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Constitutional Uniformity And Equality In State Taxation. By Wade J. Newhouse, Jr.

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CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION. By Wade J. Newhouse, Jr. University of Michigan, 1959. Pp. xxii, 853.

Professor Newhouse has produced the first comprehensive and systematic study of the equality and uniformity in taxation provisions of the constitutions of the various states. In a prodigious study done at the Legislative Research Center of the University of Michigan Law School, Professor Newhouse has analyzed with painstaking care the constitutional provisions of each state and the decisions interpreting the provisions. The work also contains a chapter on the equal protection of the laws clause of the federal constitution as affecting uniformity and equality in state taxation.

The author classifies state uniformity clauses into nine categories: (1) property shall be taxed according to its value, (2) property shall be taxed in proportion to its value, (3) the legislature may impose proportional and reasonable assessments, rates and taxes upon all persons and estates within the state, (4) there shall be a uniform rule of taxation, (5) taxation shall be equal and uniform, (6) the legislature shall provide by law for a uniform and equal rate of assessment and taxation, (7) taxes shall be uniform upon the same class of subjects, (8) taxes shall be uniform upon the same class of property, and (9) there shall be a fair distribution of the expense of government.

The author analyzes the decisions of the various states in the light of these constitutional provisions in relation to the key questions presented. First, he considers the applicability of the clause, i.e., whether the constitutional provision applies to all taxes, or only to property taxes. The author finds in general what might have been expected, that where the clauses are of Types 1 or 2 (which use the word "property") the courts have uniformly found the provisions applicable only to property taxes.¹ Curiously, however, in those states with Type 8 clauses ("taxes shall be uniform upon the same class of property"), there is a conflict; the Kentucky and North Carolina cases treat the clause as applying to all taxes, whereas the courts in five other states have limited its applicability to property taxes.² And in all ten states having clauses that call for taxation to be "equal and uniform" (Type 5) or for a "uniform and equal rate of assessment and taxation" (Type 6)—although property taxes are not explicitly mentioned, the clauses have been restricted to property taxes.³ The greatest diversity arises in those states having clauses requiring taxation to be "uniform among the same class of subjects" (Type 7). Seven of the thirteen states have ruled that the clause applies to all taxes, in five the uniformity is limited to property taxes, and in two states the results are uncertain.⁴

Similar comparative analyses along these lines are made by the author as to the judicial construction of the clauses with respect to (a) the universality

1. P. 644.
2. P. 649.
3. P. 647.
4. P. 648.

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of the clause, whether all property except that designated as exempt by the constitution must be taxed, (b) the restrictions on effective rates, whether all property taxed by a single taxing authority must be assessed at the same ratio of valuation and at the same rate so as to produce uniformity in effective rate, and (c) the method of taxation, whether property taxation is limited to the *ad valorem* method or whether other modes of tax on property may be employed. In a summary of summaries illustrated by a "Chart of Literal and Effective Property Tax Uniformity Limitations," the author states:

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.⁵

After having read through the approximately 600 pages devoted to a statement of the provisions and a state-by-state study of the construction of the provisions by the courts—with extensive case-by-case discussion (including critical comments) of the leading cases in the state—and about 100 pages of comparative analyses and summary of the results reached, I was left with the impression that the author's prodigious labors had produced highly valuable materials and critical comments, case-by-case and state-by-state, but that the grand architecture of the meaning and integration of the materials was somehow missing. I suspect this is due to the author's method of state-by-state analysis, which though a useful form of presentation from the point of view of the work's utility as a reference source, does not lend itself to a critical evaluation of the cases and holdings on an overall basis.

Indeed, this is illustrated in the one area in which the author departs from his state-by-state analysis and treats the problem in the light of all the cases and all the constitutional provisions—the effects of the constitutional restrictions on state income taxation.⁶ If the uniformity and equality provisions apply to the income tax, then a graduated income tax, or one allowing personal exemptions is likely to be held unconstitutional. The author traces this important struggle in state fiscal history, the results of which helped shape the nature and distribution of the tax burden in many states. An early landmark decision was the Advisory Opinion of the Massachusetts Supreme Court handed down in

5. Pp. 677-678.

6. P. 690 et seq.

1915, which held, in reliance on the *Pollock* case,⁷ that a tax on income from property would constitute a property tax, that it would be subject to the uniformity and equality clause, and if graduated would be unconstitutional.⁸ Three years later the Supreme Court of Missouri rejected this holding and concluded that an income tax is not a property tax and was not within the scope of the State's uniformity and equality clause.⁹ These two decisions spearheaded the struggle in the courts over the state income tax, a struggle which swept the country as the movement spread for the enactment of the levy. Holdings that a graduated income tax violated the state constitutional restrictions have had their repercussions to this day and have thwarted the efforts of legislators in Illinois, Massachusetts, Pennsylvania, Washington and other States, to adopt this modern, progressive levy.¹⁰ In some States the problem was dealt with by constitutional amendments explicitly authorizing the enactment of graduated net income taxes.¹¹ Certainly the clear trend in recent years, as Professor Newhouse points out, has been to exclude the income tax from the restrictive clauses.¹² As a result of these developments some 30 States now impose income taxes.¹³ The author's study and critical evaluation of this feature of the uniformity and equality provisions is one of the best chapters in the book, in part I believe, because he has dealt with it as a problem wherever it arose.

There is one other basic weakness in the work. It deals with the constitutional provisions largely in the abstract, by reference to judicial doctrine and varying constructions of minutiae of difference in constitutional language, without sufficiently relating the materials to their impact on taxpayers and on the taxing process. The uniformity and equality provisions were directed primarily at assuring equal treatment of taxpayers similarly situated in the property tax field. In many states, as the author shows, the provisions have a broader scope. But certainly the accomplishment of uniform equality in the property tax field was their prime objective. Yet, the most striking feature of property

7. *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895).

8. *In re Opinion of the Justices*, 220 Mass. 613, 108 N.E. 570 (1915). As a result of this decision Massachusetts does not have a graduated income tax. A constitutional amendment was adopted in 1915 to limit the impact of the court's decision, but the court held that the new provision merely permits specific and varying rates on differing types of income but does not permit a general graduated income tax. *In re Opinion of the Justices*, 266 Mass. 583, 165 N.E. 900 (1929).

9. *Ludlow-Saylor Wire Co. v. Wollbrin*, 275 Mo. 339, 205 S.W.2d 196 (1918).

10. *Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909 (1932); *Kelley v. Kalodner*, 320 Pa. 180, 181 Atl. 598 (1935); *Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56 (1920); *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933); *Opinion of the Justices*, 99 N.H. 525, 113 A.2d 547 (1955).

11. See, e.g., *Alabama, Kentucky and Wisconsin*.

12. *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930); *Miles v. Department of Treasury*, 209 Ind. 172, 193 N.E. 855 (1935), appeal dismissed, 298 U.S. 640 (1936); *Sims v. Ahrans*, 167 Ark. 557, 271 S.W. 720 (1925); *Reynolds Metal Co. v. Martin*, 269 Ky. 378, 107 S.W.2d 251, appeal dismissed, 302 U.S. 646 (1937); *Reed v. Bjornson*, 191 Minn. 254, 253 N.W. 102 (1934); *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 98 So. 4 (1921), appeal dismissed, 260 U.S. 710.

13. P.H. All States Guide, 104 et seq. (State & Local Tax Serv.).

taxation, despite the constitutional safeguards, is that inequality is rife and flagrant discriminations are widespread.¹⁴ Assessment practices are a major

14. The classic critique of the American property tax system was made by Professor E. R. A. Seligman in his *Essays in Taxation*, Ch. 2 (10th ed. 1931). There Professor Seligman declared that:

"It is a notorious fact that in scarcely any two contiguous counties is the property—even the real estate—appraised in the same manner or at the same rate. In regard to the manner, it frequently happens that corporation property, e.g. the roadbed of a railway is assessed in one county at an immense sum per mile and is treated in the adjacent county like a piece of grazing land. . . . The official reports abound with complaints or open confessions that property is assessed all the way from par to one twenty-fifth of actual value. . . . That this is a glaring infraction of equality of taxation is apparent . . . as between individuals it results in gross injustice. A tax rate of a given amount on one may be double, quintuple, or decuple the nominally equivalent tax on another. The first constitutional injunction—that of uniformity of taxation—is flagrantly violated." (Pp. 20-21.)

Professor Seligman concludes that "the general property tax in the United States is a dismal failure" (p. 31) and that "as actually administered [it] is beyond all doubt one of the worst taxes known in the civilized world." (p. 62) For contrary views as to the general desirability of retaining the tax and comments on its improvement since Professor Seligman uttered his strictures against it, see Jensen, *Taxation in the United States* (1931) 478 et seq., Groves, *Financing Government* 73-74 (1945), Schultz and Harriss, *American Public Finance* (7th ed. 1959) 387 et seq. The authoritative comprehensive work on property taxation is Jensen's *Property Taxation in the United States* (1931). Studies of property tax inequalities have been published in many states. See Silverhelz, *The Assessment of Real Property in the United States* (Sp. Rep. No. 10), N.Y. State Tax Comm. (1936). James W. Martin, Director of Business Research of the University of Kentucky, discussed before the 1952 annual meeting of the National Tax Association a Kentucky Department of Revenue chart showing "Degrees of Inequality of McCracken and Other Large County Assessments (1951)," which showed variations of 46% to 105% among the counties (1952 N.T.A. Procs. 54). He commented:

"It can be said without any fear of being wrong that, if federal income taxes introduced anything like as much discrimination among taxpayers, there would be such a howl as the American people have rarely heard." (Id. 53)

In the *Baldwin Construction Co.* case, note 18, *infra*, *Vanderbilt, C.J.* dissenting (because the court had failed to direct full value assessments of all property on the rolls) stated:

"The [New Jersey] Commission on State Tax Policy euphemistically but graphically expressed the existing situation in its *Fifth Report* (1950; p. 4):

"The administration of the general property tax (real estate and improvements) is a chaos. On the business side it is a matter of a *more or less gentle bargaining process* that over the years has *created a host of insecure but "favorable" conditions.*"

"This statement is documented with complete county by county tables in its *Sixth Report* (1953; p. 30). At page 27 the Commission summarized its findings as follows:

"Real estate in New Jersey is assessed at an average assessment ratio of 34 per cent of its value. On this basis, the State-wide average tax rate of \$6.77 per \$100 valuation taxable in 1952 represents an average effective tax burden of \$2.30 per \$100 of full value.

"The estimated average assessment ratios vary as among the 21 New Jersey counties from a low of 16 per cent in Ocean County to a high of 56 per cent in Hudson County. Six of the State's 21 counties show estimated average assessment ratios above the over-all State-wide average of 34 per cent and three of them (Hudson, Essex and Passaic) show estimated average assessment ratios above 40 per cent. On the other extreme, four counties (Ocean, Burlington, Sussex and Salem) show estimated average assessment ratios of under 20 per cent.

"The variation as among individual municipalities ranges from estimated average assessment ratios *under 10 per cent in seven municipalities to over 60 per cent in two municipalities.*"

"Its conclusion (p. 133) seems inescapable:

cause of the dissatisfaction of millions of taxpayers with their local governments, who year after year see recurring examples of discriminations and preferences among persons, properties and areas, with little or no hope of redress through administrative appeals or judicial review.¹⁵

Why has the equality and uniformity system thus required by state constitutions broken down? Professor Newhouse's work attests the conclusion that the failure of the provisions to achieve their objectives in the property tax field is not any inadequacy in their breadth or language. What are the reasons for the failure? Where does the failure lie? What are the proper responsibilities

"Never has so much money been raised from so many people so inequitably as in the current administration of the local tax on real estate."

Recent studies made by the states based on assessment-sales ratios, disclose the following:

State	Year	Average Ratio	County variation	
			High county	Low county
Kansas	1953	23%	48%	13%
Minnesota	1955*	36	52	17
Pennsylvania	1954	40	67	18
Washington	1953†	20	38.5	13

* Date study was published.

† Includes some 1952 sales.

MINNESOTA

Type of property	Ratio
Public utility	46%
Farm	44
Commercial	39
Multiple dwellings	38
Industrial	35
Residential	30
Lakeshore	16
Average (weighted)	36

WASHINGTON STATE

Type of property	Ratio
Warehouses	38%
Industrial improvements	33
Retail stores	27
Rural property	22
Duplex dwellings	21
Single dwellings	19
Average (weighted)	20

See Murray, Overall Progress in the Field of Equalization, 1955 N.T.A. Procs. 453. A standard text in Public Finance declares:

"Assessment ratios of individual properties in particular districts in a state also show wide variation. County averages in Minnesota in 1955 ranged from 17 to 52 per cent, in New York from around 10 to 100 per cent. In one Kansas county, 39 per cent of properties varied 60 per cent or more from the median.

"City property assessment ratios are generally higher than rural, both because city assessors use more efficient methods and because many cities deliberately force up the assessment ratio to avoid pressure on debt or tax rate limits.

". . . Improper discriminations result from *unequal* underassessment, which may go to extreme lengths. Within any district, individual properties may be assessed at anywhere from a minute fraction of their true value to considerably more than their true value. For example, study of one Pennsylvania county revealed that one property was assessed at 60 times its sale price while another was assessed at only one-fourteenth of its sale price.

"Small properties are usually assessed at a higher proportion of market value than large properties. Owners of large properties find protesting high assessments worth their effort; moreover, assessors are less able to value complex properties well. In some places, however, such as New York City, political considerations result in greater underassessment of small residences than of office buildings, factories, large apartment buildings, and other properties whose owners lack influential voting power." Schultz and Harriss, *American Public Finance*, 382-383 (7th ed. 1959).

15. See note 14, supra.

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of legislature, of administrative officers and of judicial tribunals? What efforts have been made, and what success has attended the many efforts at reform over the past 150 years or more in making more effective the constitutional mandate of uniformity and equality?¹⁶

To these critical questions as to the actual operation of the constitutional provisions Professor Newhouse does not seriously address himself, except for minor and passing references. The author does refer briefly to the role of the courts in some States in contributing to the breakdown of the operation of the constitutional provisions by denying relief to taxpayers in property assessment inequality cases in the absence of a showing of fraud or arbitrary or intentionally discriminatory action by the assessors; he discusses this matter at some length in connection with his review of the Illinois cases.¹⁷ But he hardly scratches the surface of this problem.^{17a} Indeed, while the work was in preparation, the first of the cases in the recent New Jersey "full-value assessment revolution" took place; in a series of monumental cases the New Jersey courts first granted relief to taxpayers suffering from unequal taxation¹⁸—relief that the Supreme Court of the United States as far back as 1923 had held a constitutional requirement, which in the intervening quarter of a century or more was largely ignored by the state courts¹⁹—and then went on to hold that the assessment procedure was improper because not based on full value; the court threatened to invalidate the entire assessment roll unless the methods are radically revised so as to comply with the law.²⁰ True, the latest of the cases

16. There is a large body of data dealing with the efforts of states and localities to improve assessment methods and inequalities, ranging from the adoption of so-called scientific methods of assessment, recruitment of more competent and better trained personnel, the centralization of assessment supervision in state taxing authorities, the widespread adoption of state-wide equalization procedures and the adoption of classified property tax systems. See note 14, *supra*, and as illustrative of the numerous studies, see Leonard, *Assessment Inequalities of Locally Assessed Real Estate in Kansas, Some Important Effects and Some Suggested Causes (1933-1953)*, Kan. State Comm. of Rev. and Tax (1954); *A Study of Real Property Assessments in the State of Washington, A Report of Subcommittee on Revenue and Taxation of Wash. State Leg. Council (1953-55)*, U. of Wash. 1958; see the *Guide for Assessment Sales Ratio Studies*, Nat. Ass'n of Tax Admr's (1954); Weil, *Property Tax Equalization in Illinois*, 6 *Nat. Tax J.* 157 (1953); Carbert, *Full-Value Assessment Versus Fractional-Value Assessment*, 1943 *Proc. N.T.A.* 164; Shannon, *Recent State-wide Programs to Improve Local Assessments*, 1951 *Procs. N.T.A.* 161; *Property Assessments and Equalization in California*, Rep. of Cal. State Senate Interim Comm. on State and Local Taxation (Part 6, 1953); and see the extensive Report of the N.T.A. Committee on State Equalization of Local Property Tax Assessments, 1958 *N.T.A. Procs.* 316.

17. See pp. 137-139.

17a. For studies dealing with this problem, see Throckmorton, *Judicial Review of Tax Assessments in Iowa*, 26 *Iowa L. Rev.* 723 (1941); Cushman, *The Judicial Review of Valuation in Illinois Property Tax Cases*, 35 *Ill. L. Rev.* 689 (1941); Morgan, *Remedies of Taxpayers to Correct Assessments of Real Estate Taxes*, 14 *J. Bar Ass'n of D. of C.* 476 (1947); Hellerstein, *Judicial Review of Property Tax Assessments*, 14 *Tax L. Rev.* 327 (1959).

18. *Baldwin Construction Co. v. Essex County Board of Taxation*, 16 *N.J.* 329, 108 *A.2d* 598 (1954); see Lasser, *Assessment of Real Property in New Jersey: An Appraisal of the Baldwin Case*, 9 *Rutgers L. Rev.* 497 (1955).

19. *Sioux City Bridge Co. v. Dakota County*, 260 *U.S.* 481 (1923).

20. *Switz v. Township of Middletown*, 23 *N.J.* 580, 130 *A.2d* 15 (1957).

does not in form deal with problems of inequality but with the failure to assess at full value, but it is widely recognized that the evil which lies at the bottom of less than full value assessment is its encouragement of inequality among taxpayers.²¹ These cases have led to frantic efforts at legislative administrative and judicial reform in New Jersey, and they have already had repercussions in a number of States.²²

Professor Newhouse's failure to deal in any significant or searching manner with the actual operations of the constitutional clauses to which his extensive study is devoted reduces the stature of the work to an essentially ivory towerish study of what the courts have said the constitutional provisions mean. I do not think that I am complaining of the author's failure to write a different book from the one he undertook, for I believe that we are justified in expecting twentieth century legal scholars engaging in studies of the magnitude of this work, not only to analyze and evaluate judicial opinions and doctrine in the abstract, but to view the constitutional provisions as a part of living governmental institutions and to consider, in a case such as ours, the practical effects of judicial interpretation and administrative action on taxpayers and state and local governments.

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21. See Carbert, *loc. cit.* supra note 16.

22. The New Jersey cases and their repercussions are considered in Hellerstein, *loc. cit.* supra, note 17a. For a discussion of the character of review of assessments within the administrative process and its effects on the taxing process and on the scope of judicial review, the article last cited and Dane, *Are State Tax Courts Necessary? The Massachusetts Experience*, address before Nat. Ass'n of Tax Admr's (Coronado, Calif., June 11, 1958), and the study of tax administrative review procedures by Federation of Tax Administrators, *State Administrative Tax Review: Organization and Practices*, Res. Rep. No. 44 (May 1958).