ARTICLE VIII

TAXATION AND REVENUE

Introductory Comment

Much of the constitutional confusion in the 1876 document and its many amendments is attributable to the original severe limitations on the raising and spending of money and the multitude of exceptions to the limitations added over the years. It was noted in 1957:

> Slightly less than one-third of the total number of sections in the present constitution are partially or wholly concerned with some aspect of governmental finance, and out of this number no less than forty-eight relate specifically to the subject of revenue and taxation. (Anderson, "Constitutional Aspects of Revenue and Taxation in Texas," 35 *Texas L. Rev.* 1011 (1957).)

In a well-ordered and well-controlled constitution, a section-by-section analysis is sufficient; when things get as confused as is now the case with revenue and taxation, an overview is essential.

History of the problem. Prior to 1875, the several constitutions had had either one or two short provisions on taxation. (See *History* of Sec. 1 of this article.) There had also been a few provisions on spending but they were not particularly restrictive. The 1875 Convention came about because of the corruption and excesses of the Reconstruction government and the almost nationwide corruption associated with "internal improvements," which in Texas meant railroads. Corruption and excesses principally affected the general public in their pocketbooks by way of high taxes. Hence, the delegates to the convention were resolved to prevent corruption, to curtail spending, and to cut taxes. One might assume that the delegates would realize that curtailing the power to raise money by taxation and borrowing would automatically curtail spending. But feelings were running so high that the delegates hit out at both.

Preoccupation with parsimony is illustrated by the absence of a verbatim record of the convention debates. Solely because of a desire to save money, the delegates refusal to hire stenographers to record the debates. (*Journal,* p. 128.) Equally illustrative is the recurring battle over the proper level of compensation for executive and judicial officers. (See *Debates,* pp. 152-55, 162-66, 424-31.)

Frugality was the principle which guided the Committee on Revenue and Taxation. The committee's report of a proposed article began:

> Your committee, to whom has been entrusted the consideration of the question of revenue and taxation, in the correct solution of which are involved the necessity of immediate relief to the over-burdened tax-payers of the State, and at the same time the antagonistic requirements for increase of revenue and avoidance of further sale of State responsibilities, have endeavored to define a system of taxation based upon consideration of natural rights and upon correct principles of political economy, limiting the assessment and expenditure strictly to legitimate objects of government and to so guard the definement as to prevent future variance and abuses. (*Journal,* pp. 378-79.)

The original proposal was soon replaced by a much shorter article proposed by a dissenting member of the committee. (*Id.,* at 422 and 455.) This substitute was in turn extensively amended.

The flavor of the original proposal can be demonstrated by one proposed section:

> Sec. 4. The legislative power to tax shall extend only to the levying of such an amount as shall suffice to pay the necessary expenses of the government of the State, the support of its asylums for the unfortunate; provision for the ordinary expenses of the courts

(including cost of libraries) and the payment of their officers; the public defence; the maintenance of the peace; the arrest of criminals; the survey of the public lands or geological survey of any portion of the State; the maintenance of the public schools; the enforcement of the laws; the payment of the floating or unfunded debt; the maintenance of quarantine regulations; and to the payments of the principal and interest of the bonded public debt, and shall not extend to any system of public improvements, except the erection of necessary public buildings, and the improvement and ornamentation of the grounds attached thereto; and any proposition to appropriate public money for any purpose deemed of public benefit, and not herein stated, including the erection of any public building whose cost shall exceed a half million dollars, shall be referred by action of the Legislature to the people at a general election, and two-thirds of the popular vote approving, may be authorized by subsequent approval of a majority of the Legislature, for a levy not exceeding in amount two per cent of the property in the State returned for taxation. (*Id.*, at 379-80.)

When the convention finished, the constitution contained a great many restrictions on the expenditure of money, only one of which, Section 6, remained in Article VIII. (The first part of the section just quoted ended up somewhat revised as Sec. 48 of Art. III, repealed in 1969.)

The delegates' concern over taxation was concentrated on the property tax since it was the principal source of revenue. During Reconstruction the property tax soared. For example, the state rate in 1865 was 12½¢ on the $100; by 1871 it had risen to 50¢. In that year the combined state and county property taxes came to $2.17½. This, it is estimated, was the equivalent of an income tax of 21 percent. (See Miller, p. 167.) In addition, there was a state and county poll tax, occupation taxes, and city property taxes. "Conventions of taxpayers were held in a number of counties, and as a culminating protest a convention of the taxpayers of the state was held in Austin on September 22, 23, and 25, 1871, with two hundred and seventeen delegates present representing ninety-four counties." (*Ibid.*)

The significance of all this is that the delegates in 1875 concentrated on the property tax. The original Constitution of 1876 literally had only one limit on the size of any other tax—occupation taxes levied by local governments could not exceed one-half the state tax. Section 9, however, prescribed the maximum property tax that could be levied by county, state, or city. The only exceptions to prescribed maximum rates were for payment of preexisting debt, for public works in Gulf Coast counties (Sec. 7, Art. XI), for schools in cities and towns (Sec. 10, Art. XI, repealed in 1969), and for cities of over 10,000 population (Sec. 5, Art. XI). This last exception had its own maximum rate, however.

The importance of the original rigidity of Section 9 cannot be overstated. The many constitutional amendments authorizing the creation of special districts were necessary only in order to permit additional taxes to be levied upon property. Many other constitutional amendments were either wholly or partially necessary because of the property tax restrictions. Section 9, of course, has been amended six times.

Even in 1876 not all provisions concerning taxation were in Article VIII. Since then, tax provisions have been inserted helter-skelter throughout the constitution. (A table of current tax provisions is provided at the end of this *Introductory Comment.*)

The current confusion is best illustrated by the peregrinations of the Confederate pension state property tax. It first appeared—5¢ on the $100—in Section 51 of Article III by amendment in 1912. In 1924, the rate went from 5¢ to 7¢. In 1947, Section 17 of Article VII was added. It "amended" Section 51 by substituting a 2¢ rate for the 7¢ rate. (Sec. 17 also created a new tax—5¢ on the $100—for the creation of a special fund for certain designated colleges and universities.) Thus, a tax that never should have been in the legislative article was transferred to the education

article where it did not belong either. (The "tax" was transferred; the old words remained in Sec. 51 until 1968.)

Things really began getting complicated in 1954 when Section 51-b was added to Article III. It created another special fund and moved the 2¢ tax thus:

> (d) The State ad valorem tax on property of Two (2¢) Cents on the One Hundred ($100.00) Dollars valuation now levied under Section 51 of Article III of the Constitution as amended by Section 17, of Article VII (adopted in 1947) is hereby specifically levied for the purposes of continuing the payment of Confederate pensions as provided under Article III, Section 51, and for the establishment and continued maintenance of the State Building Fund hereby created.

Although the foregoing provision carefully but inaccurately describes the peregrinations of the 2¢ levy, people soon forgot that they had moved the tax back to Article III. In 1958, Section 66 was added to Article XVI. It provided for payment of pensions to certain Texas Rangers or their widows but "only from the special fund created by Section 17, Article VII."

With the adoption of Section 1-e in 1968, the peripatetic confederate pension tax finally found a resting place in the article on taxation. Even so, people still forgot where the tax provision actually was. Section 1-e of Article VIII states:

> The State ad valorem tax of Two Cents ($.02) on the One Hundred Dollars valuation levied by Article VII, Section 17, of this Constitution shall not be levied after December 31, 1976.

Even in 1875, the convention delegates were not watching each other's left and right hands carefully. Section 1 states that the legislature may impose a poll tax; the original Section 3 of Article VII directly levied a poll tax of one dollar. The original Section 2 of Article VIII granted the legislature power to exempt from taxation "public property used for public purpose"; Section 9 of Article XI directly exempts from taxation such public property of counties, cities, and towns.

Basic constitutional principles of taxation. In a state constitution there is no need to mention any power to tax; the legislature has all the taxing power anybody can dream up. It follows that any affirmative statements about the power to tax are redundant. This is so even if the purpose is to introduce a limitation. It is not necessary, for example, to say that occupation taxes may be imposed as a hook upon which to hang a prohibition against taxing agricultural and mechanical pursuits; it is sufficient to provide that no occupation tax may be imposed on mechanical and agricultural pursuits. ("Mechanics and farmers" would be less ambiguous, of course, but that is another matter.)

Keeping power and limitations on power straight can get complicated. For example, the straightforward proposition "All property shall be taxed in proportion to its value" is not a grant of power to tax. (If it is a command to tax property, it is no more effective than any other affirmative command to the legislature.) The proposition is both a limitation on the power of the legislature to exempt property from any taxation and on either the power to set different rates for different kinds of property or to tax property by any method other than ad valorem. (See *Explanation* of Sec. 1 concerning this ambiguity.) It follows that a grant of power to exempt property from taxation is an exception to the limitation rather than a true grant of power.

Thrust of the Texas limitations. A glance at the table at the end of this *Introductory Comment* reveals that most of the restrictions, limitations, exemptions, and exceptions involve ad valorem property taxes. The state is free to levy and

to authorize local governments to levy any and all other taxes with only two exceptions: there can be no occupation tax on "persons engaged in mechanical and agricultural pursuits"; and local governments may only piggy-back on a state occupation tax and then only to the extent of one-half of the state tax rate. Likewise, there are almost no limitations on the power of the legislature to grant exemptions or make other kinds of classification for nonproperty taxes. The only specific limitation is that the legislature may not exempt anyone from the mandated $1 poll tax. There is, of course, a general limitation that taxes must be equal and uniform, but outside the property field this has been interpreted to mean no more than that taxes must meet the basic limitations of equal protection and due process.

A *look to the future.* It may seen paradoxical but it is relatively easy to clean up the constitutional tax mess. The first step would be to eliminate any mandatory taxes levied directly by the constitution. This would require dropping the poll tax levied by Section 3 of Article VII and the mandatory state property tax levied by Section 17 of the same article. That would permit complete flexibility in determining tax policy on the state level. The second step would be to eliminate the requirement that "[a]ll property in this State, . . . shall be taxed in proportion to its value, . . ." This would provide the legislature with the necessary flexibility to decide whether to tax intangible personal property, tangible personal property, or only real property and whether to classify any one of these kinds of property for different treatment. The third step would be to decide whether the rigidity of "all" property should be put back in to restrict the legislature's power to grant exemptions. (In thinking about this decision it is worth remembering that 13 proposed amendments have involved exemptions, eight of them since 1964.) The fourth step would be to decide whether to put absolute tax limitations on local government in the constitution—that is, to require all the people of the state to make decisions about taxing power or to put the power to set limits in the hands of the people's representatives, the legislature. Once made, the appropriate property tax decisions could be embodied in a couple of relatively simple sections. With that, the tax confusion would evaporate, for all other tax power is relatively unfettered.

TAX PROVISIONS OF THE TEXAS CONSTITUTION

Article	Section	Provision
		General
Article VIII	– Section 1	General "grant" and general limitation.
	– Section 3	Taxes for public purposes only.
		State Property Taxes
Article VII	– Section 17	10¢ on the $100.
Article VIII	– Section 1-a	Continuation of state tax donated to local units.
	– Section 1-e	Phased discontinuance of all except the 10¢ on $100 of Section 17.
		Other State Taxes
Article VII	– Section 3	Poll tax.
		Local Property Taxes
Article VIII	– Section 48-d	Rural fire districts.
	– Section 52	Water and road districts.
	– Section 52D	Road tax for Harris County.
	– Section 52e(1967)	Road tax for Dallas County.
Article VII	– Section 3	School district taxes.
	– Section 6a	Local taxation of county school lands.
	– Section 16(1930)	County taxation of state university lands.
Article VIII	– Section 1-a	County tax for farm-to-market roads and flood control.
	– Section 8	Allocation of railroad rolling stock for assessment purposes.
	– Section 9	County tax rate limit.
Article VIII	– Section 18	Equalization of assessment.
Article IX	– Section 4	Hospital district tax for certain counties.

Article IX	– Section 5	Hospital district tax for certain counties and Amarillo.
	– Section 7	Hospital district tax for Hidalgo County.
	– Section 8	Hospital district tax for a precinct of Comanche County.
	– Section 9	Hospital district taxes in general.
	– Section 11	Hospital district taxes for certain counties.
	– Section 12	Airport authority taxes.
Article XI	– Section 4	Tax limit on general law cities and towns.
	– Section 5	Tax limit on home-rule cities.
	– Section 7	Additional taxing power for coastal counties and cities for protection from the sea.
Article XVI	– Section 59	Conservation districts.
		Other Local Taxes
Article VIII	– Section 1	Local occupation tax limited to one-half state tax.
		Exemptions
Article VIII	– Section 1	Household furniture.
	– Section 1-a	Homestead.
	– Section 1-b	Homestead.
	– Section 2	Charitable and educational property; disabled veterans' property.
	– Section 19	Farm products and supplies.
Article XI	– Section 9	Public property.
		Other Limitations
Article III	– Section 55	Taxes forgiven only if ten or more years delinquent.
Article VIII	– Section 1-d	Agricultural property not to be assessed as if nonagricultural.
	– Section 10	Release of taxes in case of public calamity.
	– Section 13	Right of redemption.
	– Section 20	No assessment above fair market value.
		Miscellaneous
Article VII	– Section 3-b	Changing school district boundaries.
Article VIII	– Section 11	Where to pay property tax.

NOTE: Not included are sections that are

obsolete –	Article III, Section 51-b
	Article VIII, Section 1-c
	Article XI, Section 6
administrative –	Article VIII, Section 14
	Article VIII, Section 16
	Article VIII, Section 16a
redundant –	Article VIII, Section 4
	Article VIII, Section 5
	Article VIII, Section 15

Sec. 1. EQUALITY AND UNIFORMITY; TAX IN PROPORTION TO VALUE; POLL TAX; OCCUPATION TAXES; INCOME TAX; EXEMPTION OF HOUSEHOLD FURNITURE. Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The Legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; Provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this State shall be exempt from taxation, and provided further that the occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or

business, shall not exceed one half of the tax levied by the State for the same period on such profession or business.

History

The Constitution of the Republic provided that congress "shall have the power to levy and collect taxes and imposts, excise and tonnage duties; . . ." (Art. II, Sec. 1.) This was, of course, a grant of power, the result of using the United States Constitution as a model. (See *Citizen's Guide,* p. 11.)

The Constitution of 1845 had only two sections dealing with taxation. (Article VII, Secs. 27 and 28.) Combined, the sections were close to Section 1 of the present constitution. The only differences of substance were that the household belongings exemption was permissive, not mandatory; the legislature by two-thirds vote could exempt any other property; and there was no proviso concerning local occupation taxes. There were other differences that appear substantive but really were not. There was no mention of a poll tax, for example, but under normal rules of constitutional power, the legislature could have imposed one. The sections remained unchanged in the 1861 and 1866 Constitutions. The 1869 Constitution dropped the household belongings exemption, but made no other change. (Art. XII, Sec. 19.) This meant only that a two-thirds vote would be required to grant that exemption.

From McKay's *Debates* it is possible to reconstruct reasonably accurately the key issues in the 1875 Convention. There was clearly a strong feeling against exemptions previously granted by the legislature. For example, delegates were particularly concerned that "the property of a powerful railroad corporation had been exempted for twenty-five years." (*Debates,* p. 296.) There was also considerable debate over whether to permit occupations to be taxed. Although some delegates evidently realized that an affirmative statement of taxing power was not necessary, the nature of the debate obviously led any proponent of a power to insist upon inserting it. This was particularly significant in the case of occupation taxes, for the original report of the Committee on Revenue and Taxation proposed that occupation taxes should "be laid only to discourage pursuits immoral in their tendency or not strictly useful, or as a discrimination against itinerant traders." (*Journal,* p. 379.)

Section 1 was put into final form by a series of floor amendments on October 30. As the debate began, Section 1 read:

> Taxation shall be equal and uniform throughout the State, and all property in the State shall be taxed in proportion to its value, to be ascertained as may be provided by law. Provided, there shall be exempt from taxation household and kitchen furniture to the value of two hundred and fifty dollars. The Legislature shall have power to impose *ad valorem* and poll taxes, and also occupation or income taxes, except on agricultural or mechanical pursuits. The Legislature may also, in its discretion, provide for levying a tax on the gross earnings and franchises, or either, of all corporations, or of any class of corporations.

The first amendment on October 30 added the words "belonging to each family in this" to the household exemption. (See *Journal,* p. 524. Omission of "State" is obviously a typographical error.) An amendment was then offered striking the two sentences following the exemption. A substitute section was offered as an amendment to the amendment to strike. This substitute section also struck the same two sentences but substituted a sentence authorizing "occupation and income taxes," prohibiting "any tax upon occupations or pursuits" levied by political subdivisions, but permitting the legislature to return to counties any portion of or all "such occupation or income tax." The convention adjourned for lunch.

Upon reconvening the substitute was withdrawn by the proposer. Mr. Stockdale, Chairman of the Committee on Private Corporations, then offered a new substitute Section 1. This was Section 1 as it now stands except for the occupation tax piggy-back proviso at the end of the section. Mr. Stockdale's substitution was adopted without a roll-call vote. The piggy-back proviso was then offered and adopted. (See *Journal,* pp. 525-26.)

The convention then turned to Section 2. At that moment Section 2 began "All taxes" and continued as it now reads to the second semicolon. The first amendment proposed would have stricken everything through the word "but." Mr. Stockdale proposed to insert the word "occupation" in front of "taxes." The proposal to strike was withdrawn and Mr. Stockdale's amendment was adopted. This explains how—but not why—a reference to occupation taxes ended up in Section 2. (There is a further discussion of Mr. Stockdale's amendments in the *Explanation* below.) There is no explanation for putting the household exemption in Section 1. Indeed, the *Journal* is garbled on this point. On an earlier occasion, Section 2 was offered on the floor but the *Journal* does not show any action taken. Immediately following the entry is a proposal to "amend the amendment" by including the household exemption. This was adopted. (See pp. 467-68.) Thus, it is unclear whether the household exemption was to go into Section 1 or Section 2. What is clear is that on October 30, when the two sections were put into final form, the exemption was in Section 1.

There have been two proposed direct amendments of Section 1. The first defeated in 1927, took the form of an additional section:

> Section 1-a. The Legislature may separate the objects of taxation for State purposes from the objects of taxation for the support of the counties, districts and political subdivisions of the State and counties; and may provide for the levy of an ad valorem tax, or other form of tax, on certain classes of taxable property, or other objects, for State purposes only (including school purposes); or upon certain classes of property, or other objects, for county or local purposes only (including school purposes). In no event shall the rate of such taxes exceed the sum of the limits of such taxes fixed by this Constitution for State, county and other local purposes. The Legislature may provide for the classification of objects of taxation. Taxation shall be equal and uniform.

The foregoing is set out in full because of the difficulty of explaining it, assuming one can figure out what it means. Certainly the voters must have been confused, for the ballot in 1927 described the section as one "providing for changing the taxation system so that the State may derive its income, in whole or in part, from other sources than the ad valorem tax." (H.J.R. 25, Laws, 40th Legislature, 1927, p. 473.) The vote was 16,739 for and 175,484 against. (This was a special election on August 1, 1927. The three other amendments on the ballot also went down to defeat. They received more favorable votes than Sec. 1-a, but none more than 28,000 for. See Marburger, p. 28.)

The second unsuccessful effort was an amendment defeated in 1934. This amendment made two changes in Section 1. The first sentence was altered to read: "Taxation of real property shall be equal and uniform." A new sentence was added between the second and third sentences, reading: "The Legislature may by general laws make reasonable classifications of all property other than real property for the purpose of taxation, and may impose different rates thereon; provided that the taxation of all property in any class shall be equal and uniform."

Again, the voters must have been confused, for this time the legislature went to the other extreme and specified that the ballot should contain "For" and "Against" statements reading:

For [Against] the Amendment to the Constitution of the State of Texas providing that taxation of real property shall be equal and uniform; and that all property in this State, other than that owned by municipal corporations, shall be taxed in proportion to its value as ascertained as may be provided by law; and providing that the Legislature may make reasonable classifications of all property, other than real property, for the purpose of taxation; and that the taxation of all property in any class shall be equal and uniform; and providing further that the Legislature may impose poll tax and occupation tax and income tax and exempting from occupation tax persons engaged in mechanical and agricultural pursuits; and exempting from taxation Two Hundred and Fifty ($250.00) Dollars worth of household and kitchen furniture belonging to each family; and providing that the occupation tax levied by any county, city or town shall not exceed one-half that levied by the State for the same period. (S.J.R. 16, Laws, 43rd Legislature, 1933, p. 991.)

The vote, this time at the regular election, was 106,034 in favor, 245,031 against. (Seven other amendments were voted on at the same time. All were defeated, four by wider margins than the Sec. 1 proposal. (See Marburger, pp. 29-30.) The amendment most decisively defeated is discussed under the *History* of Sec. 3 of this article.)

There have been several indirect amendments of Section 1. The first was Section 19, added in 1879. Section 1-d, added in 1966, is another. Section 2 is an exception to the requirement that all property must be taxed. It follows that all direct and indirect amendments of that section are indirect amendments of Section 1. There was also an unsuccessful attempt at an indirect amendment of Section 1. In 1968 the voters rejected a proposal to add a Section 1-j. It would have permitted the legislature to authorize a refund of the excise tax paid on "cigars and tobacco products" if they ended up being sold at retail in Texarkana or contiguous incorporated cities and towns. (One wonders whether the drafter of this amendment was a cigar smoker who thought cigars deserved special mention. It is hard to believe that he thought that cigars are not tobacco products.)

Explanation

In general. Section 1 should be viewed only as a limitation on the power to tax. Thus, there is no need to discuss any affirmative grant of taxing power unless the grant contains within it words of limitation. For example, Section 1 states that the legislature may impose a tax on incomes. This is an unnecessary grant of power. But a question can be raised whether the words "of both natural persons and corporations" are words of limitation in the sense that if an income tax is imposed it must be imposed on both individuals and corporations. Since Texas has not enacted an income tax, there is no judicial interpretation of the grant.

In the light of the generally sloppy drafting by the 1875 delegates it seems fair to conclude that no limitation was intended. A reading of the *Journal* of the convention reveals that there were two ideas floating around. One was to continue the power to tax incomes and occupations. (Beginning with the 1845 Constitution income taxes and occupation taxes have always gone together.) The other was to tax the incomes and franchises of corporations. Mr. Stockdale, who offered the floor amendment that became all of Section 1 (except for the final piggy-back proviso), would appear to have been trying to bring together the two ideas. (See *Journal*, pp. 380, 465, 489, 525.) It is also worth noting that his floor amendment created two sentences, the first limited to occupation taxes, the second covering income taxes but ending with the traditional "mechanical and agricultural pursuits" exception from an occupation tax. (The 1845 section was one sentence, but the order was: income, occupation, exception.) In both sentences natural persons and corporations are stated to be

subject to a tax. This leads one to guess that Mr. Stockdale was interested in being sure that corporations were covered rather than in being sure that any tax would apply to both. This is supported by the wording of the piggy-back exception, which was added immediately after adoption of the proposal. The exception speaks of an occupation tax on "persons or corporations." And immediately following that addition, as set out in the *History* of this section, Mr. Stockdale stopped a deletion of the first "sentence" of Section 2 by proposing the insertion of the word "occupation" in front of "taxes." Mr. Stockdale, in preserving the power of classification of at least occupation taxes, surely did not intend to prohibit classification of individuals and corporations for purposes of income taxes. (It must be conceded that, absent verbatim debates, delegates' intentions are not easily discerned.)

There is nothing further to say about income taxes. Poll taxes are discussed in the *Explanation* of Section 3 of Article VII. The household goods exemption is discussed with the other exemptions of Section 2. The first "sentence" of Section 2 is discussed below in conjunction with other aspects of occupation taxes. By virtue of the principle that the power to tax is unlimited, to say nothing of Section 17 of this article, it follows that except for the first sentence of Section 1 there are no limitations on imposing a tax not mentioned in the constitution. (As noted in the following discussion of occupation taxes, this has not always been the conventional wisdom in Texas.)

Equality and uniformity. There are several puzzling problems with the first sentence of Section 1. The first problem is that the opening words of Section 2 include "equal and uniform" in a context that requires equality and uniformity only within a class. From this one could argue that "equal and uniform" in Section 1 does not permit classifications for purposes of levying any other tax.

The second puzzling problem is the meaning of the first sentence in relation to the second sentence. There is reason to believe that the second sentence means that property is to be taxed only *ad valorem*. These words first appeared in the 1845 Constitution. Under the Republic there had been a mix of ad valorem taxes and specific taxes on certain property—for example, $1 a head on cattle. (See Miller, pp. 36-39.) But if this is the only meaning of the second sentence, then some other constitutional provision has to be relied upon to prohibit taxing intangible property at a different rate from tangible property or to prohibit taxing residential real property at a different rate from the rate on farm land. But if it is the first sentence that serves this purpose, then "equal and uniform" prohibits classification of any objects of taxation except occupations.

The third puzzling problem is determining how all this logic turns out not to be the law. As will be seen, the law is that "equal and uniform" does not prohibit reasonable classifications in the case of any tax except the property tax; as for property, the law is that all property must be taxed at the same ad valorem rate. One possible explanation is that the drafters of the original "equal and uniform" sentence meant it to apply only to property taxes. Under the Republic there were different ad valorem rates for different kinds of property—for example, "The act of 1842, however, levied a rate of 1/10 of 1% on land owned by residents, 1/5 of 1% on that owned by nonresidents, 1/4 of 1% on town lots and improvements and money loaned at interest, and 1/2 of 1% on pleasure carriages." (See Miller, p. 38.) Thus, it may be that everybody from 1845 to 1875 knew what these two sentences meant—namely, all property is to be taxed only ad valorem and only at a uniform rate.

This is the law as derived from the cases. Unfortunately, the courts usually do not spell out exactly how they reached this result. In most instances involving attacks on discriminatory or unequal property assessments, the courts simply state the applicable constitutional rule by quoting or paraphrasing both sentences. (See, for

example, *State v. Federal Land Bank of Houston,* 160 Tex. 282, 329 S.W.2d 847 (1959); *Whelan v. State,* 155 Tex. 14, 282 S.W.2d 378 (1955); *State v. Whittenburg,* 153 Tex. 205, 265 S.W.2d 569 (1954).) On other occasions the courts speak of equality and uniformity in the words of the *Lively* case discussed below. (See, for example, *Aycock v. Travis County,* 255 S.W.2d 910 (Tex. Civ. App.—Austin 1953, *writ ref'd); Weatherly Independent School Dist. v. Hughes,* 41 S.W.2d 445 (Tex. Civ. App.—Amarillo 1931, *no writ*).) Only rarely does the court talk only of equality and uniformity. (See, for example, *City of Arlington v. Cannon,* 153 Tex. 566, 271 S.W. 2d 414 (1954).)

The case in which the supreme court came closest to spelling out the constitutional rule on property taxes is *Lively v. Missouri, K. & T. Ry.* (102 Tex. 545, 120 S.W. 852 (1909)). At issue was the action of Dallas County in levying its county tax on the basis of the full value of railroad intangible property as prorated by the state tax board rather than on the basis of the assessment ratio used for all other property in the county. In preparation for striking down the county action, the court quoted only the second sentence of Section 1 and continued:

> The rule announced by that provision is "equality and uniformity." To secure this "uniform and equal" taxation, the same sentence prescribes that the property of all persons and corporations, other than municipal, "shall be taxed in proportion to its value, which shall be ascertained as may be provided by law." This is a clearly expressed purpose, that the officers charged with the assessment of property shall in the manner prescribed by law ascertain its value. "The value of the property is to be determined by what it can be bought and sold for." . . . If it means full market value when applied to the intangible assets of a railroad company, it means the same thing when applied to land, horses, etc. The standard of uniformity prescribed by the Constitution being the value of the property, taxation cannot be in the same proportion to the value of the property, unless the value of all property is ascertained by the same standard. (102 Tex., at 558; 120 S.W., at 856.)

One important point about this statement is that the court did not quote the first sentence of Section 1. Instead the court seemed to be saying that whatever "taxation shall be equal and uniform" might mean in general, there is no need to consider the meaning in the case of property taxes; the second sentence states a rigid and specific rule of uniformity. That is, the second sentence is a definition of uniformity in the case of property taxes. It may be, of course, that the author of the *Lively* opinion had the first sentence in the back of his mind while he was writing the opinion. Nevertheless, he said that the second sentence by itself requires uniformity in property taxation. In any event, the rule of the *Lively* case is the law whether one gets there by way of the first sentence of Section 1, by way of the second sentence, or by a combination of the two.

Because Section 2 grants a power to classify occupation taxes, cases not involving either property or occupation taxes should offer clues to the meaning of "equal and uniform" in Section 1. One of the earliest cases involved the poll tax. In *Solon v. State* (54 Tex. Crim. 261, 114 S.W. 349 (1908)), the court of criminal appeals addressed itself to the question of whether Section 1 prohibited exempting certain people from paying a poll tax. The court quoted the classification power in Section 2 and then said:

> There is no such provision in respect to the poll tax, unless it can be found in the first sentence of section 1, art. 8, to the effect that "Taxation shall be equal and uniform." Occupation taxes are levied on the business conducted, and not upon the person, or with reference to the person engaged in it . . . . In all the cases in this State, in respect to occupation taxes, it has been uniformly held, both by this Court and by our Supreme

> Court, that not only the right, but the duty, of reasonable classification inheres in the Legislature . . . .
>
> Applying this rule to the matter of poll taxes . . .,the Legislature, under the limitations of our Constitution, is authorized to classify these subjects of taxation. (54 Tex. Crim., at 285; 114 S.W., at 359.)

The significance of the court's opinion is emphasized by the dissenting opinion. The dissenting judge did not dispute the argument that the first sentence of Section 1 permits classification. He argued that for poll tax purposes, there is only one class. (Tex. Crim., at 290; S.W., at 362.)

The classifications in the inheritance tax law were attacked as a violation of the equal and uniform requirement of Section 1. In *State v. Hogg,* the attack was turned aside in short order: ". . . the almost universal rule is that inheritance taxes such as are levied by our statutes are held to be privilege taxes, and not property taxes." (123 Tex. 568, 579, 72 S.W.2d 593, 594 (1934).) In its way, this supports the suggestion made earlier that perhaps the 1845 drafters meant the equal and uniform requirement of Section 1 to apply only to property taxes. A later case cited *Hogg* as authority for the constitutionality of the inheritance tax law but prefaced the citation with the statement: "It is long since settled, however, that this provision does not prevent the making of reasonable classifications of persons and property for purposes of taxation; . . ." (See *San Jacinto Nat'l Bank v. Sheppard,* 125 S.W.2d 715, 716 (Tex. Civ. App.—Austin 1939, *no writ*).)

Strange as it might seem at first blush, franchise taxes are not occupation taxes; they are privilege taxes on the privilege of doing business as a corporation. (See further discussion below.) In *Grayson County State Bank v. Calvert,* the court of civil appeals dealt with a claim of unconstitutional classification arising from the levy of a franchise tax on a state bank while a competing national bank was not so taxed. This particular situation is a little bit indirect. National banks can be taxed only in the manner specified by congress; it has authorized several types of state taxes on national banks, but a franchise tax is not one of them. The argument by the state bank was rejected:

> The equal protection clause of the Fourteenth Amendment of the United States Constitution and the equal and uniformity requirements of the Texas Constitution upon the taxing powers of the State are substantially similar. *Hurt v. Cooper* [discussed later under *Occupation Taxes*].
>
> The Constitution requires that tax legislation may classify persons and items for purposes of taxation and are [sic] satisfied when such legislation meets two tests: (1) is the classification of the tax reasonable? and (2) within the class, does the legislation operate equally?
>
> . . . National banks and State banks are not in the same class; both are banks with differences. (357 S.W.2d 160, 162 (Tex. Civ. App.—Austin 1962, *writ ref'd n.r.e.*).)

In summary, all property must be taxed equally and uniformly in proportion to its value; all other taxation must be equal and uniform, but the legislature may classify the objects for taxation so long as the classification is reasonable, a requirement also imposed by Section 3 of Article I of the Texas Constitution and by the Fourteenth Amendment to the United States Constitution. It should be noted, however, that there is a reverse equal and uniform argument that can be made with respect to property taxation. This is the case where taxing all property in proportion to its value is alleged to result in inequality. Consider the early case of *Norris v. City of Waco* (57 Tex. 635 (1882)). The property owner argued that annexation of her farm by Waco had resulted in the imposition of city property taxes for which she received no reciprocal benefits. The court rebutted the argument by stating that "equal and uniform" literally meant that her property had to be taxed, benefits or

no; by pointing out that there were some benefits flowing from being in a city; and by hinting that property contiguous to a growing city increased in value, thus implying that inequality might result more from failure to annex than from annexation.

All property. The supreme irony is that the constitutional command to tax all property in proportion to its value is crystal clear and yet is flagrantly violated in an almost infinite variety of ways. The quotation from the *Lively* case set out earlier states the rule. It is clear that if there are no exceptions, there can be no argument. The supreme court enforced the rule in that case by holding that the railroad's allocated portion of its property had to be taxed by applying the same assessment ratio used for other property in the taxing jurisdiction.

Since *Lively* there have been myriad cases invoking the rule of rigid uniformity. No court has ever said that all property does not have to be taxed uniformly. The difficulty is that the courts have erected many procedural hurdles and barriers to enforcement of the rule. In a recent article on Texas property law, Professor Mark Yudof observed:

> Despite the many cases in which Texas courts have affirmed statutory and constitutional requirements relating to property taxation, taxpayers have no effective way of compelling assessors and boards of equalization to abide by the law. State courts have imposed a heavy burden of proof on taxpayers and have been niggardly in granting remedies sufficient to force compliance with the law. ("The Property Tax in Texas under State and Federal Law," 51 *Texas L. Rev.* 885, 900-01 (1973).)

In his article, Professor Yudof describes the many ways in which all property is *not* taxed in proportion to its value and the congeries of court rules that make it difficult to obtain obedience to the constitutional command. There is no need here to describe the actual situation. Any Texas reader and most other readers know that most intangible property is not taxed at all, that much tangible personal property is not taxed, and that what property is taxed is rarely, if ever, taxed uniformly in proportion to its value. Most readers may not be aware that the courts "have been niggardly in granting remedies sufficient to force compliance with the law." But since this problem is really not a constitutional matter, the details will not be set out here. Professor Yudof's review of the cases is recommended for those who are interested in the judicial intricacies. *The Texas Property Tax: Background for Revision,* a study prepared in 1973 for the Texas Advisory Commission on Intergovernmental Relations by the Texas Research League, is recommended for those who are interested in the realities of the property tax.

Occupation taxes. It was noted earlier that prior state constitutions covered income taxes and occupation taxes in the same sentence. In popular parlance there apparently was total confusion. Professor Miller, speaking of an extensive system of occupation taxes enacted in 1862 and 1863, says that the taxes "were popularly known as 'income' taxes." (Miller, p. 142.) He notes that in 1863 a gross receipts tax was imposed on those engaged in the sale of merchandise. "This was known as the 'merchandise tax.' " (*Ibid.*) The use of gross receipts as a measure was extended in 1864, "though it was yet so restricted as to make the tax an occupation tax rather than an income tax in the accepted sense of the term." (*Id.*, at 143.)

In 1936 the United States Supreme Court was faced with a problem under one of the Texas "occupation" taxes. The case involved the "occupation" tax on the production of oil. Prior to 1933, the tax was levied on the lessee-producer alone; under a 1933 act the lessor was required to pay his proportionate share of the tax. It was argued that the tax was arbitrary because the lessor was not in the business or occupation of producing oil.

The court noted that the "taxing act calls the tax an 'occupation tax' and a 'gross production tax,' " and that the Texas Court of Civil Appeals applied both of these designations as well as calling it a "tax levied on the business or occupation of producing oil." The United States Supreme Court observed that "when mere characterizations of the tax are put aside and attention is given to the substance of the [Texas] court's opinion in this and a companion case, . . . it unmistakably appears that the court regarded the tax as an excise laid on the production of oil, measured by the extent of the production, . . ." (See *Barwise v. Sheppard,* 299 U.S. 33, 36 (1936).)

The court disposed of the claim of arbitrariness because the land-owner/lessors were not in the oil business:

> Without question the State has the power to lay an excise on the production of oil. Here it is laid, admissibly we think, on those having a direct and beneficial interest in the oil produced and is apportioned between them according to their interests. The apportionment is reasonable, not arbitrary; and is as reasonable to the lessors as to the lessee. (p. 39.)

The United States Supreme Court's conclusion that a "rose by any other name would smell as sweet" is not necessarily available to the Texas courts. Since 1883, Section 3 of Article VII has dedicated one-fourth of the revenue derived from the "State occupation taxes" for the benefit of the public schools. It would be unconstitutional to levy an occupation tax and not deposit 25 percent of the receipts into the available school fund. It follows that it would be unconstitutional to levy an occupation tax, call it something else, and not put 25 percent of the receipts into the available school fund. This is one of the two constitutional issues that can arise if the legislature imposes a tax under any name other than "occupation." (The other issue concerns agricultural and mechanical pursuits. A different constitutional question can arise if the legislature attempts to levy an ad valorem property tax by any other name. Likewise, a different constitutional question arises under the local government piggy-back limitation. All these are discussed later.) There is no constitutional requirement that the legislature call something an "occupation" tax in order to send one-fourth of the receipts into the available school fund; the legislature can mandate the dedication no matter what it calls the tax. Indeed, the available school fund receives one-fourth of the motor vehicles sales and use tax and prior to repeal received the same share of the stock transfer tax, both in the attorney general's list of nonoccupational taxes set out below. (See Tex. Tax.-Gen. Ann. art. 24.01.) Likewise, there is no constitutional requirement that the legislature call something an "occupation" tax in order to activate the piggy-back limitation, for the legislature has full power to limit local taxing power except for certain local property taxes. (See Subs. (c) of Sec. 52, Sec. 52d, and Sec. 52c (1968), all in Art. III; and Sec. 9 of Art. VIII.) Indeed, the legislature has decreed that "no city, county or other political subdivision may levy an occupation tax levied by this Act unless specifically permitted to do so by the Legislature of the State of Texas." (Tex. Tax.-Gen. Ann. art. 1.09. "This Act" covers all taxes in Chapter 122A, which is "Taxation-General.").

There are no cases and only one attorney general's opinion that deal with this constitutional issue. In 1950 the legislature voted increases in a number of taxes and directed that all receipts from the increases go into a State Hospital Fund except those that had to go into the available school fund by virtue of Section 3 of Article VII. The comptroller of public accounts asked the attorney general to classify the taxes. The attorney general advised the comptroller:

> The following in our opinion are occupation taxes: Oil production, gas production, sulphur production, telephone gross receipts, gas, electric and water company gross receipts, carbon black production, cement distributors', motor carrier gross receipts, oil well servicing, insurance gross receipts, and chain store.
>
> The following in our opinion are not occupation taxes: Motor vehicle sales and use, liquor and wine sales, franchise, new radio, television sets, cosmetics and playing cards sales, stock transfer, and beer sales.

The attorney general followed this with a list of authorities upon which his opinion was based. (See Tex. Att'y Gen. Op. No. V-1027 (1950).) None of the cases classified a tax on a basis related to the problem under consideration. For example, one of the cases cited, *Producers' Oil Co. v. Stephens* (99 S.W. 157 (Tex. Civ. App. 1906, *writ ref'd*)), held that an occupation tax on the business of producing oil was not a property tax. If the legislature had called that tax a severance tax or a privilege tax, the tax would still not have been a property tax, but the attorney general would not have been able to use the case as an applicable authority. In short, the attorney general simply classified the taxes according to what the legislature had called the tax. (One of his cited cases, *Kansas City Life Ins. Co. v. Love,* 101 Tex. 531, 109 S.W. 863 (1908), comes close to making a distinction of significance. In that case it was crucial to the decision that the tax was an occupation tax measured by the preceding year's gross receipts and not a gross receipts tax as such.)

One problem in dealing with occupation taxes is to determine why in any given case the tax imposed was called an "occupation" tax rather than a severance tax, an excise tax, a gross receipts tax, or whatever. The leading theory has been that Texas "evidences an occupation tax complex, the Legislature under the slightest pretext characterizing a given imposition as a tax upon an 'occupation'; . . ." (See M. M. Mahany, *Texas Taxes* (Dallas, 1946), p. 557.) The reason for this "complex" is well stated in a staff research report of the Texas Legislative Council. After noting that Section 1 enumerates four taxing grants to the legislature—property, poll, income, and occupation taxes—and after citing Mahany, the report continues:

> Although a subsequent section of this Constitution (Art. VII, Sec. 17) reads, "The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed . . . ," the courts have avoided a clear-cut decision as to whether or not the four types of taxes are the only kinds the Legislature may impose. Although recent years have brought a legislative swing away from the occupation tax complex and there has been wide acceptance of the opinion that the Legislature has a general taxing power, the issue has not been finally settled, and the seemingly limiting provisions of the Constitution still influence tax legislation. (*A Survey of Taxation in Texas,* Part II (1951), p. 2.)

There is an additional problem with the term "occupation tax" because of the dedication to education of one-fourth of the revenue from state occupation taxes. It may be that the legislature tended to label a tax as an "occupation" tax in order automatically to activate the one-fourth dedication to the available school fund. In bald political terms, the labeling might make the tax more palatable or harder to oppose since the needs of education could be used as a justification for the tax.

Perhaps the most telling example of this problem of nomenclature is the motor fuel tax. At one time, the statute imposed "an occupation or excise tax" of 4¢ on each gallon of gasoline. The tax was to accrue on the "first sale," which was defined to "mean and include the first sale, distribution or use in this State." El Paso got into trouble with the state by buying great quantities of gasoline in New Mexico for use in police cars, fire trucks, and other vehicles. The state sued for its 4¢ a gallon; the city defended, arguing among other things that as a municipal corporation it was exempt from occupation taxes. The supreme court held for the state:

> No actual sale ever took place in Texas. (We here use the term *sale* in its ordinary sense.) It follows that if any tax is due the State in this instance, it is by virtue of the fact that this motor fuel was used in motor vehicles operated on the public highways of this State. By no known rule of law can a tax levied on such use be classed as an occupation tax. . . . Such tax is an indirect or excise tax. This being true, the constitutional exemption of municipal corporations from occupation taxes cannot apply. (*State v. El Paso,* 135 Tex. 359, 363-64, 143 S.W.2d 366, 369 (1940). Emphasis in original.)

The court's opinion does not indicate whether the motor fuel tax was an occupation tax where paid by a seller and an excise tax only when paid by a user. In any event, the motor fuel tax in litigation in the *El Paso* case was subsequently replaced by a law which imposes an "excise tax." (See Tex. Tax.-Gen. Ann. art. 9.02(1).) This is the reason that Section 7-a of Article VIII dedicates one-fourth of the motor fuel tax to education. (See *Explanation* of that section.)

In summary, then, the principal constitutional significance of the term "occupation tax" in the Texas Constitution is the dedication of funds to education. In one sense this is not particularly important. Roughly 34 percent of the total state funds spent each year on education comes from the available school fund, but less than 40 percent of the available school fund comes from "occupation" taxes. It is obvious that nothing much need happen if a court or the attorney general rules that one-fourth of the receipts from some tax must go into the available school fund because the tax is constitutionally an "occupation" tax even though called something else. The additional money dedicated to education could easily be offset by reducing funds from other sources.

Assuming that someone can find a way to raise the question "What is an occupation tax?" the answer would seem to be "Whatever the delegates in 1875 meant." Unfortunately, as the earlier discussion demonstrates, the 1875 intent is not easy to determine. The Revised Statutes of 1879 offer some clues to the general understanding of the day. Article 4665 begins: "There shall be levied on and collected from every person, firm, company, or association of persons pursuing any of the following named occupations, an annual tax (except when herein otherwise provided) on every such occupation, or separate establishment, as follows." The remainder of Article 4665 can be summarized thus:

Occupation	Annual Tax
Liquor dealers	$250-150*
Lager beer	50
Merchants	200-5
Drummers	200
Patent medicine peddlers	200
Fortune tellers	200
Clairvoyants	5
Bankers	200-20
Photographers	20-5
Auctioneers	75-20
Ship merchants	25-10
Toll bridge keepers	10
Land agents	10
Attorneys	10
Physicians	50-10
Dentists	12-10
Bill-posters	25
Shooting galleries	20
Billiard parlors	50
Horse racing with betting	($25 for each horse in each race by the owner of the horse)

Pool-sellers (Bookmakers)	($5 per day)
Bowling alleys	1000
Person keeping a hobby-horse or flying jenny	20
Peddlers	40-20
Theaters	500 (or $5 per day)
Circuses	50-10 (per performance)
Magicians	10 (per performance)
Bull fights	500 (per performance)
Cock fights	5 (per fight)
Menageries	10 (per day)
Concerts	5 (per concert)
Livery stable	50 cents for each stall 50 cents for each buggy
Stockbrokers	75-10
Life insurance companies	300
Fire insurance companies	200
Lightning-rod dealers	50 (per wagon)
Cotton brokers	50-25
Pawnbrokers	100
Sewing machine men	20
Express companies	750
Passenger travel	—(see below)
Telegraph messages	—(see below)
Gas companies	50

*[NOTE: In most instances the range indicated was related to the size of the city in which the occupation was carried on. In some cases there was an additional smaller annual tax for each county in which the occupation was carried on.]

All of these are occupations in the normal meaning of the word and, except for passenger travel and telegraph messages, the nature of the tax is consistent with the concept of an "occupation" tax. For travel, Article 4665 levied a gross receipts tax of 1 percent on all passenger travel within the state on railroads, steamboats, or stagecoaches. For telegrams the tax was "one cent for every full-rate message, and one-half that for every message less than a full-rate message sent." Both of these taxes were first levied in 1879. (Miller, p. 218.)

Two tentative conclusions can be drawn from the range of occupation taxes levied in 1879. One is that the occupation tax was used to express disapproval of certain occupations. The other is that some occupations were taxed because property was not a significant element in the occupation. For whatever reason, the tax levied could fairly be called an occupation tax. The taxes that do not fit are those on passenger travel and telegrams. The former is a gross income tax, the latter, an excise tax. It is unlikely that anyone will ever know why these two particular taxes were called "occupation" taxes. It seems fair to conclude that "occupation tax" as used in 1875 meant the kind of tax levied on the other occupations listed in Article 4665—that is, a flat annual tax on the privilege of engaging in the occupation or a flat tax on each occasion of engaging in the occupation.

Franchise taxes were first levied in 1893. In the case of domestic corporations the tax is on the privilege of doing business as a corporation franchised by Texas. In the case of foreign corporations the tax is on the privilege of doing business in the state. The traditional franchise tax was measured by the capital of the corporation. In the case of foreign corporations it has been traditional to use an allocation formula so that Texas does not burden interstate commerce. In a way, the franchise tax ends up being much like an occupation tax except that the tax does not change from occupation to occupation. Note, also, that among the corporations exempted from

paying the franchise tax are those that are "required to pay an annual tax measured by their gross receipts." (Tex. Tax.-Gen. Ann. art. 12.03(a).)

The discussion earlier concerning the principle of equal and uniform taxation covers occupation taxes. Nevertheless, it is appropriate to mention the leading cases: *Texas Co. v. Stephens* (100 Tex. 628, 103 S.W. 481 (1907)) and *Hurt v. Cooper* (130 Tex. 433, 110 S.W.2d 896 (1937)). The *Stephens* case involved several gross receipts taxes and a severance tax, all covering oil. The Texas Company attacked two of the levies as disguised property taxes and thus a violation of Section 9 of Article VIII, which at the time limited the state ad valorem to 55 cents on the $100. One of the taxes was on the "occupation" of the wholesale business of dealing in petroleum products. The measure of the tax was two percent of gross receipts from sales and two percent "of the cash market value" of petroleum products "received or possessed or handled or disposed of in any manner other than by sale in the State." The provision ended up saying "ownership and possession of such articles (where no sale is made) . . . shall subject the same to the tax herein provided for." The supreme court conceded that the concluding words certainly sounded like a property tax, "but [they] are controlled by the leading provision defining the business on the doing of which the tax is imposed. This, . . . must be viewed as merely dealing with incidents of the business taxed, . . . and as probably intended also to prevent evasions." (100 Tex., at 640; 103 S.W., at 484.)

The "severance" tax of 1 percent was levied upon those in the business of producing oil, measured by the value of the oil removed from the ground. The court turned away the Texas Company argument, saying:

> The contentions on this branch of the case are all met by the propositions that the taking of oil from wells, as conducted by plaintiff and others so engaged, is a business subject to be taxed, that such business is sufficiently indicated in the statute and the tax is imposed upon it as an occupation tax and not as a tax upon land or oil or property of any kind. (100 Tex., at 646; 103 S.W., at 488.)

The other constitutional attack was on the unreasonableness of the classification arising from the various taxes on the petroleum business. The court answered:

> Persons who, in the most general sense, may be regarded as pursuing the same occupation, as, for instance, merchants, may thus be divided into classes, and the classes may be taxed in different amounts and according to different standards. Merchants may be divided into wholesalers and retailers, and, if there be reasonable grounds, these may be further divided according to the particular classes of business in which they may engage. The considerations upon which such classifications shall be based are primarily within the discretion of the Legislature. The courts, under the provisions relied on, can only interfere when it is made clearly to appear that an attempted classification has no reasonable basis in the nature of the businesses classified, and that the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature. This is the rule in applying both the state and federal Constitutions, and it has been so often stated as to render unnecessary further discussion of it . . . . Differences in the profits derived, in the extent of the consumption of the articles, and therefore in the facility with which the burdens may in the course of business be distributed among consumers generally, and other conditions that might be supposed would properly be taken into consideration by the Legislature in making classifications and determining the amount of the tax to be laid upon each; and it would be only an extreme and a clear case that would justify an interference by the courts with the legislative action. We see nothing of the kind in this law. The mere fact that discrimination is made proves nothing against a classification which is not, on its face, an arbitrary, unreasonable, or unreal one. (100 Tex., at 641; 103 S.W., at 485.)

The *Hurt* case involved the chain store tax. This type of tax was a product of the

Great Depression. Although raising revenue was a prime purpose of the tax, it was also a regulatory measure designed to decrease the competitive advantage enjoyed by large corporations. The Texas tax was an annual occupation tax graduated according to the number of stores in the state, the graduation running from $1 for a single store to $750 for each store over 50. (Louisiana went further and graduated the tax according to the number of stores both in and out of the state. That tax was upheld in *Great Atlantic & Pacific Tea Co. v. Grosjean,* 301 U.S. 412 (1936).) The Supreme Court of Texas disposed of the classification argument by using the *Stephens* case quotations set out above and several United States Supreme Court cases that had upheld chain store taxes.

Section 1 limits local occupation taxes to one-half of any occupation tax levied by the state. This means: "no state tax, no local tax." It does not mean: "state tax, local tax." This second proposition is not obvious from the proviso itself. The effect comes from the rule that no local government, except a home-rule city, has any taxing power except that granted directly by the constitution or by statute. Home-rule cities may levy a piggy-back occupation tax unless the legislature has withdrawn the power. As noted above, the legislature has done just that in a manner that puts home-rule cities in the same position as other local governments. (Nobody appears to have strained to read the proviso of Sec. 1 as a direct grant of taxing power.)

Local governments, particularly home-rule cities, frequently exercise their police power to regulate a business by requiring a license. Since this is a license to engage in an occupation, a question arises if there is a license fee high enough to generate revenue, thus arguably turning the fee into an "occupation" tax. An early case is *Brown v. City of Galveston* (97 Tex. 1, 75 S.W. 488 (1903)). Galveston enacted an ordinance requiring a license and a fee for all vehicles kept for public use or hire. It was argued that the size of the fee demonstrated that it was in part a revenue measure and therefore unconstitutional under Section 1 since there was no equivalent state occupation tax. The court conceded "that the police power cannot be used for the purpose alone of raising revenue, and, where exercised by a city for the purpose of raising revenue, it will be held to be by virtue of taxing power, and not of the police. But the fact that the assessment under the police power results in producing revenue . . . does not deprive the assessment of the character of a police regulation." (97 Tex., at 75; S.W., at 496.) The court concluded that the fees were levied in the exercise of the police power and that the incidental revenue did not invalidate the ordinance.

The rule—a license fee is not an occupation tax if any revenue above the cost of regulation is incidental—seems clear enough; but as frequently happens when the judiciary applies a clear rule, the results seem a little strange. Consider *Mims v. City of Fort Worth* (61 S.W.2d 539 (Tex. Civ. App.—Fort Worth 1933, *no writ*)) and Ex parte *Dreibelbis* (109 S.W.2d 476 (Tex. Crim. App. 1937)). In the *Mims* case, an annual license fee of $100 for selling fruits and vegetables at wholesale was held a valid police power regulation and not an occupation tax; in the *Dreibelbis* case, a license fee of $10 on a "temporary merchant" was held to be an occupation tax because the fee was "not levied for the purpose of regulating the enumerated businesses, but to raise revenue." (p. 477.)

In all fairness, it should be noted that the supreme court said in the *Hurt* case discussed earlier that it "is sometimes difficult to determine whether a given statute should be classed as a regulatory measure or as a tax measure." (130 Tex., at 438; 110 S.W.2d, at 899.) The court continued by stating that if the primary purpose of the fee appears to be to raise revenue, the fee is an occupation tax; if the primary purpose appears to be regulation, the fee is a license. Difficult to apply or not, the rule remains clear.

If a license fee is a license fee and not an occupation tax, it makes no difference

that the occupation involved is a mechanical or agricultural pursuit. In Ex parte *Cramer* (66 Tex. Crim. 11, 136 S.W. 61 (1911)), an electrician failed to obtain a permit to make an electrical installation in a building and to pay the required inspection fee. The court held that the electrician could not use the mechanical pursuit exemption to avoid the payment of the inspection fee.

If the tax is an occupation tax, the question becomes "What is an agricultural or mechanical pursuit?" Nobody seems to have had great difficulty deciding what an agricultural pursuit is. The only relevant case appears to be one in which the supreme court, in passing, observed that a tax on the occupation of packaging and marketing or processing citrus fruits was not an occupation tax on an agricultural pursuit. (See *H. Rouw Co. v. Texas Citrus Commission,* 247 S.W.2d 231 (1952).) An interesting point about this case is how agricultural pursuits came to be an issue. The act did not characterize the tax as one on an occupation or, for that matter, as any other kind of tax. The court seemed to assume that the tax had to be either a license tax or an occupation tax. Once this assumption was made it became obvious that the tax had to be an "occupation" tax. Once this conclusion was reached, the court concluded that the tax was invalid because the act exempted any natural person who packaged fruit grown on his own land, thus creating an unreasonable classification. On motion for rehearing, the state sought to justify the exemption as one required by the prohibition on taxing agricultural pursuits. The motion was overruled.

In the case of mechanical pursuits the courts have stated the rule thus:

> The test. . . is whether or not the intellectual quality predominates over manual skill in performing the duties of the particular calling. If the mental aspect is controlling, then the pursuit is classified as a profession. If skill in the manipulation of the hands, tools, and machinery is emphasized over the mental side, then the calling is classified as a mechanical pursuit. (*Calvert v. A-1 Bit & Tool Co.,* 256 S.W.2d 224, 229 (Tex. Civ. App.—Austin 1953, *writ ref'd n.r.e.*), quoting from *Western Co. v. Sheppard,* 181 S.W.2d 850, 854 (Tex. Civ. App.—Austin 1944, *writ ref'd*), which in turn was quoting from a Louisiana case, *State v. Cohn,* 184 La. 53, 65, 165 So. 449, 451 (1936).)

One would assume that by the hundredth anniversary of the 1875 Convention, the meaning of "occupation tax" and its quaint exemption of agricultural and mechanical pursuits would be so well settled that no one could find a significant way to use the exemption to strike down a state statute. Not so. In that year, five justices of the supreme court used the agricultural exemption to strike down a statutory provision that was neither an "occupation tax" in the ordinary understanding of the word nor a "tax" in the ordinary meaning of the word. The case is *Conlen Grain & Mercantile, Inc. v. Texas Grain Sorghum Producers Board* (519 S.W.2d 620 (Tex. 1975) (four justices dissenting)).

The statute in question was Article 55c of the *Texas Revised Civil Statutes Annotated.* (The popular title is the "Texas Commodity Referendum Act.") The statute permitted the producers of most agricultural commodities to agree by referendum that they were to be assessed a certain percentage of the price at which they sold their commodity to a processor. The processor collected the assessment by deducting the appropriate amount from the amount due each producer for the commodities purchased. The processor remitted the assessment to a board elected by the producers. The board spent the money for "programs of research, disease and insect control, predator control, education, and promotion, designed to encourage the production, marketing, and use of" the particular commodity (Sec. 1). Once all this machinery was set up, all producers of the commodity within a defined geographical area were assessed, but any producer for whatever reason could demand a refund of his assessment within two months after it was collected.

One of the commodity programs involved the producers of sorghum in 29 counties in West Texas. For some unexplained reason a sorghum processor refused to collect the assessment authorized by the producers. (Note that the person who attacked the assessment was only a middleman, a conduit with no stake in the matter.) The Sorghum Producers Board sued for the amount of the assessments that the processor had failed to collect. (The principal stockholder of the processor intervened in the suit. He was a producer subject to the assessment, which may be the reason that a "disinterested" party induced the litigation.) The processor lost in the lower court.

On appeal a majority of the supreme court held in the processor's favor. The Sorghum Board argued naturally that the required payment was exactly what the statute called it—an assessment. The majority simply replied: "The levy is not a special assessment." The only reason given was that "the assessment paid by any particular person is not necessarily related to the benefits that will be received by that person . . ." (At p. 623.) Since this is probably true of many special assessments, the majority's argument seems to be that the assessment was not an assessment because either it was not a "good" assessment or was an unconstitutional assessment by virture of an inadequate relationship between the assessment and the benefit received. In short, the majority gave a nonreason for denying that the levy was an assessment. (Of course, the court stressed the point that assessments are traditionally levied against property, which was not the case here. Actually, the assessment was indirectly related to property, for the sorghum came from land. In any event, there is no constitutional rule that an assessment can be levied only on property or that the assessment must be measured by property.) Having reached this nonconclusion, it was no step at all to conclude that the assessment was an occupation tax on an agricultural pursuit. (Interestingly enough, the court relied on the *Rouw* case previously discussed. That case held that the levy was an occupation tax but not one on an agricultural pursuit. There, however, the processor paid the assessment.)

There were two dissenting opinions. Justice Daniel, speaking only for himself, simply said that he believed that the levy was an assessment and not a tax. Justice McGee, speaking for himself and Justices Denton and Johnson, concentrated principally on the meaning of "occupation tax" and the agricultural exception in the constitutional context of 1875. His conclusion was the obvious one: ". . . the framers of the Texas Constitution did not intend to prohibit such programs as the Texas Commodity Referendum Act when they prohibited occupation taxes upon agricultural pursuits." (At p. 629.) He then switched to 1975 and observed that "the constitutional provision involved is an outmoded and unnecessary restriction upon the legislative power and should not be given the broad interpretation which the majority imparts to it." (*Ibid.*) He reinforced this by observing that the Constitutional Revision Commission in 1973 and the Constitutional Convention in 1974 had no difficulty in dropping the provision as "a product of a bygone era and tax structure [that] served no useful purpose in today's society." (*Ibid.*)

The sequel to the *Sorghum* case is probably the strangest episode in this occupation tax drama. The *Sorghum* case came down just as the legislature was undertaking to submit the 1974 Convention product to the voters by way of the amending process. (See the *Explanation* of Sec. 1 of Art. XVII.) The legislature added a section to the proposed finance article "overruling" the *Sorghum* case. Since the proposed constitution eliminated the agricultural pursuits exception, the added section had no significance except to assure that no part of the assessment would have to go into the available school fund under the proposed continuation of the constitutional dedication of one-fourth of occupation taxes to that fund.

Art. VIII, § 1

Comparative Analysis

In general. It is difficult to compare the overall limitations on taxing power in the several state constitutions. Constitutions run the gamut from Connecticut, for example, which has no provision concerning the power to tax, to states like Texas, with its rigid uniformity provision for property taxes, and Tennessee and Florida, which prohibit income taxes.

As of 1965, 34 states imposed personal income taxes. In 20 of these the constitution specifically authorized an income tax; in the remaining 14, the constitution was silent. Thirty of the income taxes were graduated, four were flat rate. Most of the states without a personal income tax can levy one. (Note the restriction to "personal" income taxes. A state can approximate a corporate income tax by an annual graduated franchise tax on the privilege of doing business in the state.)

Prior to 1969, Illinois was a state that could not levy an income tax because of a state court case. In 1969 that case was overruled by an opinion that seemed to open the door to a graduated income tax. (See Braden and Cohn, *The Illinois Constitution: an Annotated and Comparative Analysis* (1969), pp. 420-22, 435.) A consequence of that opinion was the inclusion in the 1970 Illinois Constitution of a prohibition on a graduated income tax and a requirement that an income tax imposed upon corporations could not exceed the rate imposed on individuals by more than a ratio of 8 to 5.

For poll taxes see the *Comparative Analysis* of Section 3 of Article VII.

Equal and uniform. There are about six states that have a general "equal and uniform" provision. Some 14 states have provisions requiring uniformity within a class. Four of these have a separate provision concerning property taxation which has the effect of making property a single class. In two of them "all" property is a single class, in one the class is tangible property, and in one the single class is real property. It may be that courts in other states have construed "class" in a manner that restricts legislative classification. Georgia provides: "Classes of subjects for taxation shall consist of tangible property and one or more classes of intangible personal proprty including money." (Art. VII, Sec. I, Para. III.) An amendment in 1964 added permission to treat "all motor vehicles including trailers" as a separate class of tangible property. (*Ibid.*)

All property to be taxed. About eight states have a provision requiring property to be taxed in proportion to its value. Two of these limit the requirement to tangible property and one, to real property. Three states require all property to be taxed but do not include "in proportion to its value."

Occupation taxes. Three states have an affirmative grant of power to tax "occupations." All three provisions include permission for a graduated tax, but one calls it a "license" tax. A few states have an affirmative grant of power but instead of "occupation" refer variously to "peddlers," "merchants," and "trades and professions." A few states have an affirmative grant of power to levy license taxes. No other state exempts mechanical and agricultural pursuits.

Only Louisiana has a tie between state and local occupation taxes. Local license taxes may not exceed the amount of the state license tax unless authorized by a statute passed by a two-thirds vote of each house.

Model State Constitution. The only reference to taxation in the *Model*'s article on finance is the prohibition on dedicated taxes quoted in the *Comparative Analysis* of Section 7-a of this article. The *Model*'s Commentary states:

The *Model State Constitution* is based upon confidence in the system of representative democracy. The finance article reflects these beliefs by leaving to the legislature and the governor, the people's elected leaders, broad responsibility for the conduct of the state's fiscal affairs with ample power to adjust needs to the rapid changes characteristic of modern times.

Ideally, some authorities believe, a state constitution should be silent on matters of taxation and finance, thus giving the legislature and the governor complete freedom to develop fiscal policies to meet current and emerging requirements . . . . [T]he complex and lengthy fiscal articles found in many state constitutions . . . obviously are barriers to responsible government.

Despite elaborate constitutional limitations upon the legislature designed to insure fiscal prudence, state revenues, expenditures, and outstanding debt have grown enormously since World War II . . . . Legislatures have been resourceful in circumventing tax and debt limitations. (*Model State Constitution,* p. 91.)

Author's Comment

In the light of (a) the chaos in the property tax field, a part of which is the wholesale violation of the constitutional commands by both the public and its government; (b) the universal violation of the constitutional command to pay a poll tax; (c) the chaotic state of "occupation" taxes as a category of taxes, a state compounded by the dedication to education of one-fourth of the receipts from this ill-defined tax; and (d) the confusion over exemptions, compounded by the accelerating practice of providing more and more exemptions—in the light of all this, the rational step is to drop every constitutional provision concerning taxes and either substitute nothing, or, at the maximum, as a security blanket for the timid, provide that "taxes shall be equal and uniform," explaining, of course, that this is a security blanket only and means nothing more than what Section 3 of the Texas Bill of Rights and the Fourteenth Amendment to the United States Constitution require.

So much for the sensible solution. Unfortunately, voters generally (a) hate taxes; (b) oppose anything that, or anyone who, proposes to raise taxes; (c) assume that if the legislature, county commissioners court, or city council is given power to increase taxes, taxes will be increased; and (d) believe that taxes can be kept low and fair by stuffing the constitution with all sorts of limitations. The voters are correct about one thing. If the limitations on the power to tax are drafted with the ingenuity of a Wall Street lawyer drafting a multimillion dollar loan agreement, taxes can be kept low; the government will be paralyzed; and the voters will be up in arms because garbage is not collected, the streets and highways are full of potholes, schools are overcrowded, and nobody replies to complaint letters. Granted that government is frequently, if not usually, inefficient, the equations still remain: low taxes equal poor service, higher taxes equal better service.

The only realistic way to work with these equations is to keep rigidities out of the constitution and leave in the legislature and the governing bodies of local governments the battle over high taxes and the services to be provided by government. Any attempted restrictions placed in the constitution—unless they are Wall-Street-lawyer airtight—will not work. And to the extent that they do work, Texas will be off on another constitutional amendment binge.

In short, any restrictions on the kind of tax that may be levied, on the power to classify, or on the power to exempt will create difficulties, encourage slick gimmicks, and spawn constitutional amendments. For those who note, correctly and realistically, that the voters demand restrictions—and special groups demand special protection—the proper plea is to urge that those restrictions be kept to the absolute minimum.