provisions. The Type VII basic uniformity clause is coupled with a "just valuation" type clause, and in another section of the constitution there is a Type II "proportionality" clause. Nevertheless, the Idaho court has never recognized any possible conflict among these several provisions. The basic clause of Type VII is simply referred to as requiring an absolute uniformity in effective rate, even though the court has limited the application of that provision to the taxation of property. As pointed out in the Idaho study, the court as recently as 1952 refers to the Type VII clause as one requiring taxes to "be uniform," or containing a "requirement of uniformity" and "equality in burden," or as "the constitutional mandate of equality of taxation." The words "upon the same class of subjects" have simply been ignored.

In the remaining twelve states of this group property may ostensibly, at least, be classified for the purpose of applying different effective rates. This result has not been easily reached in all cases, and, indeed, in some instances it would appear that this power to classify will be viewed rather hostilely by the court when exercised. For example, the Colorado court in its opinions has indicated that classification of property is permissible, but in fact its decisions indicate that in all likelihood little classification will be approved other than a broad classification such as personal property and real property, with intangible property possibly being a permissible class. The power to classify personal property into further subclassifications was spelled out in a 1936 amendment adding a new section to the Colorado Constitution. In fact, however, the express proviso may well result in even further limiting the power to classify personal property because it

58 Supra, p. 383.
apparently is now conditioned upon the imposition of an in-
come tax. In New Mexico no categorical answer as to classi-
fication has been given. Some question might well arise as
to the extent of permissible classification because of the unu-
sual phraseology of the New Mexico uniformity clause.
“Tangible property” is to be taxed in proportion to value, 
and in the absence of decisions one is not warranted in 
concluding that classification of “tangible property” into sub-
classifications would be permitted. The supplementary “pro-
portionality” clause might well be used to establish “tangible 
property” as a minimum subject of taxation as occurred in
Georgia and Missouri.

There has been considerable confusion and difficulty con-
cerning this question in Georgia, Missouri, and Mont-
ana. In all three states, the Type VII clause was accom-
ppanied by a supplementary clause which on its face would be 
more strict. In Georgia and Missouri, there appeared, in ad-
dition to the Type VII clause, supplementary clauses of 
Type I (property shall be taxed according to its value) and
Type II (property shall be taxed in proportion to its value).
In both states, the courts held that the supplementary provi-
sions established property as a single minimum subject of
 taxation, and consequently a further subclassification for ef-
fective rates was not permissible. An opposite result was 
found in Montana, where the court had to reconcile a poten-
tial conflict between a Type VII clause and a supplementary
 provision of Type VI (The legislature shall provide by law 
for a uniform and equal rate of assessment and taxation).
The Montana court held that had there been no clause of

54 Supra, p. 357.
55 Supra, p. 445.
56 Supra, p. 376.
57 Supra, p. 427.
58 Supra, p. 434.
Type VII then property taxation would have been limited by a requirement of absolute uniformity in effective rates, this limitation being derived from the Type VI supplementary clause. However, the "uniformity within classes" clause of Type VII was held to take precedence on this particular point, and the intent of the clause was said to be that property might be classified for applying different effective rates.

In both Georgia and Missouri this problem was subsequently dealt with by amendments, dated 1937 and 1945 respectively. These amendments deleted the supplementary clauses requiring taxation of property to be according or in proportion to its value, and expressly provided that property might be classified. However, in each case the minimum classes are spelled out. In Missouri, real property is a minimum class, all other property being subject to further subclassification. In Georgia, even greater restriction upon potential classifications is made, the amendment expressly establishing two general classes of property, tangible and intangible. Only intangible property is subject to further classification.

These three states furnish an excellent illustration of how the subjective predilections of the various courts must have had much to do in determining whether a classified property tax might be enacted. In Georgia and Missouri, the potentially liberal uniformity clause was construed to apply to all taxes, and the supplementary clauses were held to predominate, consequently preventing classification of property for taxation. To the contrary, in Montana the court took express notice of the conflict and gave a preference to the constitutional provision which permitted the greater legislative discretion. Any other course by the Montana court would have meant that little was accomplished by the introduction of the "uniformity within classes" type clause of more recent origin. The studies of these three states further emphasize
how hazardous generalizations are in this area of “the” state constitutional requirement of uniformity in taxation. Although having identical clauses, different results will often be dictated by supplementary provisions which are often ignored by writers when classifying the several states as to their types of uniformity limitations.

In the remaining six states (Delaware, Minnesota, Oklahoma, Oregon, Pennsylvania, and Virginia) having a Type VII clause, classification of property for application of different effective rates is permitted, and among those six states are found some of the most liberal in terms of degree of classification allowed. For example, in Minnesota, Oregon, and Pennsylvania, the courts have permitted the legislatures the greatest degree of discretion for the purpose of classifying property for effective rates, including the subclassification of real property as well as other extensive classifications.

As for those seven states (Arizona, Kentucky, Maryland, North Carolina, North Dakota, and South Dakota) having a Type VIII basic clause, we find the anticipated result. In all of those states property may be classified for application of different effective rates. However, one might note how the apparently liberal limitation has not been in all cases liberally applied. In Arizona, the court, despite giving lip service to the classification principle, has indicated that any classifications of property whatsoever are likely to face considerable difficulty in being established as reasonable. In Maryland, real property is made a minimum class by express constitutional provision, and a similar situation is found in Washington.

The last five states are Rhode Island and Vermont, having a Type IX basic uniformity clause, and Connecticut, Iowa and New York which have no provision of any kind.

69 Supra, pp. 363, 404, 453, 460, 540, 544.
60 Supra, pp. 547, 553, 557, 561, 566, 571, 580.
It appears certain that in all of those five states property may be classified for application of different effective rates. However, before one concludes that the two states having a clause of Type IX should simply be included in the group which have no uniformity provision of any kind, one should note that in Maryland before 1915, the only provision in its constitution relating to uniformity in taxation was a Type IX clause, and under that provision the strictest degree of uniformity was required.

We can return now to the question originally posed, may a classified property tax be imposed in any of the states? Remember that we are here concerned only with classification for rates, not for exemptions. On the basis of this study it would appear that in twenty-five states a classified property tax is possible. The writer emphasizes “possible” because not every state which can apparently utilize classification for rates has done so. States in which a classified property tax is permissible are: Type IV (a uniform rule of taxation): New Jersey; Type VII (taxes shall be uniform upon the same class of subjects): Colorado, Delaware, Georgia, Minnesota, Missouri, Montana, New Mexico, Oklahoma, Oregon, Pennsylvania, and Virginia; Type VIII (taxes shall be uniform upon the same class of property): Arizona, Kentucky, Maryland, North Carolina, North Dakota, South Dakota, and Washington; and among those states having either Type IX or no clause of any kind: Rhode Island, Vermont, Connecticut, Iowa and New York. However, it should be remembered, as pointed out above, that in a number of those twenty-five states the power to classify is limited in varying degrees by supplementary provisions. In a twenty-sixth state, Michigan (having a Type IV clause) a classified

61 Supra, pp. 591, 595.
62 Supra, p. 556.
property tax is partially possible, that is, as to that property taxed other than by the ad valorem method.

Furthermore, of those states having uniformity structures interpreted to require the strictest of uniformity, it was pointed out that ten states have avoided this result by amendment, leaving the basic uniformity clause unchanged but expressly providing for the power to classify to some degree. Those ten states are: Type I (property shall be taxed according to its value): Maine; Type II (property shall be taxed in proportion to its value): California and Nebraska; Type IV (uniform rule of taxation): Ohio; Type V (taxation shall be equal and uniform): West Virginia; Type VI (legislature shall provide by law for a uniform and equal rate of assessment and taxation): Florida, Kansas, Nebraska, South Carolina, and Utah. However, in most of these ten states the power to classify extends only to a limited class of property, for example, classification of intangibles.

Twelve states have the strict uniformity requirement unaltered by any exceptions. They are: Type I (property shall be taxed according to its value): Arkansas and Tennessee; Type II (property shall be taxed in proportion to its value): Alabama and Illinois; Type III (proportional and reasonable assessments, rates, and taxes etc.): Massachusetts and New Hampshire; Type IV (uniform rule of taxation): Wisconsin; Type V (taxation shall be equal and uniform): Mississippi, Texas and Wyoming; Type VI (uniform and equal rate of assessment and taxation): Indiana; Type VII (taxes shall be uniform upon the same class of subjects): Idaho. Among these twelve states, a trend in Illinois permitting different valuations changes considerably the apparent strict requirement.

Having determined that in some of the states a classified

property tax is permissible, the next question to be asked is this: may a graduated property tax rate be imposed in those states? It should come as no surprise to anyone even slightly familiar with this general problem of uniformity in taxation, that this is a question which has not often been raised in the cases, even by implication. In the cases concerning classified property taxes the discussion seldom departs from the more basic question of whether any classification is permissible. However, in a very limited number of cases, the question of a graduated rate applicable to property has been touched upon, by implication if not directly.

The most important discussion is found in the Minnesota development of the uniformity limitation. In the Minnesota study it was shown that the principle of a graduated property tax rate was expressly approved, although not elaborated upon to any great extent. In approving this principle, the court emphasized that "ability to pay may properly be taken into consideration by the legislature in classifying property for the purpose of taxation." On the other hand, in Washington the court has expressly ruled out graduated property tax rates on the grounds of arbitrary classification. This decision, it should be noted, was made in relation to an income tax which was held to be a tax upon property. Indeed, it is among the income tax decisions that we find the few other decisions pertinent to the immediate question. In both Oregon and North Dakota the courts have upheld income taxes which had graduated rates, and in neither case did the courts determine the nature of the tax on the ground that this question was immaterial since the uniformity required of property taxes was said to be no greater than

64 Supra, p. 406.
65 Supra, p. 580.
66 Supra, p. 459.
67 Supra, p. 566.
that required of nonproperty taxes. In both cases, incidentally, the courts equated the respective uniformity clause with the equal protection clause of the fourteenth amendment to the United States Constitution. Furthermore, it might be pertinent to note that the concurring opinion in the North Dakota case was on the ground that the tax was a nonproperty tax. Thus, it would appear to be evident that outside of the Minnesota case, anything pertinent to this question is derived from a discussion of the more controversial and larger issue, the validity of an income tax under these state constitutional uniformity provisions. In fact, the only straightforward graduated property tax was found in Oklahoma, but that tax was never enforced and no opinion was ever rendered as to its validity under the uniformity limitation.  

It is also pertinent at this point to raise the question whether the uniformity clauses apply to the method of assessment used under the property tax; i.e., the mechanics of assessing and valuing the property in order to determine the value of the property. Without exception, the state by state analysis indicated that regardless of the strictness of the uniformity limitation applicable to the effective rate (that is, percentage rate plus ratio of valuation) there was no prohibition against classification of property for the purpose of reaching a figure to be used as the "value" of the property. The only reason for giving any attention to this problem is because the statement of the rule has often been the basis for later unwarranted generalizations. 69 It was shown in the state by state analysis that in several states in which absolute uniformity is required of effective rates some confusion was caused by a somewhat careless use of the method of assessment cases. The statements in such cases to the effect that

68 Supra, p. 454.
69 For example, see the Arkansas study, C. III, §A/1, note 8, supra.
classification of property was permissible for determining a single ratio of valuation applicable to all property were then used, without any basis, as authority for indicating that property might be classified for application of different effective rates. Sometimes the confusion stemmed from a somewhat unnecessarily broad generalization in the case on method of assessment. At other times, for example, in some digests and annotations the quotations from such cases are used under a heading which indicates that property may be classified generally.

d. Method of taxation

The last problem in comparing results as to particular rules of uniformity applicable to the taxation of property is this: may a specific tax (as opposed to an ad valorem tax) be levied upon property? That is, what does the uniformity limitation require of the “method” of taxation of property?

As for those states (Arkansas, Maine, Tennessee, Alabama, California, Illinois, and Nebraska) having either a Type I or Type II basic uniformity clause, property may be taxed only by the ad valorem method.\(^\text{70}\) This rule, of course, is derived from the express words of the “uniformity” clauses since they are framed in terms of “according to value” or “in proportion to value.” In California, a 1933 amendment withdrew all personal property from the operation of the uniformity clause and expressly provides that such property may be taxed in any “manner” as the legislature may choose. In Massachusetts and New Hampshire, having Type III basic uniformity clauses, the same general result was reached, i.e., property may be taxed only by the ad valorem method.\(^\text{71}\) However, at this point, the rather unusual situation in New Hampshire is of interest. All taxes in New Hampshire are

\(^{70}\) Supra, pp. 54, 60, 86, 98, 113, 126, 169.

\(^{71}\) Supra, pp. 175, 187.
“property” taxes. Taxes on “estates” conform to what are designated as property taxes in the other forty-seven states and taxes on “other classes” of property conform to the usual concept of nonproperty taxes. The important point is that even the taxes on “other classes” of property must ostensibly meet the ad valorem requirement. However, as pointed out in the New Hampshire study this limitation has been usually avoided in any case where it would have invalidated the tax, the court using a technique of designating the revenue producer as either a “charge” or “toll.” This was done in the case of the fuel tax which has a specific base-rate structure.

The remaining types of uniformity clauses are framed in words of “uniform” and/or “equal” rather than words of “value,” and consequently one would expect more diversity in results. Of those four states having a Type IV clause (a uniform rule of taxation), three have a requirement that property must be taxed by the ad valorem method. They are New Jersey, Ohio, and Wisconsin. In New Jersey there was no judicial development of this particular rule and the conclusion here made is drawn from the words “according to value” which are added to the words “uniform rule.” The same situation is found in Ohio where the phrase “uniform rule” is joined with the word “proportional.” However, the Ohio court has had occasion to state that the ad valorem requirement would be derived from the uniformity clause even without the additional words of proportionality. Also in Wisconsin the uniformity clause is accompanied by other clauses which might well be the source of the ad valorem requirement. The Wisconsin court has never made it precisely clear whether the requirement would exist in the absence of the supplementary provisions. In both Ohio and New Jersey this strict rule has been alleviated to some degree. In 1929, an amendment to the Ohio Constitution limited the

72 Supra, pp. 218, 224, 239.
operation of the basic uniformity clause to taxation of real property. Consequently one may conclude that personal property may now be taxed by the specific method. A similar conclusion may be drawn from the 1947 revision of the New Jersey Constitution. The fourth state, Michigan, has a unique status. Contrary to the rule in the other forty-seven states, the method of taxation of property is not determined by the uniformity clause. Rather, the applicability of the strict uniformity clause (strict in that absolute uniformity in rates is required) is determined by the method by which property is taxed, that limitation applying only to that property taxed ad valorem. Thus, the Michigan legislature apparently has a free choice in determining the method of taxing property, with the method chosen in turn determining the rule of uniformity which will apply. For example, intangibles have been subjected to a "specific" tax which is called a property tax but not subject to the rule of absolute uniformity in effective rates.

Surveying those ten states having either a Type V (taxation shall be equal and uniform) or Type VI (a uniform and equal rate of assessment and taxation) clause, we find that in all cases there is a requirement that property be taxed only by the ad valorem method. However, in all but two states there has been little judicial opinion on the problem, the source of the limitation being in any case expressly spelled out in a supplementary clause of either Type I or Type II, or, with one exception, a "just valuation" clause coupled to the Type VI uniformity clause. The states are Mississippi, Texas, West Virginia, and Wyoming having a Type V clause, and Florida, Nevada, South Carolina, and Utah having a Type VI clause. In Indiana, which has a

73 Supra, p. 198.
74 Supra, pp. 252, 258, 266, 271.
75 Supra, pp. 278, 335, 340, 345.
Type VI clause coupled with a "just valuation" clause, the court seems to have expressly derived the limitation from the basic uniformity clause as well. The most significant result among these ten states is found in Kansas which has a Type VI clause standing alone. There are no provisions in the Kansas Constitution containing any express words of "value." Nevertheless, the Kansas court has ruled that the ad valorem method is required. The only change by amendment among these ten states is found in Utah, that state's constitution being amended in 1930 in order to remove intangible property from this limitation.

Among those thirteen states having a Type VII basic uniformity clause (taxes shall be uniform upon the same class of subjects) we find some rather diverse results which are usually explained by the appearance of supplementary provisions framed in words of "value." In Colorado, the problem has not been clearly ruled upon, but there is most likely an ad valorem requirement, probably stemming from the "just valuation" clause which follows the basic uniformity clause. Before 1937, in Georgia there was an ad valorem requirement spelled out in a Type I clause, but by an amendment in 1937 that clause was deleted and the requirement may no longer exist. The reason for the deletion of the supplementary provision did not concern the method for taxation requirement. Rather, the Georgia court had used that provision to establish property as a single subject of taxation, consequently preventing classification for rates. In Idaho, there has been no judicial development, but quite likely the ad valorem requirement is present in view of the supplementary clause of Type II. In any case, one might note that as to

76 Supra, p. 303.
77 Supra, p. 310.
78 Supra, p. 352.
79 Supra, p. 372.
80 Supra, p. 381.
effective rates, the Idaho court has ruled that absolute uniformity is required, simply referring to the Type VII clause as simply a "constitutional mandate of equality in taxation." Even in the absence of the supplementary clause, therefore, one cannot be sure just how the court would react to a specific property tax. In Missouri, the experience has been quite similar to that in Georgia. Before 1945, there was a Type II supplementary clause in the Missouri Constitution which was relied upon by the court in finding an ad valorem requirement. An amendment in 1945 deleted the supplementary clause; however, there was inserted a detailed provision in which it is expressly provided that tangible property must still be taxed by the ad valorem method, while intangibles are now to be taxed by the yield method. The detailed provision introduced by amendment leaves the basic uniformity almost without purpose, certainly as to this particular limitation. In Montana, as in Georgia and Missouri, a supplementary clause of Type VI was the source of the ad valorem limitation. The deletion of this supplementary provision from the Montana Constitution has not been necessary because the Montana court has construed the basic clause of Type VII to predominate as to the limitation applicable to effective rates. Consequently, classification is permissible. In New Mexico, we find a supplementary provision which is the source of the requirement that tangible property must be taxed by the ad valorem method. There is some question in New Mexico concerning the rule applicable to the taxation of intangibles. In Virginia, as in Missouri and Georgia, a supplementary ad valorem type clause was deleted by amendment, and, while there has been no judicial development, it is likely that there is no longer any ad

81 Supra, p. 422.
82 Supra, p. 432.
83 Supra, p. 443.
valorem requirement. The study of the Pennsylvania uniformity limitation revealed some confusion on this point. The Pennsylvania court has on occasion ruled that property may only be taxed by the ad valorem method. The only decision by the highest Pennsylvania court concerned a “tax” (the alcoholic floor tax) which was in reality a regulatory measure. The study revealed an earlier case in which the court apparently approved a specific property tax, but that opinion has been ignored in the later cases. The remaining four states in this group (Delaware, Minnesota, Oklahoma, and Oregon) have no ad valorem requirement. In the constitutions of those states there are no supplementary provisions. It is also pertinent to note that they are among the most liberal of the states in discretion allowed the respective legislatures in taxation of property.

Examining that group of seven states having the Type VIII clause (taxes shall be uniform upon the same class of property) we again find some diversity in results. In three of these states (Kentucky, Maryland, and North Carolina) there is possibly an ad valorem requirement. In Kentucky this is certain, the limitation being spelled out, however, by a Type II supplementary clause. Also in Maryland, the problem is settled. However, the Maryland court has ruled that the ad valorem requirement is derived from the word “uniform” in the Type VIII basic uniformity clause. In North Carolina there is some doubt whether the ad valorem limitations still exists. On the other hand, in the remaining four states of this group (Arizona, North Dakota, South Dakota, and Washington) there is no requirement that

84 Supra, p. 544.
85 Supra, p. 537.
86 Supra, pp. 359, 415, 449, 457.
87 Supra, p. 553.
88 Supra, p. 556.
89 Supra, p. 561.
property be taxed by ad valorem method only. One might note, however, that in Arizona there is no judicial opinion available, and in view of the strict interpretation used by the Arizona court in reviewing legislative classification of property for rates it is not too unlikely that the court would be equally hostile to any attempted specific property taxes. The most significant result among these states is that in Maryland, where the court clearly derived the ad valorem requirement from the basic uniformity clause of Type VIII. As would be expected, there is no ad valorem requirement among those states having a clause of Type IX (Rhode Island) or having no clause of any kind (Connecticut, Iowa, and New York).

2. A Summary Comparison of Effective Uniformity Limitations

Thus far in this study the states have been grouped on the basis of a classification of their respective uniformity clauses based on phraseology alone. For convenience, the nine basic classes of such provisions were referred to as Types of clauses. These basic uniformity clauses standing alone, without interpretation, might be referred to as literal limitations of uniformity. A state by state study was made to determine the effective uniformity limitation which exists in each state, this effective limitation being the literal limitation plus the judicial gloss. Having made a “rule by rule” comparison among the forty-eight states, it will now be helpful to compare the effective uniformity limitations found in the several states to the literal limitations, and in that way one may determine to what degree they coincide. For the purpose of the present comparison it is possible to classify the several types of possible effective limitations in the fol-

90 Supra, pp. 546, 564, 569, 579.
COMPARATIVE ANALYSIS

In the following manner, ranging from the most strict possible to the most liberal. The degree of strictness is determined by a combination of the three particular rules of uniformity.

1. There is an effective limitation of:
   (a) universality;
   (b) absolute uniformity in effective rates;
   (c) ad valorem method only.

2. There is an effective limitation of:
   (a) NO UNIVERSALITY;
   (b) absolute uniformity in effective rates;
   (c) ad valorem method only.

3. There is an effective limitation of:
   (a) NO UNIVERSALITY;
   (b) absolute uniformity in effective rates;
   (c) NO AD VALOREM REQUIREMENT.

4. There is an effective limitation of:
   (a) universality;
   (b) RATES UNIFORM WITHIN CLASSES;
   (c) ad valorem method only.

5. There is an effective limitation of:
   (a) universality;
   (b) RATES UNIFORM WITHIN CLASSES;
   (c) NO AD VALOREM REQUIREMENT.

6. There is an effective limitation of:
   (a) NO UNIVERSALITY;
   (b) RATES UNIFORM WITHIN CLASSES;
   (c) ad valorem method only.

7. There is an effective limitation of:
   (a) NO UNIVERSALITY;
   (b) RATES UNIFORM WITHIN CLASSES;
   (c) NO AD VALOREM REQUIREMENT.

Thus, in (7) the only requirement is a uniformity within classes, the most liberal effective limitation. The key requirement in determining the strictness of the limitation is that degree of uniformity required of the effective rates. It is this requirement that determines whether a classified prop-
UNIFORMITY AND EQUALITY

Property tax, as such a tax is generally conceived, is possible. In this respect the effective limitations (1), (2) and (3) are the strictest limitations. Thus, those effective limitations permitting classified property taxes would be (4), (5), (6) and (7). However, only (6) and (7) would permit the most flexible types of classified property tax, one under which free exemption is permitted.

The author has classified the states according to the gradations of effective limitations of uniformity as set forth above. This classification is based on the conclusions reached in the state by state study, and is reproduced graphically on the accompanying chart. In the following discussion the roman numeral following each state signifies the nature of its basic type of uniformity clause. First, there are thirteen states which have an effective uniformity limitation of the strictest degree, class (1). They are: Arkansas (I), Tennessee (I), California (II), Illinois (II), Nebraska (II), Ohio (IV), Texas (V), West Virginia (V), Florida (VI), Indiana (VI), Nevada (VI), South Carolina (VI), and Utah (VI). However, seven of these thirteen states have subsequently modified this effective limitation by amendment without altering the basic uniformity clause in its phraseology. Those seven states are indicated by italics. Indiana is included in this group although in that state a distinction is made between the "exemption" and "selection" of property for taxation, with the result being that there is not a full rule of universality governing in that state.

Second, there are nine states which have an effective uniformity limitation of class (2), which is also a strict limitation, although exemptions are permitted. These states are: Maine (I), Alabama (II), Massachusetts (III), New Hampshire (III), Wisconsin (IV), Mississippi (V), Wyoming (V), Kansas (VI), and Idaho (VII). Two of these nine states have modified this effective limitation by amend-
### Comparative Analysis

**Chart of Literal and Effective Property Tax Uniformity Limitations**

(continued on p. 678)

<table>
<thead>
<tr>
<th>Effective Limitations:</th>
<th>TYPES</th>
<th>Sector “A”</th>
<th>Sector “B”</th>
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</thead>
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<tr>
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<td>(3) a) NO</td>
<td>(4) a) YES</td>
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<td>(c) YES</td>
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| I Ark | Ak | Me¹ | | | | |
| Maine | | | | | | |
| Tenn | Tenn | | | | | |
| II Ala | Cal² | Ala | | | | |
| Cal | | | | | | |
| Ill | Ill⁴ | | | | | |
| Neb | Neb¹ | | | | | |
| III Mass | Mass | | | | | |
| NH | N H | | | | | |
| IV Mich | (Mich)⁶ | | (Mich)⁵ | | | |
| NJ | | | | N J² | | |
| Ohio | Ohio² | | | | | |
| Wis | Wis | | | | | |
| V Miss | Miss | | | | | |
| Texas | Tex | | | | | |
| W Va | W Va³ | | | | | |
| Wyo | Wyo | | | | | |
| VI Fla | Fla¹ | | | | | |
| Ind | Ind⁶ | | | | | |
| Kan | Kan¹ | | | | | |
| Nev | Nev¹ | | | | | |
| SC | SC¹ | | | | | |
| Utah | Utah¹ | | | | | |
| | | | | | | |

Reading down, states are grouped according to types of uniformity clauses; the literal limitations... Reading from left to right, classification is from strict to liberal effective uniformity limitation, depending on answers to three questions: (a) Is there a rule of universality? (b) Is absolute uniformity required of effective rates? (c) Is the ad valorem method required? Heavy lines separate strict from liberal limitations. The four sectors, reading clockwise, are: A) Strict literal-strict effective. B) Strict literal-liberal effective. C) Liberal literal-liberal effective. D) Liberal literal-strict effective.

1. The effective limitation has been modified, constitutionally, by a “special treatment” amendment for intangible property.
2. Same as note 1, except special treatment is for tangible property.
3. Same as note 1, except special treatment is for all property—that is, all property is classified by amendment, leaving the basic clause unchanged.
### Effective Limitations

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<th>(1)</th>
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<tr>
<td>Iowa</td>
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<tr>
<td>NY</td>
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</tbody>
</table>

4. A *de facto* classification for rates is sanctioned in Illinois. See text.

5. In Michigan the method of taxation (ad valorem or specific) determines the applicable rules of uniformity for exemptions and rates. See text.

6. In Indiana a distinction is made between “selection” and “exemption,” no rule of universality applies to “selection.” See text.

7. Probably only a very limited classification would have been actually permitted in Colorado; and now an amendment expressly provides for the classification of personal property.

8. In Georgia and Missouri the strictest degree of uniformity was in force until the deletion of supplementary clauses of Types I or II. The classification for rates is now spelled out by amendment. There is some doubt as to the ad valorem rule being applicable in Georgia.

9. There is some question as to the ad valorem rules being applicable in Montana.

10. In New Mexico the strict rules apply only to the taxation of tangible property because of peculiar phraseology.
ment without altering the basic uniformity clause in its phraseology. Those two states are indicated by italics.

Third, a single state, Michigan (IV), has a modified form of effective limitation (3). One must say modified because of the unique situation found in Michigan. There only that property taxed ad valorem is subject to the strict rule of uniformity as to rates.

Fourth, there are six states which have an effective limitation of class (4). Those states are: Kentucky (VIII), Maryland (VIII), North Carolina (VIII), Colorado (VII), Missouri (VII), and New Mexico (VII). Only Colorado has modified this effective limitation by amendment without altering the basic uniformity clause in its phraseology. A further qualification should be noted in respect to Missouri and New Mexico in which the ad valorem requirement applies in part only, namely, to the taxation of tangible property.

Fifth, there are four states which have an effective limitation of class (5). Those states are: Arizona (VIII), Georgia (VII), Montana (VII), and Virginia (VII). A qualification should be made as to Virginia in which the rule of universality applies in part only.

Sixth, two states, New Jersey (IV) and Pennsylvania (VII), have effective limitations of class (6). However, as pointed out in the Pennsylvania study, substantial arguments may be made against the continuing validity of the ad valorem requirement.

Seventh, there are twelve states which have an effective limitation of class (7). Those states are: North Dakota (VIII), South Dakota (VIII), Washington (VIII), Delaware (VII), Minnesota (VII), Oklahoma (VII), Oregon (VII), Rhode Island (IX), Vermont (IX), and the three states which have no clause of any kind: Connecticut, Iowa, and New York.
Summarizing, we find that twenty-three states have the strictest types of effective uniformity limitations. This includes Michigan, which might be subject to question. However, of these twenty-three states there are nine which have modified the effective limitation to permit to some degree classification of property for taxation. These modifications have been made without altering the basic uniformity clause. On the other hand, there are twenty-five states which permit classification for rates. However, of these twenty-five there are ten states which do not permit classification for exemptions. Thus, in terms of the existing effective limitation of uniformity in taxation, a substantial majority of the states (twenty-five plus nine) have an effective limitation of uniformity in taxation which does not prohibit some form of a classified property tax.

* * * * *

Having classified the states according to their effective limitations, it will be helpful to approach the matter from another direction. What generalizations may be made in comparing the literal words of the basic uniformity clauses to the effective uniformity limitations? What sort of results were found in those states having the types of basic uniformity clauses which, on their face, would most likely be construed as requiring the stricter degree of uniformity in the taxation of property? Those types of clauses are:

I. Property shall be taxed according to its value.
II. Property shall be taxed in proportion to its value.
III. The legislature may impose proportional and reasonable assessments, rates, and taxes upon all persons and estates. . . .
IV. There shall be a uniform rule of taxation.
V. Taxation shall be equal and uniform.
VI. The legislature shall provide by law for a uniform and equal rate of assessment and taxation.
Looking to the accompanying chart, it can be seen that there was an almost complete correlation here, there being only two important exceptions, Michigan and New Jersey.

Putting aside for the moment the two exceptions, twenty-one states have these types of basic clauses. The only relaxation in the degree of uniformity required was found in the nine states having no requirement of universality. But even on this point, one finds that the power to exempt is hedged to a considerable extent in a number of those nine states.

The states which relax the strict form of uniformity only by permitting exemptions are Maine, Alabama, Massachusetts, New Hampshire, Wisconsin, Mississippi, Wyoming, Indiana, and Kansas. Indiana may be included here only because of a rather finely drawn theory which makes a distinction between "selection" and "exemption." In two of these nine states (Maine and Kansas) the strict rules have been modified to a degree by collateral amendment.

Thus, twelve states of the twenty-one (Arkansas, Tennessee, California, Illinois, Nebraska, Ohio, Texas, West Virginia, Florida, Nevada, South Carolina, and Utah) require the strictest degree of uniformity: universality, absolute uniformity in effective rates, and ad valorem method. However, in eight of the twelve states (California, Nebraska, Ohio, West Virginia, Florida, Nevada, South Carolina, and Utah) the effective limitation has been modified by collateral amendment to the basic uniformity clause. In addition, in Illinois there was the very interesting situation in which a de facto system of classification of property for effective rates was given court approval. Consequently, in only three of these twelve states has the effective uniformity limitation been left unchanged. Those three states are Arkansas, Tennessee, and Texas.

As indicated in the state by state study, and as well in the rule by rule comparison, in substantially all of these twenty-
one states the effective limitation of uniformity in taxation of property was derived from numerous variations of supplementary provisions as well as the basic uniformity clauses. However, there was no indication that the requirements would not have been derived from the basic uniformity clause had it stood alone. To the contrary, the study had indicated that in some of the states permitting exemptions (for example, Wyoming) this was the result of supplementary provisions and would not have been permitted had there been only the basic uniformity clause. Furthermore, it should be noticed that the diversity in result as to the rule of universality was found under each of the five types of basic clauses being considered.

The two important exceptions among these twenty-three states are Michigan and New Jersey. In New Jersey we find that the only strict rule of uniformity is that property must be taxed ad valorem, while there is no requirement of universality and property may be classified for rates. There is some uncertainty whether real property could be further classified, and since 1947 it is possible that personalty no longer need be taxed by the ad valorem method. This result in New Jersey does not appear to stem from any unique phraseology of the basic uniformity clause. To the contrary, the unique result in Michigan stems precisely from the unusual manner in which the basic uniformity clause of Type IV is phrased. In that state we found that, contrary to the approach in the forty-seven other states, the manner in which property is taxed determines the applicable uniformity clause, and as to that property taxed ad valorem there is no requirement of universality but the effective rate must meet the test of absolute uniformity. As to property taxed by a specific method the only limitation is a uniformity within classes. This unusual situation stems from the phraseology: “The legislature shall provide by law a uniform rule of tax-
tion, except on property paying specific taxes. . . .” Consequently, the result in Michigan does not indicate a significant difference of judicial opinion as to the meaning of one of the more literally strict types of basic uniformity clause.

A greater and significant diversity of results is found among those states having the basic types of uniformity clauses which on their face are more susceptible of being construed so as to permit some degree of classification in the taxation of property. Those types are:

VII: Taxes shall be uniform upon the same class of subjects.
VIII: Taxes shall be uniform upon the same class of property.

There are twenty states having one of these types of clauses as their basic uniformity provisions. To these may be added the two states having a basic clause of Type IX, and those three states without a uniformity provision of any kind.

The most marked deviation among this group of twenty-five states was found in Idaho, where the court has ruled that property in that state when taxed is governed by a requirement of absolute uniformity in effective rates and the method used must be ad valorem. While there is no requirement of universality in Idaho, this was only because the power to exempt was expressly spelled out. It is true that the Idaho Type VII basic clause is accompanied by a Type II clause. However, the court has not necessarily relied on that second provision and has found no conflict between the two, merely referring to the basic clause of Type VII as establishing “a requirement of uniformity.” Consequently, in Idaho the existence of one of the more liberally phrased basic uniformity clauses has not prevented the effective uniformity limitation from being one of the strictest.

Along with Idaho, there are other states among these
twenty-five which are of interest because of their strict effective limitations. For example, in Colorado we found that for all practical purposes there was an effective limitation of the strictest character. However, an amendment in 1936 expressly provided that personal property may be classified for rates or exemptions, but this power is conditioned upon the imposition of an income tax law. Similarly, in Missouri, before a 1945 amendment, there was an effective limitation of the strictest degree even though the basic uniformity clause was Type VII. However, for each of the fundamental particular rules of uniformity the source was not the clause of Type VII but a supplementary provision (Type II). The 1945 amendment deleted this supplementary Type II provision and consequently removed a part of the strict effective limitation. However, the universality limitation remained because of a supplementary provision which spelled out this requirement. While classification of property for rates is no longer prohibited, there remains additional constitutional limitation on this power because the minimum classes of property are spelled out in the constitution by the 1945 amendment. In addition, other words of the 1945 amendment spell out the requirement that tangible property must still be taxed by the ad valorem method.

In New Mexico, where there is a Type VII basic clause, the effective uniformity limitation requires the strictest degree of uniformity for the taxation of tangible property. This result stems from a rather unusually phrased provision which directly modifies the basic uniformity clause. Before 1937, Georgia had a situation similar to that found in Missouri. The Georgia Constitution had in addition to the Type VII basic clause a Type I supplementary provision. It was the latter provision which was the source of a strict effective uniformity limitation. The universality rule was spelled out by words dealing expressly with that problem, but was also
said to be derived from the basic uniformity clause itself. The supplementary provision of Type I was used to establish property as a minimum class. The Type I provision was deleted by the 1937 amendment; however, new words were introduced which limit the power of the legislature to the classification of intangibles into subclassifications.

Summarizing, among the twenty-five states having potentially liberal uniformity limitations, there are five in which the effective uniformity limitation is of the strictest degree. However, as the state studies indicated, only in Idaho, and to a degree, New Mexico, has this strict type of uniformity limitation prevailed. In the other states (Colorado, Georgia, and Missouri) amendments have removed the collateral provisions which were the sources of the strict rules. It is significant that in all five states other than Idaho (and, perhaps, Colorado) the source of the restrictive limitation was always a supplementary provision which was interpreted by the court in such a manner as to limit the potentially liberal limitation inherent in the Type VII or Type VIII clauses. In the final analysis, it was only in Idaho that the court simply ignored the words of the conflicting uniformity provisions found in a single constitution and categorized all the provisions as simply “uniformity clauses.”

Turning to the remainder of these twenty-five states we still find considerable diversity in results. In addition to Colorado, Missouri and New Mexico, there are three other states (Kentucky, Maryland and Montana) which permit classification for rates but require universality and the use of the ad valorem method. In Kentucky these two strict rules are both derived from collateral provisions. The rule of universality is spelled out and a supplementary clause of Type II is the source of the ad valorem requirement. Consequently, the Type VIII basic clause in the Kentucky Constitution is restricted so as to permit only the classification of
property for rates. To the contrary, in Maryland, which also has a basic clause of Type VIII, the ad valorem requirement is derived from the word “uniform” in the basic clause. In both Kentucky and Maryland, the rule of universality is somewhat limited in operation. In Kentucky, by express amendment property may be exempted from local property taxation, and in Maryland the rule is applied only to the exemption of any sub-classifications of real property. In Montana, which has a basic clause of Type VII, we find a situation similar to that in Idaho, but with an opposite result. The Montana Constitution contains a Type VI clause which might well be used to negate any liberal effect of the Type VII basic clause which was also found in the Montana Constitution. However, the Montana court recognized the potential conflict and reconciled the two provisions by giving pre-eminence to the more liberal Type VII clause. The Type VI clause was allowed to require universality and the ad valorem method, but the Type VII clause was relied upon as definitely indicating the intent of the framers that property might be classified for rates.

Three of the remaining states (Arizona, North Carolina, and Virginia) have a strict rule of universality but permit classification of property for rates, or the use of other than the ad valorem method in taxing property. In Arizona, this strict rule of universality is not derived from the Type VIII basic clause but is spelled out in a supplementary provision. The rule of universality may be avoided in Arizona by the use of an in lieu tax if the in lieu tax is a property tax. It might be noted, however, that the Arizona court has given the impression that any but the most basic classification of property for rates would be frowned upon. Similarly, in North Carolina, which has a basic clause of Type VIII, the requirement of universality is derived from collateral provisions which enumerate permissible exemptions. In addition,
some doubt might be raised as to the assertion that the re-
requirement of ad valorem method is not now present in the
North Carolina Constitution. In Virginia, the rule of univer-
sality is also derived from a collateral provision expressly
prohibiting exemptions, but by amendment of the constitu-
tion there are no state taxes on real property and no local
taxes on personal property.

Pennsylvania is in a rather unusual position. That state
has a basic uniformity clause of Type VII, and stands as hav-
ing one of the more liberal uniformity limitations in many
aspects. However, that state does have a requirement that
property be taxed ad valorem only, although it may be clas-
sified for both rates and exemptions. The cases which ruled
upon the ad valorem requirement derived that limitation
from the basic clause Type VII. Illustrating a different atti-
dute by the same court, the provision in the constitution
spelling out the requirement that property may not be ex-
empted is avoided by limiting its operation to the exemption
of real property; but real property is subject to further clas-
sification for rates.

The remaining nine states (North Dakota, South Dakota,
Washington, Delaware, Minnesota, Oklahoma, and Ore-
gon) having basic clauses of Types VII and VIII, along
with Rhode Island and Vermont, which have the basic clause
Type IX, and the three states (Connecticut, Iowa and New
York) having no clause of any kind, all require only a uni-
formity within classes. There is no rule of universality or
ad valorem method, and property may be classified for rates.

Among those states one might call particular attention to
North Dakota, Minnesota, Oklahoma, and Oregon. Those
four states are the ones in which the liberal interpretation of
the uniformity clause has been most extensively developed.
In the other states, there has been less use of legislative
power, and consequently less judicial development. In all
of these four states, the courts have appeared to give the legislature the greatest discretion in classification of property, and, most significantly, they have equated the property tax uniformity limitation with the federal equal protection clause limitation.

Another interesting point to note is that in Washington and Pennsylvania extensive classifications of property for effective rates have been upheld, but in these two states income taxes have been held to be property taxes and consequently struck down because of their graduated rate features. The courts of the two states ruled out classifications of property according to quantity as arbitrary. On the other hand, in North Dakota, Minnesota, and Oregon the courts found that it was immaterial to consider the nature of a graduated net income tax, finding that the graduated rates would stand in any case, the classification on the basis of quantity or ability to pay being reasonable.

Summarizing, the study has shown that in substantially all (but cf. Idaho) cases of diversity in result on particular rules of uniformity among those states having potentially liberal uniformity clauses, the diversity is a result of supplementary provisions of varying nature. When such supplementary provisions made their appearance in the constitutions of those states having the potentially restrictive uniformity clauses (Types I, II, III, IV, V, and VI) there was no necessary conflict, such supplementary provisions merely buttressing the effective limitation which might likely be derived from the basic clause itself. To the contrary, the appearance of these supplementary provisions in the constitutions of those states having the more potentially liberal provisions (Types VII, VIII, and IX) often meant conflicting results among states having identical basic provisions.
C. A COMPARISON OF RESULTS AS TO PARTICULAR TAXES

As stated in the introduction to this monograph, in most states when a tax is challenged as violating the constitutional limitation of uniformity in taxation, the crucial problem is the determination of the nature of the tax. Is the tax a "property" or "nonproperty" tax? The reason the answer to this question often determines the constitutionality of the tax is that most state constitutional provisions provide more strict uniformity limitations for property taxes than for nonproperty taxes. Although the distinction between property and nonproperty taxes may with justification be assailed as artificial and unsound,1 it remains the crucial question in most states. Even among the twelve states which have the most liberal effective uniformity limitations,2 only half (North Dakota, Minnesota, Oregon, Connecticut, Iowa, and New York) equate the property tax uniformity limitation, however liberal, to the uniformity required of nonproperty taxes. Therefore, it will be enlightening to consider the problems involved in characterizing the nature of a particular tax when its validity has been questioned.

The income tax has been selected for this purpose, since the validity of this tax has probably raised the most controversy concerning the requirements of uniformity in taxation. Although there is a fairly exhaustive amount of legal literature concerning the income tax,3 it will be helpful to review

2 See the discussion in the preceding section, supra, p. 679.
the treatment afforded that tax in the context of a study of uniformity in taxation.

1. Judicial Precedent and the Income Tax

The sharp division of judicial opinion concerning the nature of an income tax came into focus for the purposes of this monograph with the opposite views taken by the Massachusetts and Missouri courts in 1915 and 1918, respectively.\(^4\) The Massachusetts advisory opinion, given in 1915,\(^5\) established the beachhead for the restrictive viewpoint. The Massachusetts Supreme Court ruled that a tax upon the income from property would be, in effect, a tax upon the property itself. Consequently, such a tax came within the strict uniformity limitation applicable to property taxation, which required an absolute uniformity in effective rates. The rationale of the court was as follows:

A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be changed by calling it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property. This was decided after most elaborate consideration, with affluent citation of authorities, in

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\(^4\) In 1912 the Wisconsin Court decided State v. Frear, 148 Wis. 456, 134 N.W. 673 (1912). It ruled that the income tax under attack was not a property tax. However, the decision loses impact because of the 1908 amendment to the Wisconsin constitution which expressly authorized the imposition of an income tax. Consequently, the Frear case has had no appreciable effect on the precedent concerning this question.

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Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 581...

Thus, the Massachusetts court cited as its authority for this proposition the discussion in the famous Pollock case. When the United States Supreme Court decided that case in 1895, the problem faced was entirely different from that which state courts subsequently faced in determining the nature and validity of general net income taxes. In the Pollock case, the United States Supreme Court was concerned with the federal constitutional requirement that direct taxes be apportioned. For that purpose it ruled that a tax on the income derived from land or personal property was to be characterized as a direct tax on such income-producing property. There were vigorous dissents from the 5-4 decision, and subsequent cases by the United States Supreme Court have somewhat discredited the Pollock rationale. Nevertheless, that majority opinion has played its role in the state constitutional problem of uniformity in taxation. Massachusetts relied on the opinion, and later state courts taking the restrictive view also have gained comfort from the Pollock majority rationale, although not so directly relying on it.

It should be noted that the Massachusetts court did not rule on the nature of a tax on "earned" income. As pointed out in the Massachusetts study this 1915 ruling was avoided to some extent by an amendment to the Massachusetts Constitution which expressly provides for a "tax on income." But in a subsequent 1929 advisory opinion the court ruled that the amendment did not alter the nature of the tax, and since the amendment did not expressly provide for graduated rates, such rates were prohibited by the strict property tax

6 Id. at 623-624.

7 See, for example, New York ex rel Cohn v. Graves, 300 U.S. 308, 57 S. Ct. 466 (1937), and Brushaber v. Union Pacific R. Co., 240 U.S. 1, 36 S. Ct. 236 (1916).

8 In re Opinion of the Justices, 266 Mass. 583 (1929).
uniformity limitation. Any classifications were limited strictly to those spelled out in the amendment.⁹

The Massachusetts view did not go long unchallenged. Within three years, the Supreme Court of Missouri faced the same problem. In 1918, the Missouri court decided *Ludlow-Saylor Wire Co. v. Wollbrinck*¹⁰ and reached a conclusion opposite from that taken by the Massachusetts court. The decision was 4-3, with a vigorous dissenting opinion. Indeed, one may safely assert that both majority and minority opinions in most all of the state cases on this problem have reflected deeply felt attitudes concerning the income tax. As the Missouri study¹¹ indicated, in 1918 the constitution of that state contained a Type VII basic uniformity clause (taxes shall be uniform upon the same class of subjects), but that clause was supplemented by an ad valorem clause of Type II from which was derived the strict degree of uniformity required of property taxes. One may characterize the majority opinion in the *Ludlow-Saylor* case as ruling that the income tax under consideration was not a tax upon property—that is, it was neither a tax on income as property, nor a tax upon the property from which the income was derived. Relying in part on the rationale of an 1869 opinion, *Glasgow v. Rowse*,¹² the court reasoned as follows:

The reasoning and conclusion of the court in the above case [the Glasgow case] has never been disapproved in this

⁹ It is interesting to note that the Massachusetts court has ruled that the Massachusetts corporate franchise tax with a base of net income is an “excise” tax, not a property tax. See, for example, *Alpha Portland Cement Co. v. Comm.*, 244 Mass. 530, 139 N.E. 158 (1923).
¹⁰ 275 Mo. 339, 205 S.W. 196 (1918).
¹¹ Supra, p. 418.
¹² 43 Mo. 479 (1869). The basic uniformity clause in effect at the time of the Glasgow decision read as follows: “... all property subject to taxation ought to be taxed in proportion to its value.” Art. I, §30, Const. 1865.
It is predicated upon a distinction made by the court as to the application of the term "property" used in the Constitution. In law and in the broadest sense "property" means a "thing owned," and is, therefore, applicable to whatever is the subject of legal ownership. . . . In short it embraces anything and everything which may belong to a man and in the ownership of which he has a right to be protected by law. The court held, in effect, that in directing, as the Constitution does, that taxes on property should be levied according to value, reference was intended to be made to other species of property than that which a person has in his income; that the Constitution did not abridge the power of the Legislature to provide revenue by a taxation of income; that its command was directed to other and distinct classes of property which (on account of their peculiar nature could be measured on value) become the object of taxation independent of the owner, and are susceptible, by proper procedure, to lien or seizure for the enforcement of the tax. The court held that it was property having such a nature and characteristics, and not the mere usufruct of such property, nor the earnings of physical or mental labor, which was referred to in the clause under review and intended thereby to be subjected to taxation according to its value. . . .

In consonance with these distinctions the court held . . . that the term "property" in the Constitution did not apply to that species of ownership enjoined by the possessor of an income, and hence the Legislature was no more restricted in taxing incomes than it or its subordinate agencies are restricted in laying occupation and other taxes relating to the activities or personalty of the individual taxed; indeed, the fact that the act in question is a tax upon the owner of an income is distinctly recognized and stated in Section 2 of the act, which uses these words; "the net income of a taxable person". . . .

That income is property because it is an ownable thing, is a matter of simple apprehension which has been affirmed under the definition of property above stated. That it is, "in
effect," a taxation of the labor or capital which produced it, may be conceded, since by reason it affects the value of the thing or things from which it is derived. But none of these considerations alter the fact that incomes are distinguishable from the tangible or intangible property yielding them, nor do they affect the established law in Missouri, that incomes are thus connoted by our Constitution and decisions. These recognize incomes as one of the classes entering in proportion to value, and, therefore, not falling within the designation of property which the Legislature is forbidden to tax except in that way. . . .

This quite lengthy quotation is set forth in order to illustrate the way in which the court avoided the application of the strict uniformity limitation. This writer has characterized the decision as ruling that the tax was a nonproperty tax. However, as the quotation illustrates, the Missouri court did not spell it out so neatly. Indeed, one can understand why the decision has been referred to as ruling that the tax was a property tax, but not limited by the property tax uniformity limitation. However, it is suggested that the court verged closer to finding the tax *sui generis*, as, indeed, later states expressly decided. For example, the court relied in part upon the words of the statute to indicate that the tax was upon the owner as much as upon the income as such. Further, if income was to be considered property, it was not property within the constitutional sense; hence, the tax was not, constitutionally, a tax upon property, that is, a property tax. The important point is that the court avoided applying the harsher uniformity limitation, and vaguely touched upon the approaches later explicitly used in different instances to characterize the tax as not being a property tax.

However viewed, the Missouri court held that the income tax was not to be characterized as a property tax. Just what

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13 Supra note 10, at 352-3, 354, 355.
14 Cf. Matthews, supra note 1, at 511-512.
the court believed to be its nature may be left to speculation. The court did not feel compelled to force the tax into some concept of privilege or excise tax. It was sufficient to rely on a property-nonproperty tax dichotomy, with a property tax being one with an object of “property” in the constitutional sense, and all other taxes being loosely joined as the opposite in a two-class analysis. Had the tax been held to be a tax upon property, it would have violated the property tax strict uniformity requirement. In 1932, the Missouri court in Bacon v. Ransom\textsuperscript{15} reaffirmed the rationale of Ludlow-Saylor, and further extended its position in holding that a graduated rate schedule was a reasonable classification. In so ruling, the court relied on the ability to pay rationale.

It might be pointed out that the dissenters in the Ludlow case relied strongly upon both the Pollock rationale used by the United States Supreme Court and the Massachusetts opinions. The tenor of the dissent is aptly illustrated by the following typical statement found therein: “However, the origin of the heresy is not important now, for scarcely any respectable court is adhering to the view that income derived from real and personal property, at least, is not itself property and that a tax upon such income is not a charge against and a tax upon such property itself.”\textsuperscript{16} The following discussion will show that a substantial number of courts never enjoyed reaching that “respectable” status.

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At the same time that this general controversy was brought into sharp focus by the divergent Massachusetts and Missouri opinions, there was a third case which illustrates what might be called a second theme running throughout this

\textsuperscript{15} 331 Mo. 985, 56 S.W. 2d 786 (1932).
\textsuperscript{16} Supra note 10, at 370.
general controversy. In 1919, the Supreme Court of Delaware in *State v. Pinder*\(^{17}\) asserted:

> In the absence of any authority on the subject, this court would unhesitatingly hold that income is property within the meaning of section 1, article 8 of our Constitution, and, therefore, subject to taxation or exemption. . . .\(^{18}\)

Yet this opinion cannot be taken as support for the general position taken by the Massachusetts court. The Delaware court’s characterization of the tax was made in answer to the argument that the income tax was a nonproperty tax and that the legislature’s power was limited to the taxation of property. The court, in the final analysis, rejected this construction of the constitution. However, it was said that the argument could also be met on the ground that income was property within the meaning of the tax clause of the constitution.

It is interesting to note how the early Missouri case, *Glasgow v. Rowse*, was distinguished. The Delaware court expressed an attitude quite diametrically opposed to that implicit in the Massachusetts opinions. The court said:

This case [*Waring v. Savannah*, a Georgia case discussed *infra*] is similar in principle to *Glasgow v. Rowse*, in which it was held that income tax “did not come within the meaning of the term ‘property’ as used and designated in the Constitution.” *Necessarily it was so held*, because the Constitution required that taxation on property should be in proportion to its value, and a tax on income would be in violation of the ad valorem principle. *The tax could not, therefore, be sustained if income was property within the meaning of the Constitution.* . . .

In the absence of any authority on the subject, this court

\(^{17}\) 30 Del. (7 Boyce) 416, 108 Atl. 43 (1919).

\(^{18}\) *Id.* at 421.
would unhesitatingly hold that *income is property* within the meaning of . . . our Constitution, and therefore, *subject to taxation* or exemption, shall we hold differently because the court, in a Georgia case, decided in 1850, declared that income was not property within the meaning of the taxation laws of that state then before the Court? 19

It should be observed that the Georgia case, cited by Delaware, held as it did in order to *sustain* the tax. The quotation illustrates without elaboration the distinctly different problems faced by the Massachusetts and Delaware courts in characterizing an income tax. In one case, the tax was challenged as a property tax in order to invalidate it. In the other, the tax was challenged as a nonproperty tax in order to invalidate it. For purposes of uniformity in taxation, as the Delaware study indicated, 20 the nature of a tax is apparently of no importance in that state since all taxes are limited by the same liberal uniformity limitation which, significantly, has been equated to the equal protection clause of the Federal fourteenth amendment.

Therefore, it will be necessary to deal quite cautiously with any state opinions which have characterized income taxes as property taxes when such characterization was necessary in order to establish the validity of the tax. The Delaware opinion showed considerable hostility to the view that income was not property, and that an income tax was not a property tax, *if* such characterization would *deny* the legislature the power to impose the tax. That is, the view of the court was, "Income is property . . . and *therefore* subject to taxation." Unquestionably the characterization by the Delaware court reflects an acute awareness of the result to be thereby achieved. Had the Massachusetts court faced a situation identical to that faced by the Delaware court, would

19 *Id.* at 420, 421. Emphasis added.
20 *Supra*, p. 360.
it have hastened to agree with the contention that the tax on income was not a tax on property?

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Decisions by two southern states followed sharply on the heels of the Missouri decision and furnished support for each side of the controversy. In 1920, the Alabama court showed its preference for the strict position and ruled in *Eliasberg Bros. Mercantile Co. v. Grimes*\(^{21}\) that a tax upon income was a property tax. Consequently, the court held that the tax in question violated the property tax maximum rate limitation in the Alabama Constitution. The uniformity limitation was not involved. Nevertheless, the property tax maximum rate and uniformity limitations are closely related in principle and the Alabama court apparently realized the consequence of its ruling in relation to the established interpretation that the uniformity limitation required absolute uniformity in the property tax rate.\(^{22}\) The rationale of the Alabama court was not precisely that of the Massachusetts court. Rather the Alabama court relied on the theory that income was embraced within the meaning of the word "property" as used in the constitution, and, consequently, any tax upon income was a tax upon property. The majority opinion concluded:

If they [the constitution makers] regarded money as property—and it is inconceivable that they could have regarded it otherwise—they must have entertained a general purpose to protect it from excessive or unequal taxation, by whatever name it might be called, and by whatever scheme it might be taxed. Money, when received as income, is visible, tangible, concrete, and that, in its last analysis, is what is taxed. It is of no consequence that items of money are added to-

\(^{21}\) 204 Ala. 492, 86 So. 56 (1920).
\(^{22}\) See the Alabama study, *supra*, p. 103.
gether, and the sum, reduced by the cost of its acquisition, is designated as income. That indicates merely the mode and extent of its taxation. Nor is it of any consequence that the money thus taxed has left the hands of its quondam owner, however speedily; for the state has the inherent power to tax property owned at any time during the tax year, though it has not always seen fit to do so. 23

A large part of the opinion was devoted to an evaluation of prior Alabama decisions, and the majority did not, therefore, consider it necessary to dwell at length on any developments in other states. However, support for its conclusion was found by the court not only in the Pollock case, but as well in the Ludlow-Saylor dissenting opinion in Missouri, and the Pinder decision in Delaware. Again, one may venture the conclusion that the opinion, read as a whole, exhibits a hostility to the idea of an income tax as a revenue producer.

The response to the Eliasberg decision was similar to the response to the earlier Massachusetts advisory opinion. In 1933, the Alabama Constitution was amended so as to avoid the Eliasberg rationale. The amendment expressly provides for a graduated income tax. But contrary to the Massachusetts experience, the Alabama court in a decision subsequent to the amendment, while disclaiming any intent to "discredit" the Eliasberg opinion, in fact tends to question the validity of the reasoning therein. 24 However, because of the 1933 amendment it was not necessary to overrule the Eliasberg case. The later decision is significant in evaluating the

23 Supra note 21, at 498.
24 State v. Weil, 232 Ala. 578, 168 So. 679 (1936). See especially p. 582, referring to the Alabama decisions prior to Eliasberg which the court asserted did not support the Eliasberg rationale, and noting that subsequent to Eliasberg the Georgia court had approved the older Georgia decision there criticized. See note 46, infra. But the Weil case must be read in light of a 1950 decision, discussed in note 33 to Ch. III, §B/1, supra, p. 104.
weight to give Eliasberg as precedent for this restrictive view.

Paired against the Alabama Eliasberg opinion is the view of the Mississippi court, first expressed in 1921 in Hattiesberg Grocery v. Robertson, and reaffirmed in 1925 in State ex rel. Knox v. Gulf, M. & N.R. Co. The Mississippi Supreme Court ruled that the net income tax under attack in the Knox case was an “excise” and not a tax upon property. Consequently, the tax was not subject to the stricter uniformity limitation. In addition, in the Knox case, the court upheld the graduated rate schedule under attack as a reasonable classification. The dissenting opinion adopted the view that a tax on income derived from property is a tax on the property itself, and therefore that a tax on such income would result in an illegal “double taxation” on the income-producing property. Indicating the continued heated nature of this controversy, the dissenting opinion concluded:

Good-bye section 112 [the basic uniformity clause], this is the last of you. The framers of our Constitution by your adoption thought they were affording the taxpayers of the state some security against unjust and unequal taxation. They were mistaken. Little by little you have been whittled away by the courts until there was little left. By this stroke that small remaining vestige has been swept away. Now by giving each scheme of taxation a new name, property may be taxed times without number. It is all in the name. The state now, without let or hindrance from the Constitution may fill its insatiate tax maw to overflowing.

There was really little, if anything, new added to the controversy either by the majority or minority of the Mississippi court. At most, there is the stress by the majority that the in-

25 126 Miss. 34, 88 So. 4 (1921).
26 138 Miss. 70, 104 So. 689 (1925).
27 Id. at 115.
come tax partakes of the nature of both a property and personal tax, and is, therefore, an "excise" tax.

In less than a decade the controversy had reached this high pitch. Because of the somewhat logical approaches taken by both sides to the controversy, one wonders whether the opinions are merely reflections of the attitudes of individuals concerning the desirability of imposing an income tax.

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The opinion by the Georgia court in 1930, in the case of Featherstone v. Norman,28 is considered by this writer to be the turning point in the controversy. But even before this time there were decisions in three states which indicated that a trend was in the making. Oregon, Arkansas, and New Hampshire became aligned with those states whose decisions made the imposition of an income tax possible. However, the decision in New Hampshire must be cautiously dealt with for comparative purposes because of the unique constitutional limitation in that state.

In Standard Lumber Company v. Pierce,29 decided in 1924, the Oregon court did not find it necessary to determine the nature of a general net income tax with a graduated rate schedule in order to conclude that the tax did not violate the uniformity limitation. The reason was that an income tax could be characterized as a property tax and still not run afoul the uniformity limitation. In other words, the situation was similar to that in Delaware. Both states had Type VII uniformity clauses (taxes shall be uniform upon the same class of subjects). The Oregon court, like the Delaware court, equated the uniformity clause with the equal protection clause of the fourteenth amendment to the federal constitution. Essentially the same limitation was said to apply

29 112 Ore. 314, 228 Pac. 812 (1924).
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to *all* taxes, whatever their nature might be. Consequently, the classification features of the Oregon general net income tax, including the graduated rate feature, were held valid regardless of the nature of an income tax. Reading the *Pierce* opinion in combination with the 1931 decision, *Redfield v. Fisher*,80 one is warranted in concluding that the Oregon court has not unequivocally committed itself on the issue of the nature of a *net* income tax, and if pushed on the question might well align itself with the position found in other later state decisions, namely, that an income tax is just that, an "income tax"—*sui generis*, if a categorization is necessary.

The Arkansas court also reached a conclusion favorable to the imposition of an income tax, but not without some confusion in the process. The Arkansas legislature's first experiment was with an abortive general *gross* income tax, the validity of which was passed on in 1925 in *Sims v. Ahren*.81 A majority of three agreed that the tax was not a property tax, but that the tax as levied was discriminatory and consequently invalid under the uniformity within classes limitation applicable to nonproperty taxes. The two concurring justices did not disagree as to the nature of the tax, but would have struck it down for other constitutional reasons,

80 135 Ore. 180, 292 Pac. 813 (1931). In that case the court held that a tax of 5% upon the *gross* income from certain intangibles was in fact a property tax, and that the tax violated the federal equal protection clause because it reached only the income of intangible belonging to individuals. The classification was said to be arbitrary, the court relying for this proposition on the somewhat discredited case of *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553 (1928). On rehearing (p. 205) the court distinguished the *Pierce* case, expressly *not* overruling it and stressing that the tax under consideration was on *gross* income, not net income. In *McPherson v. Fisher*, 143 Ore. 615, 23 P. 2d 913 (1933) the court sustained the subsequent 1931 tax upon the net income from intangibles which was so drafted to overcome the objections in the Redfield case.

81 167 Ark. 557, 271 S.W. 720 (1925).
explained more fully in the Arkansas study, namely, under a theory that the legislature was limited to the imposition of property taxes and the taxation of "occupations" or "privileges" not of "common right." In any case, the legislature subsequently enacted a general net income tax, with a classified and graduated rate schedule. This tax was upheld in Stanley v. Gates, decided in 1929. All justices (now numbering seven) agreed as to the nature of the tax, saying:

Reference to the various opinions in that case [Sims v. Ahren] will show that the court recognized that there was a division in the authorities upon the subject whether an income tax was a property tax or not, and we deliberately adopted the view that it was not a property tax. If it is not a property tax, it does not make any difference what name it is called. Whether it is called an excise tax, or a tax in the nature of an excise tax, or a personal tax, is a mere matter of definition, and does not in any wise change its character. This being the case, the strict property tax uniformity limitation was not applicable, classifications were permissible, and the classifications embodied in the tax under consideration were held to be reasonable. While no rationale was ever fully developed by the court, the usual arguments were recognized, the usual precedents were cited, and the opinion concluded, "... a majority of the court holds that 'property,' as the term is used in art. 16, §5 of the Constitution [the uniformity clause, Type I], means the property itself as distinguished from the annual gain or revenue from it."

A third ruling favorable to the imposition of an income tax was made by the New Hampshire court at approximately

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32 179 Ark. 886, 19 S.W. 2d 1000 (1929).
33 Id. at 891.
34 Id. at 893-894. Also see the separate opinion by Wood, J., on rehearing, in the Sims case, supra note 31, at 586-593.
the same time as the first Oregon and Arkansas cases. However, in evaluating New Hampshire decisions concerning the nature and validity of an income tax one must always keep in mind the unique situation under the New Hampshire Constitution. To designate a tax a property tax is a *sine qua non* for its existence in New Hampshire, because in theory only property taxes are permissible in that state, the legislature having no authority to levy nonproperty or “excise” taxes. As the New Hampshire study\(^{35}\) demonstrated, taxes in New Hampshire are either taxes on “estates” or “other classes of property.” The “estates” tax conforms to the usual notion of a general ad valorem property tax. The taxes on “other classes of property” conform to what are known as nonproperty taxes in other states. However, because of this designation of the second general class of taxes the New Hampshire legislature is somewhat more restricted in its taxing power than other states. But for purposes of this comparison, it must be remembered that if an income tax is to be levied at all it must be characterized as a tax upon property, either “estates” or “other classes of property.” Understanding that, one is better able to evaluate the first New Hampshire ruling on the nature of an income tax. This was an advisory opinion\(^{36}\) given in 1915, the same year in which the first Massachusetts opinion on this issue was given. A majority of the New Hampshire court ruled that income from certain intangibles (interest or dividends from bonds, notes, interest bearing credits, and corporate stock) could be taxed at the same rate as that levied upon all other property in the taxing district.\(^{37}\) Thus such income could be taxed by the “estates” tax—a general ad valorem tax in any other state. Justice Peaslee dissented in an extended and elaborate opin-

\(^{35}\) *Supra*, p. 182.

\(^{36}\) *In re Opinion of the Justices*, 77 N.H. 611, 93 Atl. 311 (1915).

\(^{37}\) See note 46 to Ch. III, §C/2, *supra*, p. 195.
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ion, contending that the tax under consideration was in reality an income tax, an income tax was an excise tax, and, therefore, not permissible under the New Hampshire Constitution. The reason this is stressed is because Justice Peaslee's characterization of the tax is quite often cited and quoted by justices in other states who would characterize an income tax as a nonproperty tax and, consequently, not only permissible but also not subject to the stricter property tax uniformity limitation.

The care with which Justice Peaslee's opinion must be handled is well illustrated by the definitive New Hampshire ruling on the problem in 1925 in Conner v. State\textsuperscript{38} for which Justice Peaslee wrote the opinion of the court. The court upheld an intangibles income tax, but the basis for the ruling was different from that of the 1915 advisory opinion. The tax imposed a proportional rate, but a rate different from that levied under the "estates" tax. The ruling of the court was that the tax was not an "excise" tax, but a property tax upon "other classes of property" than "estates." The 1915 advisory opinion was not overruled, being distinguished as simply indicating that income could be taxed as property under the "estates" tax (that is, the general property tax). Justice Peaslee rejected his dissent in the prior case insofar as it assumed that there was no constitutional basis for the imposition of an income tax; that is, he took the position that an income tax need not necessarily be characterized as a nonproperty tax. The basis for this conclusion was that in the 1915 advisory opinion the interpretation of taxes on "other classes of property" was not given sufficient consideration. In addition, it is significant that in the 1925 decision no mention is made of the precedents found in other states pro and con the nature of an income tax for the purpose of applying the uniformity clause. It should be stressed that the New Hamp-

\textsuperscript{38} 82 N.H. 126, 130 Atl. 357 (1925).
shire opinions have at all times been concerned with the characterization of an income tax in relation to the unique constitutional situation in New Hampshire.39

Chronologically the next development was in Tennessee. The Tennessee opinions on the nature of an income tax normally would merit no more than passing reference in the context of a comparative analysis were it not for the fact that they are often cited in both judicial and other discussions of the problem. Consequently, they should be placed in their proper perspective in order to show that they have little relevance to the particular problem. As pointed out in the Tennessee study,40 the power of the legislature to impose an income tax in that state is governed by the following constitutional provision: “The legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem.” A tax upon the income from stocks and bonds was upheld in Shields v. Williams,41 with the court not finding it necessary to determine the nature of the tax in order to determine the uniformity limitation applicable. A strict rule of uniformity governs the taxation of property in Tennessee, but it was held not to be applicable to this special tax because the special constitutional provision was interpreted as withdrawing the tax from the scope of the property tax uniformity limitation—regardless of the nature of the tax. Then in Evans v. McCabe,42 decided in 1932, the court held that a general net income tax which the legislature attempted to impose was prohibited by that provision of the constitution. As the court stated:

39 See the text to notes 49 through 51, Ch. III, §C/2, supra, p. 196, for illustrations of how in New Hampshire the uniformity limitation applicable to taxes on “other classes of property” is somewhat stricter than that limiting nonproperty taxes in other states.
40 Supra, p. 91.
41 159 Tenn. 349, 19 S.W. 2d 261 (1929).
42 164 Tenn. 672, 52 S.W. 2d 159 (1932).
In *Shields v. Williams* we did not find it necessary to express our opinion as to the nature of an income tax. No such necessity arises now. The income tax clause of our constitution... destroys chapter 21 of the Acts of the Extra session of 1931 [the general net income tax], whether that Act undertakes to levy a property tax or a privilege tax.\(^{48}\)

In both opinions the court referred to the considerable conflict as to the nature of income tax for purposes of determining applicable uniformity principles, and recognized that the problem would have been crucial in Tennessee in view of the strict property tax uniformity limitation had it not been for the special constitutional provision.

The Georgia decision of 1930, *Featherstone v. Norman*,\(^ {44}\) may rightfully be termed the turning point in this controversy. No new arguments or theories were introduced; much the same approach was taken as that found in the state decisions already described. However, in a lengthy opinion, the Georgia court canvassed the field and took a vigorous stand in favor of the position that an income tax is not to be subjected to the strict property tax uniformity limitation. With this decision by the Georgia court the scales were definitely weighted in favor of the income tax. Six years later, the controversy approached a standstill, although during the intervening period the fight was no less heated. By 1937, a very definite majority of the states passing on the question had construed their constitutional uniformity limitations so that an income tax might be levied. Since that time, there has been a tendency in some states to by-pass the judicial controversy and spell out in the constitution the extent to which an income tax might be levied.

As the Georgia study\(^ {45}\) indicated, at the time of the

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\(^{48}\) *Id.* at 682.

\(^{44}\) 170 Ga. 370, 153 S.E. 58 (1930).

\(^{45}\) *Supra*, p. 364.
Featherstone opinion, Georgia had—and still has—a Type VII basic uniformity clause (taxes shall be uniform upon the same class of subjects). However, at that time there was an accompanying provision of Type I, and from this ad valorem clause the Georgia court derived a strict property tax uniformity limitation. Property was said to constitute a single class and had to be taxed ad valorem. Therefore, if any really effective income tax was to survive in Georgia, it could not be characterized a property tax. In 1929, the legislature imposed a general net income tax. In the Featherstone case, the court adopted the view that an income tax is not a tax upon property because income is not property within the meaning of the constitutional provisions relating to tax limitations—in particular, the uniformity in taxation limitation. In so deciding, the Georgia court could find support in an 1868 decision of its own, Waring v. Savannah, a decision often quoted in this respect. In the main, however, the opinion was a thorough review of other state decisions to date on the income tax—uniformity limitation problem, with the court viewing its conclusion as supported by the number and weight of “outside authorities.” The court posed no particular rationale of its own as support for its conclusion. Rather, the conclusion was based upon an approval of the rationale running through those past cases ruling that, for purposes of uniformity, an income tax is not to be considered a property tax.

46 60 Ga. 93 (1878). The discussion of this case in the Georgia study should be reviewed at this point. See the text to notes 15 through 22, Ch. III, §G/3, supra, p. 369. Also, see the discussion in the Featherstone case, supra note 44, at 380.

47 Supra note 44, at 384. A quotation, at p. 383 from the New Hampshire advising opinion of 1915, supra note 36, is a good example of how that opinion may be misused because of a failure to appreciate the unique constitutional situation in New Hampshire.
Between 1930 and 1936, seven state courts passed upon the issue, and four other state decisions might be mentioned in passing. The Georgia decision, plus the decisions in Idaho, Illinois, Montana, Washington, Minnesota, Pennsylvania and North Dakota represent the most important phase of the controversy. There was considerable pressure for the imposition of income taxes to supplement the traditional tax structures in order to meet the growing revenue needs of state governments. Criticism was mounting against the alleged defects of the general property tax as the bedrock of state tax structures. Could net income taxes and sales taxes be introduced to shore up the weakening tax structures? The sales taxes ran into no serious state constitutional objections, and the battles pro and con were confined to the legislative fora where the fiscal wisdom or unwisdom of sales taxes could be avowedly argued. However, the net income tax not only had to overcome that obstacle, but also the state constitutional obstacle in the form of uniformity limitations. Ostensibly in the judicial fora after enactment of a tax law, there is no longer any concern about the wisdom of the tax, the question being reduced to one of legitimacy. Was the uniformity limitation an insurmountable obstacle to any effective revenue producing income tax—for example, one reaching unearned as well as earned income, and having a classified rate structure, including graduated rates? The answer depended on whether the tax was to be limited by the stricter property tax uniformity limitation. Therefore, under the analysis used by the courts, it was necessary to determine the nature of an income tax. This, then, was the only issue before the judicial fora, the fitting of the income tax into the property-nonproperty tax dichotomy. However, as might be expected, in determining this issue the judicial opinions reflected the partisan policy arguments, and at times those opinions were not exactly models of judicial restraint.
When there was a divided opinion, the heat engendered could hardly stem from division on so conceptual an issue as the nature of an income tax. Among those seven states, the courts of Illinois, Washington, and Pennsylvania fought the losing battle for a restrictive interpretation which rather effectively prevented any net income tax without constitutional amendment. However, the courts of Idaho, Montana, Minnesota, and North Dakota joined the Georgia court in accepting the view that the income tax was not a property tax, whatever else one might wish to call it.

Chronologically Idaho and Illinois led the way with decisions in 1932. On March 11 of that year, a unanimous Idaho court decided *Diefendorf v. Gallet.* The opinion is certainly one of the outstanding state opinions on the controversy at hand. Furthermore, it is quite interesting to compare the attitude of the Idaho court on this question with its attitude in determining the degree of uniformity required of property tax effective rates. As indicated in the Idaho study, the Idaho Constitution contains not only a Type VII basic uniformity clause (taxes shall be uniform upon the same class of subjects), but a provision similar to Type II, a proportionality clause. The Idaho court has found no possible conflict between the two, but simply refers to them as “uniformity clauses” limiting property taxes only, and requiring an absolute uniformity in rate as well as ad valorem method of property taxes. A separate provision is the source of a requirement of universality. Thus, property taxes are governed by the strictest uniformity requirement in Idaho. A more thorough analysis, in the Idaho study, suggested that this approach by the court demonstrated one of the most strict attitudes among those thirteen states having Type VII basic uniformity clauses, and one which ruled out a classified

48 51 Idaho 619, 10 P. 2d 311 (1932).
49 *Supra,* p. 378.
property tax although this construction was not the only reasonable one. Nevertheless, when faced with the question of determining the validity of a general net income tax, modeled after the federal income tax of that date, the court unanimously agreed that the tax was a nonproperty tax, and consequently not subject to the strict property tax uniformity limitation which would have invalidated the tax because of its features, such as a progressive graduated rate. The court made an extensive review of the authorities to date from other states, and concluded that the weight of authority—with which it agreed—was that an income tax was not a tax on property, but an “excise” tax. The term was used in the sense the term “nonproperty” tax is used in this monograph, the court saying:

It is difficult to arrive at any all-inclusive definition of the term excise tax, since it has long been changed from its original connotation of an impost upon a privilege. In its modern sense an excise tax is any tax which does not fall within the classification of a poll tax or a property tax, and embraces every form of burden not laid directly upon persons or property.  

As seems to be the case with most of the income tax—uniformity limitation opinions those other state decisions in line with the court’s conclusion were most prominent and the basis for the conclusion that the weight of authority agreed with the court’s ruling. The court simply failed to stress the Delaware and New Hampshire opinions to the contrary, although, as indicated above, they might well have been distinguished. In any case, the court relied on the Ludlow-Saylor opinion by the Missouri court as “representing a sound and clear summary” of the view which the Idaho court adopted. Moreover, the Idaho court found the income tax best char-

\[\text{Supra note 48, at 633.}\]
characterized as a tax upon the right or ability to produce, create, receive, and enjoy, and not on specific property.\textsuperscript{51}

Some months after the Idaho decision, the Illinois court decided \textit{Bachrach v. Nelson}.\textsuperscript{52} The basic uniformity clause in the Illinois Constitution is Type II, and the Illinois study\textsuperscript{53} pointed out that there is the strictest degree of uniformity required of property taxes in Illinois. In the \textit{Bachrach} case, the court was faced with determining the validity of the personal net income tax act which had a graduated rate and certain exemptions and was passed by the legislature of Illinois in a special session during February, 1932. The court held that the tax was a property tax, and, obviously, a violation of the property tax uniformity limitation. The rationale of the court was that income was property within the meaning of the constitutional limitation, the tax was upon income, and, therefore, upon property. In addition, the court agreed with the Massachusetts position that a tax upon income from property would be upon the property from which the income was derived.\textsuperscript{54} The opinion by the Illinois court was quite dogmatic, asserting, for example, that "The over-

\textsuperscript{51} Id. at 634. The court used two arguments, either of which was sufficient to support the result. The second argument was based on Art. VII, §3 of the constitution, which provided that "The words 'property' as herein used shall be defined and classified by law." The act levying the tax purported to "define" income, and so defined it that it was not property within the meaning of the constitutional tax article. The court concluded that this classification of income as not being property was a proper exercise of legislative discretion under Art. VII, §3.

\textsuperscript{52} 349 Ill. 579, 182 N.E. 909 (1932).

\textsuperscript{53} Supra, p. 125.

\textsuperscript{54} Supra note 52, at 595. Also see Ohio Oil Co. v. Wright, 386 Ill. 206, 53 N.E. 2d 966 (1944), discussed in the text to footnotes 22 to 31, Ch. III, §B/3, supra, p. 124. An earlier case, Young v. Ill. Athletic Club, 310 Ill. 75, 141 N.E. 369 (1923) is distinguished in footnote 22 to Ch. III, §B/3, supra, p. 123. See pp. 584 to 591 in the Bachrach case for the tenuous "historical" argument of the court, from which it was concluded that the purpose of the framers of the present Illinois Constitution had been
COMPARATIVE ANALYSIS

whelming weight of judicial authority holds that [income] is [property].”\textsuperscript{55} For this proposition, the court cited the Alabama \textit{Eliasberg} case, as well as other Alabama decisions, certain Massachusetts opinions, certain United States Supreme Court opinions, and the Missouri \textit{Ludlow} case and the Delaware \textit{Pinder} case. These cases were cited as defining:

What is personal property and in substance hold that money or any other thing of value acquired as gain or profit from capital or labor is property, and that, 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.\textsuperscript{56}

This statement is hardly accurate as to the \textit{Ludlow} opinion, which held that income was not property within the sense used by the constitutional uniformity limitation. In addition, this writer has already suggested that the \textit{Pinder} case should be cited with considerable caution in this field. Apart from that, the court cited the Alabama, Massachusetts, and Delaware opinions, along with the \textit{Pollock} case, as basis for its “overwhelming weight” of judicial authority. Missouri cases constitute authority to the contrary, as do the Mississippi, Oregon, Arkansas, Georgia, and Idaho opinions. The court in a later paragraph does refer to those states as having statutes providing for income taxes, along with the states of New York, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Utah, and others. No judicial authority is referred to, these states being dismissed by citing Wisconsin and New York as states in which either an income tax

to limit the legislature to the same sources of revenue to which it had been limited by the prior constitution of 1848. Considerable comfort was derived from the fact that there was no express authorization for an income tax included in the present 1870 constitution.

\textsuperscript{55} \textit{Id.} at 591.

\textsuperscript{56} \textit{Id.} at 592.
was expressly sanctioned by the constitution or no constitutional uniformity limitations existed.\(^57\) The point is, the Illinois court had no basis for its evaluation of the precedent in other states—if weight of number is to be so important. But this assertion by the Illinois court is typical of the approach used by a good many of the opinions on this particular problem.

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Within nine months of the Illinois decision, the Montana court in 1933 decided *O'Connell v. State Board of Equalization*.\(^58\) The Montana legislature had enacted a graduated personal net income tax law, copied from the Idaho law. Contemporaneously, a constitutional amendment was proposed which would have expressly authorized the imposition of such a tax. The court, however, in the *O'Connell* case determined the validity of the tax before the amendment became effective. In a 3-2 decision, the majority concluded that the income tax was not a tax on property, and, therefore, not subject to any of the property tax uniformity requirements which might be stricter than the uniformity required of nonproperty taxes.\(^59\) Consequently, both the exemptions and the graduated rate schedule were held reasonable classifications, neither of which could stand in a property tax. The majority relied a great deal upon the Idaho act and the interpretation placed thereon by the Idaho court in the *Diefendorf* case. The decision of the majority was that the tax was "in the nature of an excise,"\(^60\) although the precise nature of the tax was not elaborated upon. It was sufficient that the tax was not a property tax. Recognizing the controversy the court said:

\(^{57}\) *Id.* at 594-595.

\(^{58}\) 95 Mont. 91, 25 P. 2d 114 (1933).

\(^{59}\) See the Montana study, *supra*, p. 431.

\(^{60}\) *Supra* note 58, at 120.
... we do not feel disposed, nor do we think it necessary, to enter into a lengthy discussion as to the character of the tax imposed by the chapter here under consideration. ... We content ourselves with saying that there are reasons why such a tax might be classed as a property tax, and reasons why it should be classed as an excise tax. Volumes, in fact libraries, have been written in a vain endeavor to accurately classify the income tax. Courts and text-writers have endeavored to argue the world into the belief that the income tax is a property tax. ... Other courts are just as emphatic in the claim that it is an excise tax. ...

... It is not necessary for us to declare the exact nature of the income tax under consideration. It is apparent that the legislature of the state of Montana intended to enact an income tax and did not intend that it should be considered as a property tax law. ... Perhaps in the end, the majority could be said to have looked quite favorably on the view that an income tax is *sui generis*, the idea presented in a well-known law review article quoted by the court. If the majority did not seek to find the definitive answer in view of the clashing opinions by courts of last resort in other states, but found in this clashing opinion itself the basis for upholding the tax, this was grounded upon the premises the majority began with, that the court was to indulge in every possible presumption in favor of the constitutionality of a legislative act. The court was sitting to determine "not whether it [was] possible to condemn but whether it [was] possible to uphold the Act." No doubt the clashing opinion furnished a reasonable doubt to be resolved in favor of the validity of the act.

61 *Id.* at 112-113.
63 *Id.* at 107.
64 Cf. the dissenting opinion by Blake, J., *infra* note 82, in the Washington Culliton case.
UNIFORMITY AND EQUALITY

To dissenting Chief Justice Callaway, there was no *reasonable* doubt. In a vitriolic dissenting opinion, he asserted that an income tax is a property tax, and consequently had to fall under the Montana property tax uniformity limitation. In reaching his conclusion Justice Callaway, too, was guided by certain premises.

We should observe at the outset . . . that the settled determination of the people in framing and adopting the Constitution to restrict the legislature in matters of taxation is an outstanding feature of that fundamental law. The historic tendency of governments constantly to exact more money from the taxpayer pursuant to popular desire in furthering public activities was in the mind of the framers; they knew that the history of the human race tells with startling repetition the story of ships of state going to destruction upon the rocks of high taxation.65

First, he considered the idea that income was not property within the contemplation of constitutional provisions. This, he said, seems to have had its origin in the *Waring* case decided by the Georgia court, and the idea there expressed (and so often quoted) that income is "the fruit" and property, labor and capital "the tree," and that "the fruit" is no "tree" so long as it is "plucked to eat, and consumed in the eating."

Upon this and *similar fallacious* reasoning a number of respectable courts have declared that income is not property. It would be useless to discuss these authorities. . . . *Their sophistry* is adequately *exposed* by the eminent Justice Somerville speaking for the Supreme Court of Alabama, in *Eliasberg Bros. Merc. Co. v. Grimes*. . . . 66

Other arguments were reviewed,67 but Justice Callaway's

65 *Supra* note 58, at 122-123.
66 *Id.* at 123-124. Emphasis added.
67 Note particularly his discussion of the "privilege" tax argument, at pp. 127-128.
patience seemed to wear thin and he concluded, "But the idea that an income tax is an excise under our Constitution is a fantasy."\textsuperscript{68} Justice Callaway closed with this admonition:

Admitting that income taxes are desirable, that, as different writers say, the income tax system is a long step in advance, which in the interest of good government should be taken, and that it is the only practical system to reach intangibles which to a large extent are and have been escaping taxation, and is generally conceded by economists and tax experts to be the most equitable and just of all kinds of taxes, the question to be decided by us is whether that system is permissible under the Constitution, or whether it will be necessary to amend it in order that the system may be employed. My answer is: The Constitution must be amended to warrant a valid income tax law.\textsuperscript{69}

It is interesting to note how the Montana court's approach to the income tax problem is of the same spirit as its approach to the problem of a classified property tax. As pointed out in the Montana study, the Montana Constitution contains both a Type VII and Type VI clause, the latter being generally interpreted as requiring strict uniformity in property taxes. When faced with determining the validity of a classified general property tax the Montana court in 1919 had reconciled the two conflicting clauses so as to permit classification for rates, though no exemptions could be made and the ad valorem method was required. In other words, whether it be a classified property tax or an income tax, the majority of the Montana court would start with the premise that it was sitting to determine "not whether it was possible to condemn but whether it was possible to uphold" legislative enactments. Where reasonably possible, legislative discretion is given the benefit of the doubt.

\textsuperscript{68} \textit{Id.} at 128.
\textsuperscript{69} \textit{Id.} at 131.
In the same year of the Montana decision, but nearly two months later, the Washington court entered the arena to reveal a bitter internal split on this highly controversial problem. As related in the Washington study, a graduated general net income tax was passed in 1932 in Washington as an initiative measure. The act stated its purpose to be the taxation of "all annual incomes within the state as such, and not as property." This was to no avail. The act was challenged immediately and a majority of the court on September 8, 1933, in Culliton v. Chase, held it unconstitutional. The decision was 5-4. The majority's rationale was: the act imposed a tax directly on income (notwithstanding the legislative recital to the contrary), income is property, therefore the tax was a property tax. Being a property tax, the act was subject to the uniformity limitation applicable to property taxes. In 1930, the Washington Constitution was amended to change the basic uniformity clause to Type VIII (taxes shall be uniform upon the same class of property). Before that time, property taxes were subject to the strictest uniformity limitation. All five of the majority were agreed that the graduated rate feature was not such a classification as was provided for under the new and, to a limited extent, more liberal property tax uniformity limitation. Indeed, two of the majority indicated that income would be a minimum class. Consequently, even in a state having modified its strict property tax uniformity requirement, the characterization of the income tax as a property tax was fatal—at least, insofar as a graduated income tax was desired.

The rationale of the majority depended, first, upon the definition of property found in the Washington Constitution in the same provision containing the uniformity clause: "The word 'property' as used herein shall mean and include..."
everything, whether tangible or intangible, subject to ownership.” Income was said to be “something,” and surely “subject to ownership,” while “everything” includes “something,” therefore it followed that income was property. Because of this “peculiarly forceful constitutional definition”—as characterized by the principal opinion—the majority could assert that none of the decisions from other states had any bearing on the problem before the Washington court. However, as an aside, without reference to such judicial authority, it could also be asserted that “The overwhelming weight of judicial authority is that ‘income’ is property and a tax upon income is a tax upon property.” An almost identical statement in the Illinois case has already been considered. Second, the majority could assert that in a 1930 opinion, *Aberdeen Savings & Loan Assn. v. Chase,* it had “definitely decided . . . that an income tax is a property tax, which should set the question at rest . . . .” The significance of that case is more closely examined in the Washington study, and that analysis could be referred to at this point with profit.

The tone of the principal and concurring opinions of the

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72 Cf. the analysis of the majority rationale in the concurring opinion by Steinert, J., at p. 384. See the principal opinion at p. 374.

73 Id. at 374.

74 However, the court did have to distinguish the Idaho Diefendorf case, *supra* note 48, and the Montana O’Connell case, *supra* note 58. The basis upon which the majority could distinguish the Idaho case was the second reason used in that opinion, *supra* note 51, which was based on the provision in the Montana constitution defining property. The majority asserted that the Montana majority had been unduly swayed by the Idaho decision. *Id.* at 376-377. However, it should be pointed out that the majority in the Idaho Diefendorf decision did not rely on the special constitutional provision referred to for its nonproperty tax argument.

75 Id. at 374.

76 157 Wash. 351, 289 Pac. 536 (1930).

77 *Supra* note 71, at 376.

78 See the text to notes 28-34 in Ch. III, §H/7, *supra,* p. 581.
majority hint at a bitter dispute lying close to the surface but not yet spilling over into the printed opinion. This is reflected in the rather defensive tone of the dissenting opinion. This feeling about the several opinions in the Culliton case is confirmed by the 1936 Jensen case in which acrimonious debate was not kept in the conference room.

In the eyes of the four dissenting justices the tax was a nonproperty tax, with its object the enjoyment of privileges made possible by the protection of the organized state. Furthermore, the dissent felt that even if the tax were characterized as a property tax it was not unconstitutional because the uniformity clause for property taxes required only a uniformity within classes. The dissenting opinion preceded its discussion of the meaning of the constitutional provision with a review of “not only its historical background, but the social and economic condition of the state when” the original, and superseded, uniformity clause was written into the constitution in 1889. It is interesting to set forth this discussion at some length, as it illustrates the justification used by those who would liberally interpret the uniformity limitations as opposed to the justification typical of those opposing the income tax. Judge Blake wrote:

In 1889, the major portion of the wealth of the state lay in its lands and their produce—agricultural, mineral and timber. Taxation was a fairly simple process. Its subjects were tangible, visible—easy to evaluate. The functions of government were also fairly simple. Relatively speaking, in those days the value of tangible property was great and the cost of government little. The burden of taxation was nothing compared to the benefits the owner of real property received as the result of his comparatively small contribution to the organized state, which protected him in his ownership and use of property.

But even then, the economic complexion of the country

79 Supra note 71, at 385.
was changing. More and more of the country's wealth was going into intangibles—into stocks, bonds, securities of various sorts—indicia of property which could easily elude the search of the tax collector. In the light of subsequent history, even then it should have been obvious that the powers of taxation must be elastic.

This . . . was a new state, whose vast resources of wealth that lay in and on the land seemed inexhaustible. After the depression of the middle nineties, a tide of immigration started, which continued until toward the end of the first decade of this century. As a result of this influx of people, and the still popular belief that wealth lay in the land, values of real property increased amazingly and kept relatively well ahead of increasing taxes. But in the latter part of that decade the tide of immigration began to ebb rapidly, and real property value receded with equal celerity.

In the meantime, due to a growing complexity in organic society, the state had been called upon to take over an ever-increasing burden of functions, and the cost of government had relatively increased. As long as property values were increasing, the additional tax burden went unnoticed. But when property values collapsed, the problem of taxation began to be acute—and for twenty odd years it has been increasing. The cry for reduction of taxes has become ever louder in the face of increasing cost of government.

The burden of taxation on real estate became more onerous during the second and third decades of this century by reason of several facts, among which were the following: . . . (2) as the burden of taxes on real property increased, capital sought investment in bonds, stocks and other securities, and escaped taxation entirely, or carried, at most, only a small portion of the burden.

A growing agitation for decrease in taxes developed. But the relief was not available, because the state found itself in a strait-jacket in the shape of article VII of the constitution [the original uniformity clause, Type VI, a uniform and equal rate of assessment and taxation], with the judicial interpretation that had been placed upon it. . . .
As a result of these years of agitation and investigation of the subject, there was submitted to the people and adopted by them at the general election of 1930 [an amendment which substituted the present uniformity provision].

That provision contained a Type VIII clause (taxes shall be uniform upon the same class of property). Having made this review, Judge Blake observed,

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 straitjacket in which it was bound. To do so requires a literal, technical construction of a few words of the amendment, in perversion of their true and obvious intent and purpose and in total disregard of its historical background and the conditions which brought it into being.

Of course, the attitudes of the majority and minority in this case are excellent illustrations of the techniques of interpretation of written law. Shall we do as the majority, look at the words of the instrument and thereby determine the "plain meaning" of the words, or shall we, with the dissenting justices, look to historical scene to determine the "true" meaning of the words? What was the intention of those who drafted and those who approved the words of the new uniformity provision? Choose your technique of interpretation, and the opposing conclusions may reasonably follow. Perhaps it is superfluous to say that what seemed a wise result might have influenced the choice of interpretive technique used to justify the conclusion drawn. In any case, the dissenting opinion, in light of these interpretive considerations, reasoned to its above conclusion. Recognizing that other decisions were not binding, the dissent nevertheless

80 Id. at 385, 386-387.
81 Id. at 388.
noted that if one is to follow the principle that legislation is presumptively valid, then "[t]he disagreement of courts and judges on identical problems seems to afford the highest proof that 'reasonable doubt' does exist." Consequently, such reasonable doubt should be resolved in favor of the legislation.

In order best to evaluate the *Culliton* decision one must consider *State ex rel. Stiner v. Yelle*, an opinion handed down on the same day of the *Culliton* opinion. In the *Yelle* case a majority of five (the minority of *Culliton* plus one) upheld a Business and Occupation Tax first imposed in 1933. That Act, described in more detail in the Washington study, purported to levy upon "every person an annual tax or excise for the privilege of engaging in business activities." The base of the tax was gross income from the business engaged in, with a different proportional rate applicable to different classes of business, as classified in the Act. Because of a veto the tax did not reach either those engaged in agriculture or professionals. The majority of five, in the *Yelle* case, agreed that the tax was *not* a property tax, distinguishing it from a net income tax as follows:

The act does not concern itself with income which has been acquired, but only with the privilege of acquiring, and that the amount of the tax is measured by the amount of the income in no way affects the purpose of the act or the principle involved.

If one recognizes this argument as having a familiar ring, remember it is by the "dissent-plus-one" of the *Culliton* case. If one wonders how the "plus-one" (Judge Holcomb) could be convinced by such finely drawn distinctions, con-

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82 *Id.* at 396.
84 *Id.* at 407.
sider this statement by the writer of the majority opinion, concurred in by Judge Holcomb:

... it seems necessary first to determine whether the tax under consideration is a property tax or an excise tax, because of the uniformity clause. ... 

Time and space will not permit a review of the authorities on this question. Slight differences in the terms of the acts considered, or in constitutional provisions, have led to a maze of conflicting and bewildering decisions. It may be that we have, in some prior case, used language not wholly consistent with our present views. After an exhaustive study of the cases, we are all well satisfied that this is not a property tax, even under the broad and all inclusive terms of our constitution. To hold otherwise would render it exceedingly difficult if not impossible to sustain any excise tax. 85

The juxtaposition of these two cases in the jurisprudence of a single court, indeed in the same volume of reports, decided on the same day and found on adjoining pages of the reports, should serve as well as any example to illustrate the almost hopeless task of arranging the precedent on this general problem with any reasonable degree of symmetry. Two of the four dissenting justices in the Yelle case agreed that the tax was not a property tax, but disagreed with the conclusion of the majority that the exclusion of farmers and professionals was not arbitrary. Two dissenters adamantly clung to their view that this tax, as well as a net income tax, was a tax upon property within the scope of the uniformity limitation.

But this was not the last word in Washington. As described in the Washington study, the legislature tried again in 1935, enacting a personal net income tax and a companion

85 Id. at 405-406. Emphasis added.
corporate net income tax. Apparently finding some faint hope in the Yelle case, the legislature framed the acts in terms of "privileges," providing that the personal net income tax was to be paid by every resident of the state "for the privilege of receiving income therein while enjoying the protection of its laws." The Culliton majority was not to be so easily persuaded. In Jensen v. Henneford, decided in 1936, the personal net income tax was held to be unconstitutional. Again there was a 5-4 decision, with majority and minority being composed of the same judges composing the majority and minority in the Culliton case. The majority ruled that the tax was a property tax, regardless of the statutory recitation to the contrary.

The 1935 act purports to levy a tax upon "the privilege of receiving income." But an examination of the various provisions of the act shows clearly that the legislature was concerned with the property (income) upon which the amount of the tax was to be levied, not with the mere privilege of the individual to receive the income. When a tax is, in truth, levied for the exercise of a substantive privilege granted or permitted by the state, the tax may be considered as a excise tax and sustained as such. Illustrations of such taxes are found in the cases of State ex rel. Stiner v. Yelle (for the privilege of engaging in business activities). . . .

But the mere right to own and hold property cannot be made the subject of an excise tax, because to tax by reason of ownership of property is to tax the property itself. . . .

The right to receive property (income in this instance) is but a necessary element of ownership, and, without such right to receive, the ownership is but an empty thing and of no value whatever. . . . The right to receive, the reception, and the right to hold, are progressive incidents of ownership and indispensable thereto. To tax any one of these

86 185 Wash. 209, 53 P. 2d 607 (1936).
elements is to tax their sum total, namely, ownership, and, therefore, the property (income) itself. . . .

Having disposed of the first issue with this specious but common reasoning, the majority then ruled that the tax violated the property tax uniformity limitation on several counts. It is sufficient to note that the majority viewed the power of the legislature to classify income (as property) as a very limited one, even though, ostensibly, property taxes need only be uniform within classes in Washington.

Judge Blake wrote the Jensen dissenting opinion, as he had written the dissenting opinion in Culliton. Admitting that if Culliton stood unimpaired it would dispose of the present case, Judge Blake proposed that Culliton had for all intents and purposes been destroyed as precedent by cases decided between 1933 and 1936. His persuasive argument rested primarily on the Yelle case, in which the business and occupation tax with a base of gross income was upheld as a nonproperty tax, the object of which was the privilege of engaging in enumerated occupations. The Yelle rationale had been reaffirmed in a subsequent case. In addition, the case upholding the Washington sales tax as a nonproperty tax was cited, and, more significantly, he referred to the case which ruled that the compensating use tax was a nonproperty tax, the use tax being on the “privilege of using” tangible personal property. Judge Blake could find no significant difference between those taxes and a net income tax, insofar as their nature was concerned. Using the rationale

87 Id. at 218-219.
88 See Supply Laundry Co. v. Jenner, 178 Wash. 72, 34 P. 2d 363 (1934), and note 50 to Ch. III, §H/7, supra, p. 587.
89 Morrow v. Henneford, 182 Wash. 625, 47 P. 2d 1016 (1935), and note 3 to Ch. III, §H/7, supra, p. 574.
90 Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 P. 2d 14 (1935), and notes 3 and 7 to Ch. III, §H/7, supra, pp. 574, 575.
of the majority, he could find no basis upon which to differentiate among the enumerated taxes.

Apart from the arguments on legal issues, the *Jensen* decision is illustrative of how this general issue of the validity of a net income tax has resulted in bitter controversy. The concurring opinion of Millard, C.J., must be set forth substantially in full in order to reveal the acrimonious nature of the debate:

None of the authorities cited justifies or excuses the minority’s disregard of the doctrine of *stare decisis*. We held in [*Aberdeen case, supra*] ... and in [*Culliton case, supra*] ... that, under our constitution, income is property and that an income tax is a property tax. From that declaration, this court has never departed, and the people have not seen fit to amend the constitution to permit us to hold otherwise. It is true that some of the judges who concurred in the majority view in the first case cited dis­­sented when the second case was decided.

“In future cases, even a dissenting justice should be bound by the decision of the majority until and unless au­thoritatively overruled or reversed by some higher tri­bunal. . . .” *Culliton v. Chase*. . . .

Surely, the rule of *stare decisis*—a rule whereby uniform­ity, certainty and stability in the law are obtained—should apply. This is not a forum where personal predilection should obtain. *Political expediency has no place on this tri­bunal*. Neither threats nor promises should dissuade one from the performance of duty. To sacrifice the rule of legal stability for acquisition or retention of official position is a price no honest person can exact, a price no self-respecting person can pay. Is a legal principle more than once enunci­ated, and from which the court has never receded, to have no binding effect? 01

These are, indeed, rather harsh words.

Returning to the legal issues, the remainder of the 1935

01 *Supra* note 86, at 225. Emphasis added.
net income tax structure was killed in *Petroleum Navigation Company v. Henneford*, a case decided later in the same term in which *Jensen* was decided. The corporate net income tax was held to be a property tax, by a 6-3 majority, with the majority briefly disposing of the tax on the ground that it was a violation of the property tax uniformity limitation, again indicating the very limited extent to which income (as property) might be classified. An effort made in 1951 by the Washington legislature to revive the issue in the form of a corporate net income tax met with failure in *Powers v. Huntley* for the same reasons expressed in the *Petroleum* case. The Washington study contains a more detailed analysis of these corporate net income taxes and points to certain inconsistencies in the opinions as to permissible minimum classes of income (as property).

* * * * *

This "holding" action by the small Washington majority could not balance the steadily growing trend which favored the constitutionality of a net income tax under state uniformity and equality limitations. In the spring following the Washington *Culliton* case, the Minnesota court passed on the question. On March 23, 1934 the Minnesota court, in *Reed v. Bjornson*, upheld a general net income tax law enacted in 1933 as against the contentions that the tax violated the state uniformity limitation and the federal equal protection clause. The principal arguments were directed at the graduated schedule and exemptions.

The *Reed* decision was unanimous, something of a rarity in this controversial area. Justice Loring, writing the opinion for the court, noted as the first issue that the briefs had

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92 185 Wash. 495, 55 P. 2d 1056 (1936).
94 191 Minn. 254, 253 N.W. 102 (1934).
substantial parts devoted to a discussion of whether or not the tax involved was a property tax. The court was quite aware of the heated controversy on this question, but did not find it necessary to enter the fray. The reason for this was the interpretation placed by the court upon the Minnesota basic uniformity clause which is Type VII (taxes shall be uniform upon the same class of subjects). The court ruled that this uniformity clause limited all taxes—whether property or nonproperty. And, most importantly, the court was convinced that its uniformity clause was no more restrictive than the equal protection clause of the fourteenth amendment of the federal constitution. Consequently, regardless of the nature of the tax, the graduated rates and exemptions were not ruled out. As indicated in the Minnesota study, the court has, at least in one case, approved a form of graduated rate under an obvious property tax. If the issue concerning the nature of the tax had been forced, it seems that the court did not look unfavorably on the view that an income tax is sui generis. This is evident in the following discussion by the court:

While income as it is received is necessarily property, a tax upon it has many characteristics which differ quite radically from those of a tax levied upon real or invested personal property. Income is a more fleeting or transitory benefit which comes according to present efforts or the wisdom or luck of past accumulations. Many who own little or no tangible or intangible property have large incomes and enjoy great benefit from the protection which organized society affords. They not only have ability to pay a tax for that protection but get value received in liberal measure for what they may be required to pay. So do those who receive large incomes from property. An income tax is calculated to

95 *Supra*, p. 406. See the text discussion therein to footnotes 53 through 77 for the development concerning the Minnesota corporate franchise tax with a base of net income, and the confusion concerning its nature.
take toll from the flow of this property to the individual through the arteries of organized social life and to cause it to bear a share of the burden of government. In many ways such a tax is *sui generis*. It imposes a tax on the net income or revenue which passes into or through a man's hands within a prescribed period, a large share of which never finds permanent investment.\(^96\)

On this analysis of the nature of an income tax and the meaning of the uniformity clause the court found much comfort in the Oregon *Standard Lumber Co.* decision.

One further point of interest in the *Reed* case is the approach taken by the court. Reminiscent of Justice Blake's opinion, dissenting in the Washington *Culliton v. Chase*, the opinion in the *Reed* case noted that the present uniformity clause in the Minnesota constitution was adopted in 1906, replacing the clause theretofore governing taxation. The meaning of the new uniformity clause was to be determined from "the history of the times" which "indicates clearly that the people, in adopting the 1906 amendment, were liberating the legislature from most of the previous constitutional restraints in regard to taxation."\(^97\) The opinion then proceeded to give full play to this intention in its interpretation of the "wide open tax amendment," as the provision was designated when up for adoption.

At this point it will be interesting to return for a moment to the situation in Montana. Recall that in the summer of 1933, the Montana court decided the *O'Connell* case, in which a personal net income tax was characterized as a non-property tax and upheld, but not without the outspoken opposition of two dissenting justices. Winter did not have a cooling effect upon the rather heated differences, and less than two months after the Minnesota opinion, in the spring

\(^96\) *Supra* note 94, at 260.
\(^97\) *Id.* at 259.
of 1934, the Montana court faced the problem again in a manner reminescent of the second Washington case of 1936, discussed above. On May 12, 1934, the Montana court in Mills v. State Board of Equalization\(^9^8\) reaffirmed its general position stated in the O'Connell case. After the O'Connell case the legislature had amended the income tax law to add a surtax provision. In the Mills case, taxpayers not only attacked the validity of the surtax provision, but would have re-opened the question of the validity of the tax in the absence of the surtax provision.

As to the validity in general of an income tax, the majority opinion noted that attention had been directed to the assertion by Holcomb, J., in the Washington Culliton case, to the effect that "the overwhelming weight of judicial authority" favors the view that an income tax is a property tax. The Montana majority's response was to refer to the article\(^9^9\) written by Professor Allen in 1933 in which he discussed the court opinions to that date and concluded that, while earlier state decisions were about equally divided, by 1933 opinions rendered were "preponderantly" in favor of the view that an income tax is a nonproperty tax. The Montana majority concurred in this, saying:

> Through the course of his article Professor Allen refers to the decisions pro and con on this question, and then demonstrates by his citations the truth of his observations. The learned jurist from our neighboring state does not fortify his conclusion by any such array of citations, and in fact our investigation of the adjudicated cases leads to the conclusion reached by Professor Allen.\(^1^0^0\)

The majority further noted that some of the briefs "severely" condemned the court for not "defining or classify-

\(^{98}\) 97 Mont. 13, 33 P. 2d 563 (1934).
\(^{99}\) Allen, \textit{supra} note 3.
\(^{100}\) \textit{Supra} note 98, at 17-18.
ing" the income tax in the *O'Connell* case. The majority properly responded, "We did, however, decide that the income tax is not a property tax."¹⁰¹ That is, the crucial issue is not so much what an income tax "is," as what it "is not." If the tax is not a property tax, it makes little difference how it is defined. In other words, we reach the dichotomy used throughout this monograph—property taxes and nonproperty taxes, with the latter category simply all taxes not falling in the first class. Thus, the majority did not retreat from its position in the *O'Connell* case.¹⁰²

Mr. Chief Justice Callaway was still not convinced—nor did any concept of *stare decisis* suppress his contempt for the majority rationale. In his opinion, *O'Connell* should be overruled. One reason given was:

... the majority [in *O'Connell*] declared an excise tax to be an income tax, contrary to our Constitution and the great weight of authority.

... [here the opinion by Holcomb, J., in the Washington *Culliton* case is referred to, and his assertion as to the weight of authority]. ... 

That there is ample authority for the statement is seen by referring to the authorities cited in my opinion in the *O'Connell* case. In view of the "conclusion" of Professor Allen, referred to in the majority opinion, it may not be amiss to call attention to the fact that the "weight of authority" does not depend upon the number of opinions upon one side or another of a debated question. It rests upon the sounder opinions, those which are supported by reason, experience and wisdom. Upon this foundation there cannot be any doubt that the great weight of authority sustains the assertion that income is property; ... ¹⁰³

¹⁰¹ *Id.* at 18.

¹⁰² However, the surtax provision was held invalid because of poor drafting which resulted in an unintentional arbitrary discrimination. See note 8 to Ch. III, §G/8, *supra*, p. 431.

¹⁰³ *Supra* note 98, at 34. Emphasis added.
All would agree that a "box-score" jurisprudence is not desirable. Sheer weight of numbers need not necessarily be persuasive. However, the "weight of authority" is usually distinguished when not followed as being contrary to the "sounder" premises. But this is hardly the place to become embroiled in controversy over that concept.\footnote{104} For, however that may be, Mr. Chief Justice Callaway's Procrustean definition is really most persuasive of one thing: Justice Callaway was convinced he was "right," and that should be the end of the matter. Further evidence of the basic "error" of the \textit{O'Connell} decision was, in Justice Callaway's view, as follows:

The result of the decision in the \textit{O'Connell} case was foreseen; in my dissenting opinion it was predicted that the operation of [the income tax law] would \textit{increase taxes} during the present biennium. It has. It was also pointed out that "if the legislature has the right, under the Constitution, as it now exists, to levy an income tax, it may employ that tax to raise large sums of money \textit{in addition to} the \textit{ad valorem} tax as provided by the Constitution."

The Extraordinary Session . . . attempted through the surtax device to \textit{increase the income taxes of individuals}. . . . And it is to be noted that the legislature, unless restricted by the Constitution, \textit{may do so again and go still further}, by employing the pen of a more skilled draughtsman, and \textit{thus the tax burden, now oppressive, will become unbearable}, entailing ills upon the people beyond their suffering . . . .

The constitutional barriers so carefully erected by the people in their Constitution have been broken down by the \textit{O'Connell} case. I call attention again to the desirability of \textit{enacting the pending constitutional amendment} which provides that the legislative assembly may levy "and collect taxes upon incomes and persons, firms and corporations for the purpose of \textit{replacing} property taxes."\footnote{105}

\footnote{104} Cf. note 167, infra.
\footnote{105} \textit{Supra} note 98, at 34-35. Emphasis added.
One may well wonder how that passage got into an opinion concerning the constitutionality of an income tax, that question ostensibly depending upon the nature of the tax and the applicable uniformity limitation. The majority opinion did attempt to answer this type of objection, and while having no bearing on the constitutional issue, that answer may be quoted to catch the full flavor of this judicial battle.

Again our attention is invited to the impending disaster which will overtake the citizens of this state, by holding that the legislature in the enactment of future income tax laws is in nowise limited by the provisions of our Constitution. . . . The states of New York, Iowa, Connecticut, Vermont and Rhode Island have practically no constitutional limitations whatever upon the exercise of the taxing power by their legislatures. It cannot be said that these states have not prospered during their existence to any less degree than have the neighboring states of similar areas and resources. The lack of constitutional restriction upon the taxing power has not operated to drive wealth beyond their borders. The state of New York, without such constitutional restriction, is first in wealth and population, and, indeed, within its confines is the city said to be the financial center of the business world.106

However persuasive these various arguments may be as to the wisdom, or lack of wisdom in imposing income taxes, they offer little aid in reaching some conclusion as to the proper interpretation of the pertinent constitutional limitations. Finally, it is interesting to surmise whether Justice Millard of the Washington court would have invoked the spectre of stare decisis to condemn so thoroughly the dissent of Justice Callaway in the Mills case, as he did to condemn the continued dissent of Washington justices in the Jensen case. Was the continuing dissent of Justice Callaway a “personal predilection?”

106 Id. at 18.
Over a year went by after the Minnesota and second Montana decisions before another state court considered the problem. In the fall of 1935, the Pennsylvania Supreme Court decided *Kelley v. Kalodner*\textsuperscript{107} in which it held unconstitutional a personal net income tax law enacted in the summer of 1935. The law imposed a graduated rate, contained certain minimum exemptions, and reached the entire income from all sources, earned and unearned. Thus, income derived from property—tangible or intangible—was reached. The court accepted as its first inquiry the determination of the nature of an income tax. Pointing out that there were no Pennsylvania cases determinative of the issue, the court noted that the numerous decisions on the point in other jurisdictions showed a clear-cut division of authority, referring to the Idaho, Missouri, and Arkansas decisions as holding the tax to be a nonproperty tax and Massachusetts, Delaware, Illinois, and Washington decisions to the contrary. The United States *Pollock* decision was, quite properly, distinguished as shedding no light on the particular problem at hand—the validity of income taxes under state constitutional uniformity provisions. This split of authority appearing, the court concluded:

We are at liberty to determine the question along normal, natural lines. In so doing we are inevitably impelled to the conclusion that an income tax is a property tax. This result seems particularly clear in so far as a tax upon the income from real and personal property is concerned.\textsuperscript{108}

Consequently, insofar as income from property was taxed the tax was held to be a property tax. It was not necessary to go further because the tax was not severable. Thus, the court could assert:

We pass no opinion upon the question of whether a tax

\textsuperscript{107} 320 Pa. 180, 181 Atl. 598 (1935).

\textsuperscript{108} Id. at 186. Emphasis added.
upon the income from trades, occupations or professions is a tax on property, although respectable judicial opinion has indicated that it is not.\footnote{109}

That part of the act passed upon—the tax upon income derived from property—was held to violate the property uniformity limitation because of both the minimum exemptions and the graduated rate schedule. Classifications based upon quantity of the same thing were held to be unreasonable classifications.

Thus, the court in the \textit{Kelley} case never actually ruled on the nature or validity of an income tax limited to earned income. However, the Pennsylvania study—both in general and on the income tax in particular—showed that there would be little significance in holding the tax on earned income to be a nonproperty tax because the Pennsylvania court, after the \textit{Kelley} case, clearly ruled that graduated rates were not permitted for any taxes—property or nonproperty—in Pennsylvania, and that \textit{all} taxes are limited by the basic uniformity clause, which is Type VII.\footnote{110} Subsequent cases have also indicated, as demonstrated at length in the Pennsylvania study,\footnote{111} that only to a limited extent will it be possible to impose a tax on unearned income in Pennsylvania under the existing constitutional uniformity limitation as it has been interpreted. Thus, however indecisive was the \textit{Kelley} case, Pennsylvania decisions have definitely been adverse to the imposition of income taxes.

The spring following the Pennsylvania decision saw the controversy come substantially to a standstill—that is, insofar as judicial development was concerned. On March 7, 1936, the North Dakota court, in \textit{State ex rel. Haggart v.}
Nichols,\textsuperscript{112} unanimously held that a graduated net income tax did not violate the North Dakota uniformity clause, which was a Type VIII clause (taxes shall be uniform upon the same class of property). The writer of the principle opinion, concurred in by two other justices, viewed any discussion of the nature of the income tax as immaterial. The reason offered was similar to that found in Minnesota; after equating the uniformity clause to the federal equal protection clause, the principal opinion then found that even if the tax was held to be a property tax, the classifications (e.g., graduated rates) were permissible.\textsuperscript{118} Two justices specially concurred, both on the basis that an income tax was not a property tax.\textsuperscript{114}

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During this period of the early thirties, other decisions favorable to the imposition of an income tax\textsuperscript{115} were made in North Carolina,\textsuperscript{116} Maine,\textsuperscript{117} Iowa,\textsuperscript{118} and Kentucky.\textsuperscript{119}

\textsuperscript{112} 66 N.D. 355, 265 N.W. 859 (1936).

\textsuperscript{113} However, for the record, the court did hold that the tax on income from realty was not a tax on such realty. This decision was necessary because of another constitutional limitation. \textit{id.} at 387ff.

\textsuperscript{114} \textit{Id.} at 388.

\textsuperscript{115} For inconclusive precedent in West Virginia, see the text and notes 10 and 11 to Ch. III, §E/3, \textit{supra}, pp. 264-265.

\textsuperscript{116} An income tax has been expressly sanctioned in the North Carolina constitution since as early as 1868. See the text in Ch. III, §H/4, \textit{supra}, pp. 560-561. At the present time North Carolina has a Type VIII basic clause. However, before 1935 the basic clause was Type IV, and it required a very strict rule of uniformity of property taxes. In 1933, in Maxwell v. Kent-Coffey Mfg. Co., 204 N.C. 365, 168 S.E. 397 (1933), the North Carolina court found it necessary to rule that an income tax under attack was a nonproperty tax. Although the income tax is expressly permitted, there is no mention of method or rates, and the tax was challenged as not conforming to the ad valorem requirement which existed before 1935. The court ruled that the tax did not have to conform to the limitation because it was a nonproperty tax.

\textsuperscript{117} In 1935 the Supreme Court of Maine ruled in an advisory opinion, In re Opinion of the Justices, 133 Me. 525, 178 N.E. 621 (1935), that a net
There has been no judicial development on this problem since the thirties, with the exception of decisions favorable to the imposition of an income tax in Maryland in 1940, and in Kansas in 1947.

2. A Special Note on “Gross” Income Taxes and Corporate Franchise Taxes with a Base of Net Income

Before attempting any evaluation of this judicial development concerning net income taxes, it will be of interest to survey very briefly the treatment given to gross income taxes by the state courts. The first of these decisions has all-income tax would not be a property tax, and consequently would not be limited by the strict uniformity required of property taxes. The Maine basic clause is a Type I provision. However, in fact, Maine has never enacted any form of an income tax. See the text to notes 9-11 in Ch. III, §A/2, supra, p. 61.

118 Vilas v. Iowa State Board of Assessment & Review, 223 Iowa 604, 273 N.W. 338 (1937). Iowa has no uniformity clause of any kind, and normally it will not make any substantial difference whether a tax is characterized as property or nonproperty. See Ch. III, §J/2, supra, pp. 596-598. However, because of Art. VIII, §2, which provides that “The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals,” it was necessary to characterize the income tax as a nonproperty tax in the Vilas case in order to sustain it against objections that Art. VIII, §2 was violated.

119 Reynolds Metals Co. v. Martin, 269 Ky. 378, 107 S.W. 2d 251 (1937). While Kentucky has a Type VIII basic clause, the limitation on property taxes is still somewhat stricter than that applied to nonproperty taxes. See Ch. III, §H/2, supra, pp. 551-553. Consequently, the characterization in the Reynolds case was of real importance, especially because of the graduated rates feature.

120 Oursler v. Tawes, 178 Md. 471, 13 A. 2d 763 (1940). Maryland has had a Type VIII clause since 1915, but the characterization of the income tax as a property tax avoided certain stricter property-tax requirements, although classification for rates is now permitted in Maryland.

121 Hartman v. State Comm. of Revenue and Taxation, 164 Kan. 67, 187 P. 2d 939 (1947). However, this decision was preceded by a constitutional amendment in 1932 which expressly authorized the imposition of a graduated net income tax. See note 9 to Ch. III, §F/3, supra, p. 309.
ready been mentioned. In 1925, in *Sims v. Ahrens*, the Arkansas Supreme Court struck down the Arkansas gross income tax because of certain arbitrary classifications, although the court characterized the tax as a nonproperty tax. Subsequent Arkansas development centered on the more orthodox net income tax.

The other gross income tax cases were decided during the early 1930's, the same period during which the battle over the *net* income taxes reached its peak. The leading case is *Miles v. Department of Treasury*, decided in 1935 by the Indiana court. Like the Arkansas tax, the Indiana 1933 gross income tax can be distinguished from a *net* income tax in that the base of the tax is gross income. However, it is to be distinguished from the ordinary "gross receipts" tax in that it applied to all persons, whether in business or not, and included all forms of earned and unearned income. The Indiana act was sustained, the court ruling that it was a nonproperty tax and therefore not subject to the strict property tax uniformity requirement. The tax was characterized as being "upon the right or ability to produce, create, receive, and enjoy, and not upon specific property." Any distinction between gross income and net income taxes was belittled.

Although selective gross receipts taxes are quite common, and the broader "business and occupation tax," which

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122 Supra note 31, and text thereto.
123 209 Ind. 172, 193 N.E. 855 (1935).
124 See text to notes 52-62, Ch. III, §F/2, supra, pp. 304-306. A more detailed analysis of the Indiana tax and judicial development is found in that material.
125 Also see Notgrass Drug v. State, 175 Miss. 358, 165 So. 884 (1936), discussed note 5 to Ch. III, §E/1, supra, p. 250 in which the Mississippi court characterized a broad business and occupation tax as a nonproperty tax. Of course, the Mississippi decisions had already characterized a net income tax as a nonproperty tax. Notes 25-27, supra. Cf. Redfield v. Fisher, supra note 30, decided by the Oregon court.
126 See text to notes 56 and 61, Ch. III, §F/2, supra, pp. 305-306.
is a general gross receipts tax, is found in a few states, the true "gross" income tax is rare. However, there have been some developments concerning the broad business and occupations taxes which are also of interest. In some states which have been the most severe on the net income tax, the business and occupation tax has survived. The best example of this is found in Washington. At the same time the Washington court was placing an insurmountable barrier before a net income tax, a very broad business and occupation tax was sustained in State ex rel. Stiner v. Yelle. That decision has already been referred to in the net income tax discussion. The Washington legislature had attempted to impose, in fact, a tax having the scope of the Indiana gross income tax. However, because of a veto by the governor of a part of the act, the tax did not reach those engaged in agriculture and the professions. Also, the catch-all clause was knocked out. As noted before, in the Culliton case, decided on the same day as Yelle, the court by a 5-4 decision ruled that the net income tax was a property tax and contrary to the uniformity clause. In the Yelle case, a 5-4 opinion characterized the business and occupation tax as a nonproperty tax, and consequently the tax was sustained, not having to meet the strict property tax uniformity limitation. Two dissenters, from the majority in Culliton, would have ruled that the tax was a property tax.

The judicial development concerning the corporate franchise tax with a base of net income has paralleled the gross income tax development. In several states in which the

127 Supra note 83, and text thereto.
128 Supra note 71.
129 Cf. the discussion of Winter v. Barrett, 352 Ill. 441, 186 N.E. 113 (1933) and Reif v. Barrett, 355 Ill. 104, 188 N.E. 889 (1934), in note 8 to Ch. III, §B/3, supra, p. 119. Also see: Laing v. Fox, 115 W. Va. 272, 175 S.E. 354 (1934), and Lougee v. New Mexico Bureau of Revenue Com'r, 42 N.M. 115, 76 P. 2d 6 (1938).
courts have ruled that a general or personal net income tax was a tax upon property, and therefore subject to strict uniformity limitations, a more lenient attitude has been taken toward the corporate franchise tax with a base of net income. For example, in Massachusetts,\textsuperscript{130} Tennessee,\textsuperscript{131} and Pennsylvania\textsuperscript{132} the courts have ruled that such taxes are privilege taxes, even though having a base of net income. It should be pointed out that the taxation of corporate income by either a direct income tax or a franchise tax runs into certain federal constitutional law problems. Each method has its disadvantages. Consequently, in those states having no uniformity limitation barrier, there is a freedom of choice in selecting either the corporate franchise tax with a base of net income or the corporate income tax. Indeed, Minnesota, for example, uses both to get the greatest possible coverage.\textsuperscript{133}


Having reviewed the cases which reveal the sharp division of judicial opinion on the nature of an income tax for the purpose of applying the constitutional limitation of uniformity in taxation, what conclusions may be drawn? First, note

\textsuperscript{130} See, for example, Alpha Portland Cement Co. v. Comm., 244 Mass. 530, 139 N.E. 158 (1923), note 9 to Ch. III, §C/1, \textit{supra}, p. 174.

\textsuperscript{131} See Bank of Commerce & Trust Co. v. Senter, 149 Tenn. 569, 260 S.W. 144 (1923), note 66 to Ch. III, §A/3, \textit{supra}, p. 91.


\textsuperscript{133} And see the abortive attempt made by Pennsylvania, described in note 154 to Ch. III, §G/12, \textit{supra}, p. 521. No challenge was made on the basis of the Pennsylvania constitution’s restrictive ruling as to income taxes. The invalidity of the supplementary tax was based on the federal constitutional limitation on state taxation of interstate commerce.
that this controversy concerning the income tax ran its course over a period roughly coinciding with the last trend which has developed in the historical growth of the so-called uniformity clause. In general terms that period covered the first forty years of the present century. In Section A of this Chapter it was pointed out that the historical growth of the so-called uniformity clauses has fallen into three periods. The third period was characterized by a liberalization of the effective uniformity limitation and covered the years 1874 to 1945. However, this period of liberalization had two branches, the second of which originated with Maine in 1913. This second branch was characterized by a tendency to modify the strict uniformity limitation in the following manner. A basic clause of a strict type was left unchanged but a constitutional amendment was introduced providing for special treatment of certain classes of property.

As pointed out earlier in this monograph, the income tax development and the trend originating with Maine in 1913 are both results of the social, economic, and political pressures of the period. An increased demand for state services meant that additional revenue had to be produced. This demand for substantial increases in revenue threw a severe strain on the traditional state tax structures. Many difficult fiscal policy problems were raised. What sort of tax structure was desirable? These controversies over fiscal policy brought with them difficult problems concerning state constitutional limitations. One such constitutional limitation is the subject of this monograph—the constitutional requirement of uniformity and equality in taxation. The controversy over the uniformity limitation has centered principally on two issues. First, there was the stress on the traditional, but creaking ad valorem general property tax which brought a demand for classification in the taxation of property. That demand raised

134 See Chapter V, §A, supra.
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a constitutional issue concerning the scope and content of the uniformity limitation in terms of particular rules of uniformity as applied to property taxes. Section B of the present Chapter dealt with that problem; indeed, that problem was the principal feature of the state-by-state analysis in Chapter III.

Second, the demand for additional revenue brought with it demands for new sources of revenue, new taxes. Considerable controversy was centered on such taxes as sales and use taxes, but it did not principally involve the constitutional issue of uniformity in taxation. Serious attention was also centered on the income tax as a new source of state revenue. Beyond the hotly debated fiscal policy issues obviously raised by the discussion of the income tax, there was the difficult constitutional problem of uniformity in taxation. If an income tax was adopted, would it have to conform to the property tax uniformity limitation? That is, what was the legal nature of an income tax—property or nonproperty?

a. Some preliminary information

One way of approaching this comparative summary is to simply “sum up.” What states, and how many, have ruled that an income tax for purposes of uniformity is a property tax, nonproperty tax, or that its nature is immaterial? A bird’s-eye summary of the preceding chronological development of judicial precedent follows. Seven states (Alabama, Illinois, Massachusetts, New Hampshire, Delaware, Pennsylvania, in part, and Washington) have ruled that an income tax is a property tax. On the other hand, thirteen states (Arkansas, Maine, Wisconsin, Mississippi, Kansas, Georgia, Idaho, Missouri, Montana, Kentucky, Maryland, North Carolina, and Iowa) have ruled to the contrary, that an income tax is a nonproperty tax. One might add Indiana
to those thirteen states, although the tax actually ruled upon by the Indiana court was a gross income tax. Finally, four states (Tennessee, Minnesota, Oregon, and North Dakota) have ruled that an income tax could be either property or nonproperty, since under their respective limitations the nature of the tax was immaterial.

Of course, such a summary as this, without more, would be "boxscore" jurisprudence at its worst. No such tabulation of state decisions concerning the nature of an income tax for purposes of uniformity in taxation is sufficiently informative. Indeed, such a tabulation is rather misleading. For example, the tabulation just made does not reflect the unique constitutional situation found in New Hampshire which detracts from the weight of its decision that an income tax is a property tax. A somewhat similar situation underlies the Delaware decision. Also, this "boxscore" does not reflect the interrelation between the court decisions and the constitutional provisions which expressly deal with the income tax problem. For example, the Tennessee decisions are intelligible only against the background of its unique constitutional provision which expressly sanctions a very limited type of income tax. If there is a constitutional provision, it is always helpful to know whether it preceded the court decision.

Furthermore, before the significance of the above "boxscore" can be determined it will be necessary to set forth certain other data. First, it will be helpful to indicate which states have dealt with the income tax problem by way of a special constitutional provision.\(^{135}\) There are twenty such states, in all. Eighteen states have constitutional provisions which expressly sanction the imposition of an income tax. One state, Florida, is unique in that it has a constitutional

\(^{135}\) The information in this summary is based on the historical note on each state in the state by state study, Chapter III. The provision will also be found in the Appendix, infra.
provision expressly prohibiting the imposition of an income tax. That provision was added to the Florida Constitution by an amendment in 1924. The twentieth state, Tennessee, has presented an unusual situation. Its constitution expressly sanctions the imposition of a tax on the income from intangibles, and the court has interpreted that clause as implicitly prohibiting the imposition of any other tax on incomes regardless of the nature of such a tax.

It will be helpful to make a few comments concerning the eighteen states having constitutional provisions favorable to the imposition of an income tax. This will be done by reference to the Groups established hereinbefore. Of the states in Group I, only Tennessee has any provision concerning income taxes and uniformity. Two states in Group II have income tax provisions. They are Alabama and California. The Alabama provision was added by an amendment to the Alabama Constitution in 1933. It expressly provides for a maximum rate, but says nothing concerning either exemptions or graduated rates. The California provision does nothing more than sanction the taxation of "incomes," and it was adopted in 1879 at the time of the adoption of the present California Constitution. Only one of the two states in Group III has an income tax provision. In 1915 the Massachusetts Constitution was amended to permit the taxation of income. Exemptions were expressly provided for, but no mention was made of graduated rates.

Two of the four states in Group IV have income tax provisions. The Ohio Constitution was amended in 1912 to sanction an income tax. Minimum exemptions and graduated

136 Supra, p. 275.
137 Supra, p. 91.
138 Supra, p. 96.
139 Supra, p. 106.
140 Supra, p. 180.
rates are permissible.\textsuperscript{141} In 1908, at approximately the same time, the Wisconsin Constitution was amended to provide that an income tax might be imposed and that it might be “graduated and progressive.”\textsuperscript{142}

Similarly, two of the four states in Group V have income tax provisions. The present constitution of Texas came into force in 1876. From the first it has contained a clause providing that the legislature might “tax incomes.”\textsuperscript{143} More explicit, in West Virginia an amendment, adopted in 1932, provides that the legislature may “classify and graduate a tax on all incomes according to the amount thereof.”\textsuperscript{144}

In Group VI five of the six states have income tax provisions. However, one of those five is Florida, which bans an income tax, as noted above. In 1932 the Indiana Constitution was amended by adding a provision permitting an income tax “at such rates, in such manner, and with such exemptions as may be prescribed by law.”\textsuperscript{145} In the same year, 1932, the constitutions of Kansas\textsuperscript{146} and South Carolina\textsuperscript{147} were also amended to permit the imposition of graduated income taxes. In Utah’s first and only constitution, which came into force in 1896, provision was made not only for an income tax, but in addition the rates are required to be graduated.\textsuperscript{148}

Six of the thirteen states in Group VII have income tax provisions. Such a provision was added to the Colorado Constitution by an amendment in 1936. It permits either a

\textsuperscript{141} Supra, p. 223.  
\textsuperscript{142} Supra, p. 238.  
\textsuperscript{143} Supra, p. 254.  
\textsuperscript{144} Supra, p. 262.  
\textsuperscript{145} Supra, p. 306.  
\textsuperscript{146} Supra, p. 309.  
\textsuperscript{147} Supra, p. 336.  
\textsuperscript{148} Supra, p. 345.
“graduated or proportional” income tax.\textsuperscript{149} As early as 1845 Louisiana included in its constitution a provision permitting an “income tax.” However, the provision was omitted in the 1878 constitution. The present constitution of Louisiana, adopted in 1921, re-adopted an income tax provision, this time permitting an “equal and uniform tax” to be “levied upon net incomes” and sanctioning “reasonable exemption.” In 1934 this provision was amended to provide: “Equal and uniform taxes may be levied upon net incomes, and such taxes may be graduated according to the amount of the net income. . . . Reasonable exemptions may be allowed.”\textsuperscript{150} In Missouri a provision was added to the new constitution of 1945 which indicated that nothing in the tax article was to prevent the taxation of incomes. Having already judicially approved an income tax, the purpose of this provision was apparently to explain a new provision added to the uniformity clause and spelling out the extent to which property might be classified for taxation.\textsuperscript{151} The Montana Constitution was amended in 1934 to permit the imposition of a “graduated and progressive” income tax.\textsuperscript{152} The original and present constitution of Oklahoma, adopted in 1907, provides expressly that a graduated income tax may be imposed.\textsuperscript{153} Like Louisiana, Virginia dealt with this problem at an early date. The present constitution of Virginia was adopted in 1902, and included a provision permitting the taxation of incomes. The antecedent of this provision first appeared in the Virginia Constitution of 1850.\textsuperscript{154} The only case of a state abandoning an income tax provision, with the exception of Louisiana, which re-adopted its provision, is

\textsuperscript{149} Supra, p. 350.
\textsuperscript{150} Supra, p. 387.
\textsuperscript{151} Supra, p. 426.
\textsuperscript{152} Supra, p. 431.
\textsuperscript{153} Supra, p. 448.
\textsuperscript{154} Supra, p. 542.
found in New Mexico, also in Group VII. In its original constitution of 1911 New Mexico included a provision similar to the Oklahoma provision permitting the imposition of a graduated income tax. However, in 1914 the New Mexico uniformity structure was substantially revised. A more liberal Type VII clause was substituted for a Type V provision, and the structure was considerably reduced. This included the deletion of the income tax provision.\textsuperscript{155}

In Group VIII only one state has an income tax provision. North Carolina, like Louisiana and Virginia, adopted such a provision at an early date. North Carolina first adopted a provision permitting the taxation of income in its constitution of 1868, and the provision has been retained in substantially the same form to date. No mention is made of exemptions or graduated rates.\textsuperscript{156} There are no states in Groups IX and X which have special income tax provisions.

Other data which will aid in evaluating the above "box-score" concerns income taxes actually in force in the several states.\textsuperscript{157} For present purposes it will be helpful to make the following classification of income taxes: personal net income taxes, direct corporate net income taxes, and corporate franchise taxes having a base of net income. Twenty-eight states have, in effect, a general net income tax—that is, a combination of a personal net income tax with one or both of the corporate income taxes. The use of two types of corporate income taxes stems from federal constitutional law problems.\textsuperscript{158} Twenty states combine a personal income tax with a direct corporate net income tax. They are: Arkansas, Alabama, Wisconsin, Mississippi, Kansas, South Carolina, Colorado,

\textsuperscript{155} Supra, p. 440.
\textsuperscript{156} Supra, p. 558.
\textsuperscript{157} The following information is based on the latest data collected in the CCH State Tax Reporters for each state, and the All States volume.
\textsuperscript{158} See the text to note 133, supra.
Georgia, Idaho, Louisiana, Missouri, New Mexico, Oklahoma, Virginia, Arizona, Kentucky, Maryland, North Carolina, North Dakota, and Iowa. Six states combine a personal net income tax with a corporate franchise tax having a base of net income. They are: Massachusetts, Utah, Montana, Oregon, Vermont, and New York. Two states, California and Minnesota, combine the personal net income tax with both a direct corporate income tax and a corporate franchise tax with a base of net income. The two corporate taxes are not overlapping but complementary, and so devised in order to get the widest possible coverage under federal constitutional limitations. A twenty-ninth state, Indiana, might well be grouped with the above twenty-eight states even though the Indiana tax is a gross income tax.

One state, Delaware, has a personal net income tax only. Three states reach only corporate income, Rhode Island by a direct corporate income tax, and Pennsylvania\(^ {159} \) and Connecticut by corporate franchise taxes with bases of net income. Tennessee has a corporate franchise tax with a base of net income, and in addition there is a limited personal net income tax, reaching only the income from intangibles. In New Hampshire there is only limited income taxation, the tax being limited to income from intangibles.

Thus, some thirty-five states have an income tax of some form or degree, leaving thirteen states with no income tax of any kind according to the usual classification. However, it should be noted that this group of thirteen states includes Michigan. And the Michigan Intangibles Tax is, in fact, a limited income tax such as is found in New Hampshire. For income-producing intangibles, the base of the tax is income.\(^ {160} \) The twelve remaining states are Maine, Illinois, Ne-

\(^ {159} \) For the abortive attempt by Pennsylvania to impose a companion direct corporate income tax, see note 154 to Ch. III, §G/12.

\(^ {160} \) See text to notes 28 through 30 to Ch. III, §D/1, \textit{supra}. 
b. A classification according to results favorable to the imposition of an income tax

As stated before, it is inadequate merely to classify the states into those having held that an income tax, for purposes of uniformity in taxation, is either a property tax or a nonproperty tax. Only seven state courts have ruled that an income tax is a property tax, as opposed to the fourteen which have ruled that such a tax is a nonproperty tax and the three (omitting Tennessee) which have decided that the nature of the tax was immaterial because of the liberal property tax uniformity limitation. A more significant classification is based on whether the ruling of the court was favorable to the imposition of an income tax. Admittedly, the property-nonproperty tax division generally coincides with an adverse-favorable division; however, this is not always the case—witness the decisions in New Hampshire and Delaware in which the courts ruled that the income taxes under consideration were property taxes, such rulings making the imposition of such a tax possible. In New Hampshire, while the income tax was held to be a property tax, in fact all taxes are "property" taxes in that state. However, "property" taxes are divided into taxes on "estates" and taxes on "other classes of property." The second category conforms to the usual classification of nonproperty taxes, and the New Hampshire tax was held to be a tax "on other classes of property."

Even a classification of favorable-adverse effect is not sufficiently refined. It does not take into consideration the impact of constitutional provisions dealing expressly with
the imposition of an income tax. If there is such a constitutional provision in a given state, it is necessary to relate that provision to judicial decisions in that state, if any, in the following manner. Did the constitutional provision precede or come after the court decision; and, is the constitutional provision in agreement with the judicial decision? That is, for example, did the constitutional provision follow the judicial decision and, in effect, "overrule" the court, either by expressly permitting or forbidding the imposition of an income tax?

The first classification is of those states in which a court decision was favorable to, and made possible the imposition of an income tax when that tax was challenged as being a violation of the state constitutional uniformity limitation. The ruling of the courts concerning the nature of the tax is disregarded. Thus, in Arkansas, Maine, Mississippi, Georgia, Idaho, Minnesota, Oregon, Kentucky, Maryland, North Dakota, and Iowa court decisions that an income tax was a nonproperty tax removed such tax from the scope of the strict property tax uniformity limitation. It is true that in Minnesota, Oregon, and North Dakota the courts never really decided on the nature of the tax, indicating however, that if pushed, the tax would not be characterized as a property tax. In New Hampshire, as pointed out above, the decision of that court that an income tax was a property tax was necessary to impose any tax at all. Similarly, in response to the argument that only property taxes were permissible in Delaware the court was willing to characterize the tax as a property tax. Since the Delaware court has equated the property tax uniformity limitation to the federal equal protection clause this characterization of the tax did not have the effect of subjecting it to a stricter uniformity limitation. Summing up, there are thirteen states in which court decisions made possible the imposition of an income tax.
The second classification consists of three states and is quite closely related to the first classification. The only difference is that subsequent to the favorable judicial opinion a constitutional provision was approved expressly sanctioning the imposition of an income tax. In Indiana and Montana the constitutional provisions were introduced by way of amendment at almost the same time the court decision was made. Thus, both possibly indicate some doubt on the part of those proposing the tax as to the outcome of the court battle. However, in both states the favorable court decisions were not influenced by or dependent upon the constitutional provisions then up for adoption. In Missouri the decision that an income tax was a nonproperty tax occurred in 1918, and the constitutional provision made its appearance nearly thirty years later in the constitutional revision of 1945. The adoption of the provision was obviously designed to forestall any future argument that certain alterations in the uniformity clause might be taken to have overruled the earlier court decision of 1918.

Thus, the first two classifications, consisting of sixteen states, constitute the strongest judicial precedent in favor of the imposition of an income tax. To this may be added the less significant authority of three states making up a third classification. In Wisconsin, Kansas, and North Carolina it is true that the courts have ruled that an income tax is a nonproperty tax and consequently not subject to the property tax uniformity limitation. However, in each case there already was in force a constitutional provision expressly sanctioning the imposition of an income tax, and, in addition, in Wisconsin and Kansas the constitutional amendments provided for graduated income taxes. Consequently, the Wisconsin and Kansas decisions have little persuasive weight for courts of other jurisdictions. The decision of the North Carolina court is more important. Although the taxation "of
incomes” was expressly permitted by the constitution at the time of the decision, it was necessary for the court to decide whether the tax was subject to the property tax ad valorem rule.

The fourth classification is made up of those states in which an income tax is expressly permitted by constitutional provision, and in which there is no judicial decision on the matter. Here the problem was solved by the people themselves, without resort to judicial controversy. There are ten such states: California (1879), Ohio (1912), Texas (1876), West Virginia (1932), South Carolina (1932), Utah (1896), Colorado (1936), Louisiana (1845, 1921, 1934), Oklahoma (1907), and Virginia (1850). It is significant that the Ohio amendment, while not following a judicial decision concerning the income tax, did follow, and “overrule” to some degree, a decision severely restricting the power of the legislature to impose an inheritance tax. The 1912 amendment expressly permits both income and inheritance taxes with graduated rates. In addition to these ten states, in Tennessee the constitution expressly permits the taxation of income from intangibles, a limited form of income tax. But judicial decisions have interpreted this provision so that it prohibits by implication any other form of income tax.

To be considered now are those judicial decisions which have been adverse to the imposition of an income tax. The fifth classification consists of two states, Alabama and Massachusetts. In those states the courts decided that an income tax was a property tax, and such decisions were adverse to the imposition of such a tax. However, constitutional amendments were adopted subsequent to such decisions and, in effect, “overruled” the courts, expressly permitting the imposition of income taxes. In neither case were graduated rates

181 See the Ohio study, Ch. III, §D/3, text to notes 9-15.
mentioned by the amendments. In Massachusetts a subsequent decision restrictively interpreted the constitutional amendment, with the result that graduated rates were ruled out under the strict property tax uniformity limitation. A contrary attitude was found in Alabama. A court decision there, subsequent to the amendment of the constitution, seriously questioned the rationale of its original adverse decision, but did not find it necessary to overrule that decision because of the constitutional amendment.

It does seem significant that while in two instances we have a court decision adverse to the imposition of an income tax which was later "overruled" by constitutional amendment, in not a single instance do we find a court decision favorable to the imposition of an income tax later "overruled" by constitutional amendment. Indeed, at the present time general net income taxes are out of the question for all practical purposes in only four states. A sixth classification of states is composed of those in which judicial decisions were adverse to the imposition of an income tax, essentially because the tax was characterized as a property tax. Illinois and Washington fall squarely into that category. However, in Pennsylvania, this is only partially so because as illustrated by the Pennsylvania study a limited form of tax on the earned income of individuals is possible. And, of course, the characterization of the Pennsylvania corporate franchise tax with a base of net income as a nonproperty tax avoided in part the restrictive Pennsylvania interpretation. Florida constitutes a seventh classification. In this state alone has the constitution been amended so as to prohibit the imposition of an income tax of any kind.162

This leaves those states in which there is neither a court decision nor a constitutional provision dealing with the imposi-
tion of an income tax. There are twelve such states. However, for reasons set forth below, those twelve states may be divided into those having some sort of income tax in force, and those having no form of income tax in form. Thus, the eighth classification consists of the six states (New Mexico, Arizona, Rhode Island, Vermont, Connecticut, and New York) having an income tax of some form, but having neither judicial decision nor constitutional provision on the matter. The ninth classification consists of the six states (Nebraska, Michigan, New Jersey, Wyoming, Nevada, and South Dakota) in which there is no income tax of any kind in force, and in which there are neither judicial decisions nor constitutional provisions concerning the validity of such a tax.

At this point it is pertinent to note that, at least in terms of sheer weight of numbers among the forty-eight states, the scales are balanced in favor of the validity of an income tax. Leaving aside those twelve states which have no decision of any kind on the problem, this means that thirty-six states have passed, in one manner or another, on the problem. In thirty-one of those thirty-six states the final decision to date has been in favor of the validity of an income tax. In sixteen of those thirty-one states the primary decision was made by the judiciary. In fifteen of those thirty-one states the primary decision was made by way of constitutional provision. And of these fifteen states, in two the decision of the people overruled the judicial opinion.

c. A classification relating the results concerning the income tax to types of uniformity clauses

At the risk of being unduly repetitious it will be interest-
ing to relate the prior information to the types of basic un-
iformity clauses. Except for a few exceptions which will be
noted, the judicial decisions and constitutional provisions dealing with the income tax problem occurred in each state at a time when the present uniformity clause was in force. All states in Group I have dealt with the problem in some manner. In Arkansas and Maine judicial decisions have characterized the income tax as a nonproperty tax and consequently made such a tax feasible. In Tennessee there has been a combination of constitutional provision plus judicial decision. The constitutional provision sanctions the taxation of incomes from intangibles, and the judicial decision construed the constitutional provision to prohibit implicitly all other forms of income taxes.

The greatest hostility to an income tax is found among the states in Group II. The problem was settled at an early date (1879) in California by an approving constitutional provision. However, in Illinois an income tax is ruled out because of an adverse judicial decision which characterized an income tax as a property tax. In Alabama such an adverse judicial decision was overcome only by constitutional amendment. In Nebraska the problem remains open.

The income tax has met a mixed reception in Group III. The tax was made possible in New Hampshire because of a judicial characterization of the tax as a property tax. To the contrary, in Massachusetts an income tax is possible only because a constitutional amendment "overruled" to some degree an adverse judicial decision which had characterized the income tax as a property tax.

The greatest room for speculation is found in Group IV. Two states (Michigan and New Jersey) have not dealt with the problem either by judicial decision or constitutional amendment. In the other two states in Group IV income taxes have been made possible by way of constitutional amendment. In Wisconsin the amendment has been followed and "affirmed" by a judicial decision. In Ohio the
constitutional provision stands alone, although a decision adverse to the imposition of an inheritance tax had clearly foreshadowed an adverse judicial decision as to an income tax in the absence of the constitutional amendment.

In Group V there is one state, Wyoming, which has not dealt with the income tax problem. In the remaining three states in this group the results to date have been favorable to the imposition of an income tax. In Mississippi an early leading judicial decision made this possible by characterizing the tax as a nonproperty tax. In both Texas and West Virginia there are favorable constitutional provisions.

Group VI presents an interesting situation. Nevada has not dealt with the income tax problem. However, the other five states in this group have dealt with the matter by constitutional provision. In Indiana a judicial decision was contemporary with the constitutional amendment, but placed no reliance on the amendment in reaching a result favorable to the tax. To the contrary, in Kansas the judicial decision simply applied the constitutional provision which expressly permits the imposition of an income tax. In South Carolina and Utah the favorable constitutional provisions stand alone. In the fifth state, Florida, we find the single case of a state prohibiting by constitutional amendment the levying of any form of income tax. It is interesting to note that each state, except one, has adopted a special constitutional provision to deal with the general problem. Compare the similar course of action taken by this Group of states concerning the property tax uniformity limitation. As the previous sections of this Chapter revealed, in all of the states in this Group, except Indiana, the strict effective uniformity limitation has been modified by the use of constitutional amendments which permit the special treatment of certain classes of property. The strict basic uniformity clause has been left unchanged. Thus, as to the two most difficult of the uniformity
in taxation problems the states in Group VI have tended to deal with the matter by introducing special constitutional provisions which bypass the strict basic clause.

Group VII has the largest number of states, thirteen, and represents a considerable diversity in experience. In one state, New Mexico, there is neither judicial decision nor constitutional provision dealing with the problems concerning an income tax. In another state, Pennsylvania, there is a judicial decision adverse to the levying of an income tax. The Pennsylvania court has ruled that, at least as to income derived from property, an income tax is a property tax. As a result the tax is subjected to a more strict uniformity requirement. The remaining eleven states in Group VII are to be counted among those favorable to the imposition of an income tax. In four states (Colorado, Louisiana, Oklahoma, and Virginia) constitutional provisions expressly permit the imposition of an income tax. In the remaining seven states (Delaware, Georgia, Idaho, Minnesota, Missouri, Montana, and Oregon) there is some of the strongest judicial precedent favorable to the imposition of an income tax without hindrance from the uniformity limitation. Although most of those seven states have a liberal property tax uniformity limitation, that limitation is usually somewhat stricter than that which limits nonproperty taxes and, in a good many cases, would probably stand in the way of a graduated income tax. Thus, in Georgia, Idaho, Missouri, and Montana it was of considerable importance that the income tax was characterized as a nonproperty tax. To the contrary, in Minnesota, Oregon, and even Delaware the characterization of the tax was said to make little difference because the property tax uniformity in those states is said to be the same as the uniformity required of nonproperty taxes.

Two states in Group VIII, Arizona and South Dakota, have not dealt with the problem. In only one of the seven
states in this Group has the result been adverse to the imposition of an income tax. The Washington court characterized the tax as a property tax, subject to a stricter uniformity limitation. In the remaining four states the courts have ruled favorably on the income tax. In Kentucky and Maryland judicial decisions characterized the income tax as a nonproperty tax and thereby avoided certain uniformity limitations. In North Carolina the judicial decision was preceded by a constitutional provision which permitted an income tax. However, the decision was made at a time when North Carolina had a strict uniformity clause, and the decision was necessary in order to avoid the ad valorem method requirement. In North Dakota the court found it unnecessary to rule on the nature of an income tax because there was said to be no substantial difference in the uniformity rules applicable to property and nonproperty taxes.

The income tax problem as it relates to uniformity of taxation has not been dealt with either by judicial decision or constitutional provision in four of the five states in Groups IX and X (Rhode Island, Vermont, Connecticut, and New York). Only in Iowa has there been any development. A judicial decision in that state ruled that the income tax was not a property tax and thereby avoided a minor uniformity limitation applicable only to property taxes. From this review, no significant pattern relating to the basic types of uniformity clauses seems to have developed. The unfavorable judicial decisions are scattered throughout all the groups: Alabama and Illinois in Group II, Massachusetts in Group III, Pennsylvania in Group VII, and Washington in Group VIII. In Group VI there has been no judicial opposition, but a constitutional provision in Florida prohibits the tax.

Recall that there are twelve states which have neither judicial opinion nor constitutional provision settling the issue. It does seem significant that the following division may be made
among those states on the basis of whether they have income
taxes actually in force. The six states which have some form
of an income tax are all states which either have basic uniform-
ity clauses of Types VII, VIII, or IX, or have no clause of any
kind. They are New Mexico, Arizona, Rhode Island, Ver-
mont, Connecticut, and New York. With one exception,
South Dakota, the remaining six states are states having
basic uniformity clauses which have in most all cases been in-
terpreted to require a strict effective uniformity limitation as
applied to property taxes. They are: Nebraska from Group II,
Michigan and New Jersey from Group IV, Wyoming from
Group V, and Nevada from Group VI. It is a fair implication
that in those six states having an income tax of some form
there simply has not been sufficient doubt as to the validity
of the tax under the uniformity limitation to challenge it.
It is also fair to suggest that if the question as to the nature
and validity of an income tax remains open in a state, that the
most vigorous controversy concerning the problem would
in all likelihood arise in states having the strict uniformity
clauses, namely Types I through VI. And note that five of
the six states which have no such tax of any kind are found
to have a strict uniformity clause. However, caution should
be used in making any generalization concerning the Michi-
gan problem because of the unique constitutional develop-
ment in that state which makes it possible for the income tax
to be characterized as a property tax and still avoid a strict
uniformity limitation. That is, in Michigan such a tax could
be characterized as a *specific* property tax, as opposed to an
ad valorem property tax.

d. Conclusions

As stated at the beginning of the present section, the rea-
son for making the special study of the income tax was to
use the history of a single tax to illustrate not only the im-
portance of the property-nonproperty tax dichotomy in relation to the uniformity in taxation limitation, but also to reveal the pitfalls of this division. It is a fact that this dichotomy has been accepted and used by the state courts in their interpretation and application of the state constitutional limitation of uniformity in taxation. It is also a fact that in those states having a strict effective uniformity limitation applicable to property taxes, this dichotomy is of controlling importance because in most cases the characterization of a tax as either a property or nonproperty tax will be the most important factor in determining its validity. It is also a fact that the income tax controversy represents the quintessence of this conceptual battle.

What conclusions, then, may be drawn from the income tax experience—just what is the "test" which distinguishes a property tax from a nonproperty tax? This writer, after puzzling over the relevant material, tends to feel that none of the several tests and, oftentimes, bare conclusions offered by the courts are really convincing as absolutes. He found no revelation of some "true" test. There was much discussion of the nature of an income tax. But in the final analysis the really decisive questions were as follows. First, how did the justices look upon the income tax from a fiscal policy viewpoint? Second, how much discretion was the legislature to be allowed, even though the tax in question might be distasteful to the justices? How much flexibility should the lawmakers be allowed in their efforts to meet the new and expensive demands for service from the government? Having assumed the fiscal wisdom or unwisdom of the tax, or having assumed that the legislature should have the leeway to make that decision, there was not too much difficulty in deciding that the tax was a property tax or nonproperty tax as the result might demand. Characterize the tax as a property tax and it was doomed. Actually, even those writers severely
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criticizing the mere use of a property-nonproperty tax test as being "sacerdotal conceptualism" and "unrealistic" have done so because its use prevented in some instances the imposition of an income tax, whereas the critic viewed such a tax as a sound, desirable and "modern" fiscal measure.163

However, it is suggested that this inconclusive state of affairs is not so much a reflection of the injection of "policy" factors into issues of "legality," as it is of the obsoleteness of the dichotomy, and its consequent inadequacy as an interpretive aid. The interpretation and application of the "uniformity clauses," so-called, is an outstanding example of the problem with which courts are faced when interpreting constitutions. This is an area of constitutional law in which the courts have a minimum of objective guideposts to channel their "interstitial" lawmaking.

[C]onstitutional interpretation is no . . . simple matter. The judge faces the task of giving meaning to words very often in the context of broad phrases that admit of a great variety of interpretations. Whether he takes into account the historical circumstances that gave birth to the words, whether he draws upon judicial tradition and precedent, whether he resorts to a process of didactic interpretation that gives logical meaning to words apart from their setting in time and place, whether he measures the results of his interpretation by the interests at stake and his conception of the kind of politico-socio-economic order that should function within the structure of the constitutional system, he is in any event determining the meaning of words in a situation where meaning is not automatically decipherable. A host of considerations may converge upon and condition his thinking but in the end choose and decide he must.164

163 See, for example, Matthews, supra note 1, at 515. Also see pp. 33-34, 506, 520-526.
Certainly if there was ever a case of words not being “automatically decipherable” it is that of the uniformity clauses. The courts could not refuse to decide, for the purpose of courts is to settle disputes. There are no gaps in the law. Thus, the courts were saddled with interpreting and applying clauses conceived at a time when the nation’s economy, and consequently its revenue structure, was relatively simple. Property was essentially tangible property. Intangible wealth had not yet become so important. The general property tax was easily distinguished from other revenue producers of the times. However, as the economy grew more complex, as demands for state services increased, attempts to reach all the wealth of society in order to spread fairly the tax burden taxed the ingenuity of the tax-makers, and taxes no longer in fact fell into the simple property-nonproperty division. Yet, in determining the validity of new experiments in taxes, the courts had to continue to apply the constitutional limitations conceived for a different economy. It is not really too surprising that the property-nonproperty test was retained, although it should be evident that the test was inadequate and became in point of fact a legal facade for a rehash of fiscal policy arguments. At this point the writer is reminded of an aphorism made in another context, but apropos to the present discussion.

There is an old Chinese proverb which runs something like this: “One should always have in the background of one’s mind a multiplicity of definitions covering the subject at hand, in order to prevent oneself from accepting the most obvious.” And Cardozo said: “If the result of a definition is to make . . . [facts] seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer the realities.”

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But, appealing as a project of redefinition might be,\textsuperscript{168} this writer is convinced that a “new” formulation of a “test” or even of the “function” of these uniformity clauses would truly be to “plow in the sea.”

Consequently, one must work with the property-nonproperty tax dichotomy. And, in point of fact, one is not completely at a loss for a test which will give a modicum of service. It is suggested that the “weight of authority”\textsuperscript{167} supports a test related to the standard used throughout the present monograph. Herein a tax has been characterized by the object of the tax, that is, the thing taxed. A majority of the courts considering the validity of an income tax under the uniformity limitation (and this majority has been established by the more recent decisions) have characterized the income tax as a nonproperty tax. Whatever its precise nature might be in relation to all those various kinds of taxes which are not property taxes, it was held not to be a tax upon property. It would seem that all of these courts can find support in the following proposed test. Society organizes itself in the form of a government in order to promote the common good and to contribute benefits and protection to the citizens.

\textsuperscript{168} Such a “new” approach, with a “fresh” outlook was the purpose of Matthews, \textit{supra} note 1. See pp. 520-526 for his conclusions. However, persuasive as it might be, the problem remains, will such a “different” approach be accepted and used?

\textsuperscript{167} Cf. Patterson, \textit{Jurisprudence: Men and Ideas of the Law} 308 (1953): [T]he “weight of authority”, a favorite device of textwriters and law teachers, is some indication that in states having no decision of the question the “majority rule” will be adopted, more likely than not. This inference is based on the belief that the other courts will consider the need for uniformity or that they will respect the opinions of able and learned men charged with official responsibility to determine the law. Yet the “weight-of-authority” inference has a low degree of probability unless supported by qualitative factors, such as the oldness or recency of the cases, the prestige of the courts that rendered them, and the like. The inference from weight of authority is not of the statistical type.
However, this organization costs money. Civilization is expensive. Therefore, those who are privileged to receive the benefits and protections of the organized arm of society should have to support that arm. The privilege of receiving the benefits and protections of government is then a rational "thing" to be taxed, the object of a tax to produce the needed revenue. Net income is selected as the base of that tax simply because net income is pragmatically related to the object of the tax, which is the privilege of receiving the benefits and protections of organized society. Not all, if any, of the court decisions characterizing an income tax as a nonproperty tax have spelled out the test in the above manner. However, it is suggested that all may be conveniently fitted within it.

Unfortunately, however, the suggested test is no panacea because there is a question-begging aspect to it. Just how is one to determine whether the object of the tax is "really" the privilege, income itself, or even the property from which income is derived? Some of the minority courts have refused to accept a legislative recital that the purpose of the tax was to reach a privilege, with income simply being the base. For example, recall the history of the ill-fated Washington income taxes. There seems to be no way around this impasse; that is, no way insofar as the constitutional legal issue is concerned, because the controversy over the nature of the income tax, it must be remembered, simply reflects the economic arguments. Thus, in the final analysis, the best solution for dealing with the income tax problem is by spelling out in the constitution itself the extent to which an income tax will be permissible. In this way the pros and cons on the fiscal wisdom of the income tax as a revenue measure will be the determinants, and those arguments can be pressed and met openly, not under a facade of a legal issue. Thus, if it is thought that no income tax of any form is desirable, then do as Florida did and spell out in the constitution the gen-
eral prohibition. On the other hand, if an income tax is thought desirable, then the legislative power to impose such a tax should be expressly granted in the constitution, in general terms, of course. However, the Massachusetts experience indicates that the issue of graduated rates should also be dealt with expressly. If policywise the income tax should be limited to proportional rates, then it should be so stated. On the other hand, if graduated rates are considered desirable, then the income tax provision should indicate that the tax, if imposed, may have progressively graduated rates. The experience of the substantial number of states which have dealt with the problem by constitutional provision indicates that this is the most desirable course of action. However, the writer recognizes the difficulty in many states in getting any sort of constitutional revision because of amendment requirements which are too rigid. Thus, it may be that the express constitutional provision, while the desirable solution, is not a practical one at the present time. If that is the case, and the problem has not already been solved by judicial precedent, then one simply must work with the property-nonproperty tax dichotomy. In such a case there is the suggested test to fall back upon.

168 See, for example, the Illinois proposed amendment, discussed in Cushman, "The Proposed Revision of Art. IX of the Illinois Constitution," 1952 Univ. of Ill. L.F. 226, at 243. The proposal was defeated in the 1952 elections. However, the amendment will be submitted again in the fall of 1956. Ill. Regular Session, Senate Joint Resolution No. 16, Adopted June 24, 1955.

169 On the difficult problems concerning the progressively graduated rate, see Blum and Kalven, "The Uneasy Case for Progressive Taxation," 19 Chi. L. Rev. 417 (1952).

170 See, for example, the experience in Tennessee, described by Trehwitt, H. L., "Tennessee Amends Her Constitution," State Government 119 (June 1954).