

1928

A State Income Tax and the Minnesota COnstitution

Henry Rottschaefer

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Rottschaefer, Henry, "A State Income Tax and the Minnesota COnstitution" (1928). *Minnesota Law Review*. 1467.
<https://scholarship.law.umn.edu/mlr/1467>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

MINNESOTA LAW REVIEW

Journal of the State Bar Association

VOLUME 12

JUNE, 1928

No. 7

A STATE INCOME TAX AND THE MINNESOTA CONSTITUTION

By HENRY ROTTSCHAEFER*

THE Minnesota tax system dates back to a period when the general property tax constituted the principal source of revenue for state purposes throughout the United States. The constitutional limitations upon the taxing power have been modified from time to time, usually in the direction of permitting greater legislative freedom in selecting principles for distributing the tax burden.¹ This has permitted legislative adjustments intended to adapt the general property tax system to changing conceptions of proper policy in tax matters, and to deal with some of the most glaring evils bred by that system. The only marked departure from that system until within the last decade was the adoption of the inheritance tax.² The injection of new elements into our tax system has proceeded more rapidly within the last few years with the adoption of the occupation tax on mining and producing ores,³ the motor vehicle tax⁴ whose mongrel nature has caused our supreme court considerable work⁵ and the excise tax on the sale of gasoline.⁶ The statutes imposing the taxes last referred

*Professor of Law, University of Minnesota.

¹See H. F. Kumm, *The Constitution of Minnesota Annotated*, 160-185.

²For a brief history of inheritance taxes in Minnesota see *State ex rel. Foot v. Bazille*, (1905) 97 Minn. 11, 106 N. W. 93.

³Minn. const., art. 9, sec. 1A; Minn. Laws, 1921, chap. 223, Minn. G. S. 1923, secs. 2373 et seq.

⁴Minn. const., art. 16, sec. 3; Minn. Laws, 1921, chap. 461, Minn. G. S. 1923, secs. 2672 et seq. The law has been several times amended since its enactment.

⁵See *Raymond v. Holm*, (1925) 165 Minn. 215, 206 N. W. 166, and cases therein cited.

⁶Minn. const., art. 9, sec. 5, as amended in 1924; Minn. Laws, 1925, chap. 297.

to followed the adoption of constitutional amendments whose function was rather to allocate the proceeds of such taxes to prescribed purposes than to remedy any defect in legislative power to impose them, although the language of some of them suggests the latter purpose also. It might almost be said that we are acquiring a habit of amending our constitution whenever we wish to resort to theretofore untouched sources of revenue. There has been an even more recent instance of the same kind.⁷ Moreover, when the question of a state income tax first received official treatment a constitutional amendment providing for such a tax was proposed but failed of adoption. The matter has recently been brought before the public again by discussions before the Minnesota Tax Conference at its meeting last February at which several speakers advocated a state income tax as a method of spreading the tax burden more nearly in accordance with ability to pay. It was also suggested as a possible escape from the impasse in which the state finds itself in taxing national banks as a result of the decision of the federal Supreme Court finding its present system under existing circumstances violative of Revised Statutes section 5219.⁸ It is, of course, inevitable that the question will be raised as to whether the adoption of a state income tax will require an amendment of the state constitution. It is to this problem, rather than the policy of such a tax, that the following discussion will be devoted.

Every exercise of the taxing power necessarily involves selecting a subject upon which to impose the tax. The adoption of an income tax would involve selecting a subject heretofore left untouched by our state tax system. The nearest approach to such a tax in the existing system is found in the various gross earnings taxes, but these are in legal theory not taxes on such earnings but on the property from which such earnings are derived measured by gross earnings instead of by its value.⁹ The first question, therefore, is whether the state constitution prevents selecting income as a tax subject. The answer depends on the source of the taxing power and the function of the constitutional provisions relating to it. The people of the state have nowhere in the constitution specifically granted to any department of the

⁷Minn. const., art. 18, adopted 1926, provides for special method of taxing forest lands and their products.

⁸Minnesota v. First Nat. Bk. of St. Paul, (1927) 273 U. S. 561, 47 Sup. Ct. 468, 71 L. Ed. 774.

⁹State v. U. S. Express Co., (1911) 114 Minn. 346, 131 N. W. 489.

government any general power to tax. The power to impose general property taxes is not expressly conferred; nor can it be validly argued that it is impliedly conferred by the specification that certain property shall be exempt.¹⁰ The only logical inference derivable from that fact is that there exists a power to tax property, not that that power is conferred by the document decreeing such exemption. Our present constitution nowhere confers the power to impose inheritance taxes, but no one doubts the constitutionality of selecting succession to the property of decedents as a tax subject.¹¹ As stated in *State v. Wells Fargo & Co.*,¹² "the taxing power is not conferred by the constitution, but is only limited by it." This proposition would be clear beyond the need for discussion were it not for the form of certain recent constitutional amendments dealing with or affecting taxation. Section 1A of article 9, dealing with the occupation tax on the mining of ores, reads like a statute levying a tax rather than a grant of power or a limitation on, or regulation of the exercise of, an existing power. Section 3 of article 16, relating to motor vehicle taxes, is ambiguous, but can be construed as both granting a power to tax motor vehicles and prescribing a rule for the exercise of such power. The amendment to section 5 of article 9, ratified in 1924, specifically embodies a grant of power to impose excises on the sales of gasoline. It is, of course, true that these amendments in each case involved other matters of policy to which it was desired to give that permanency derivable from incorporation in constitutional form. The fact, however, remains that the practice of including either the specific levy of a new kind of tax or a grant of power to impose some new kind of tax in constitutional amendments might lend specious support to the contention that the like procedure was required to permit the selection of income as a tax subject. It is, however, unlikely that the court would hold this practice sufficient to overturn its prior holdings as to the source of the taxing power and the function of the constitutional provisions relating to it. This would be true even were each instance of the practice interpretable only as solely intended as a grant of power.

¹⁰Minn constitution, art. 9, sec. 1.

¹¹See state ex rel. Foot v. Bazille, (1905) 97 Minn. 11, 106 N. W. 93; Gaze v. Probate Court of Hennepin County, (1910) 112 Minn. 279, 128 N. W. 18.

¹²(1920) 146 Minn. 444, 454, 179 N. W. 221.

It may, therefore, be concluded that the legislature can select income as a tax subject unless some constitutional provision expressly or impliedly prohibits it, despite the fact that no provision specifically or inferentially confers upon it that power. It has that power for the same reasons and in the same sense that it has the power to select property or inheritances as tax subjects. There is nothing that specifically prohibits the selection of income for taxation. None of the limitations specifically relating to the taxing power could be reasonably construed to prevent its selection, nor is there anything in the past interpretations of our due process clause on which the most optimistic opponent of income taxes could reasonably rely to support a claim that the mere selection of income for taxation would be unconstitutional. But little light can be gained on this point from the authorities. In some of the states having an income tax the constitution specifically authorizes it. In some of these, constitutional amendments were adopted before enacting such taxes, usually in order to free such taxes from restrictions imposed on taxes generally which were deemed to interfere with the kind of income tax demanded by sound tax policy.¹³ There have been, and are, income taxes in states that had, or have, no such constitutional provisions.¹⁴ The tax of one such state was assailed on the very score that there was no authority conferred in the constitution to impose it. The court answered that contention with the argument that the state could levy the tax without special authority therefor unless some provision of the constitution limited the kind of taxes that could be imposed. It further denied that the mere use of the term "property" in specifying the power to exempt from taxes limited the state to selecting property as a tax subject. It accordingly sustained the income tax.¹⁵ The conclusion is, therefore, warranted by both reason and authority that our state constitution does not prevent the selection of income as a tax subject.

The preceding discussion has assumed that an income tax involves selecting income as the tax subject rather than its use as the measure of a tax on something else as tax subject. The nature of an income tax is a matter on which judicial opinions differ.¹⁶ If considered as a property tax on the income itself as

¹³This was done in Massachusetts and Wisconsin.

¹⁴Missouri, Delaware, and Mississippi may be cited as instances of such states.

¹⁵*State v. Pinder*, (1919) 30 Del. 416, 108 Atl. 43.

¹⁶This matter will be subsequently dealt with in considering the question of exemptions from income tax.

a kind of property, it clearly involves selecting income as the tax subject. The same would be true if it be viewed as a tax that is *sui generis*. It has also been considered, in so far as it included income from property, as a tax on the property from which such income was derived. In that case income becomes the measure of the tax on such property as the tax subject. Its use as such measure could scarcely be questioned in Minnesota under a constitution that permits the substitution of gross earnings for value in measuring property taxes. An income tax has also been held an excise tax on the activities producing the income. On such view the act of engaging in income producing activities or of receiving income is the tax subject and again income is the measure of the tax. Our constitution imposes no restrictions on the mere selection of a measure for a tax on a permissible tax subject unless it be found in its due process clause, and the utmost restriction that could be therein discovered is that the measure adopted be reasonable. It is eminently so to measure a tax on the prosecution of income producing activities by the net income derived therefrom, and, therefore, its adoption would be constitutional. No case has been found treating this specific matter from this angle, but the fact that income taxes have been sustained even where the state constitution contained no grant of power to impose them affords some basis for holding that the point, if raised, would be decided according to the views herein stated.

It may, therefore, be taken as established that our present constitution permits the selection of income as a tax subject, or its use as a measure either of a tax on income producing property or of an excise on the prosecution of income producing activities, including that of receiving income. A law taxing all net incomes, without exempting any part of the net income of any person, at a single uniform rate would be valid. Such a tax would, however, run counter to current notions as to what constitutes desirable policy in income taxation. The real problem is not as to the power to impose some kind of income tax, but as to the constitutionality of an income tax at progressive rates under a statute granting exemptions of limited amounts of net income to all within the law. It is also quite probable that the legislature might desire for sound reasons of policy to exempt all income received by certain persons such as educational institutions and the like. Such a statute, considered by itself without reference to the problems its introduction into the tax system might raise

as to the validity of the resulting system, would raise several quite distinct constitutional issues: (1) The validity of increasing the rate of the tax according to the size of the net income; (2) the validity of exempting a limited portion of the net income of all those subject to the tax; and (3) the validity of completely exempting certain groups from the tax. The only provisions of the state constitution that have any bearing on these particular problems are article 4, section 33, which provides that "The legislature shall pass no local or special law . . . exempting property from taxation," and article 9, section 1, which requires taxes to be "uniform upon the same class of subjects" and which specifies the property that shall be exempt. Its due process clause has thus far received no interpretation suggesting that it is a limit on the legislative power to classify and grant exemptions for tax purposes, and the existence of the specific provisions relating thereto, which have just been set forth, renders such use of the due process clause highly improbable. It may, therefore, be ignored in the discussions.

The validity of taxing incomes of different amounts at varying rates depends upon the extent of the classification permissible under the provision requiring taxes to be "uniform upon the same class of subjects." This requirement of our constitution applies to all kinds of taxes, and would, therefore, be applicable to an income tax irrespective of its nature. The intelligent consideration of this problem requires a preliminary analysis to determine exactly what kind of classes would result from the employment of the proposed method of taxation. The actual results will depend upon which of two quite distinct methods for varying the rate with the amount of income is adopted. One of these consists in imposing a tax at a given rate upon the whole net income up to and including a stated amount, and at a higher rate upon the whole net income if that exceeds that amount. A case of that kind would be a statute that taxed all incomes¹⁷ of \$10,000 or less at 1 per cent, and all incomes in excess of \$10,000 at 2 per cent. A person with \$10,000 income would pay a tax of \$100; a person with \$10,001 would pay a tax of \$200.02. The division into classes for tax rate purposes is based solely on the size of total incomes, and involves taxing a given amount of income in certain cases at varying rates that depend upon the

¹⁷The term "income" will hereafter be used in the sense of "net income" unless specified to the contrary.

total income of which it forms a part. The other method consists in taxing at a given rate income up to and including a stated amount, and at a higher rate a defined increment of income above such amount. A statute of this type would, for example, tax at 1 per cent the first \$10,000 or less of any income, and at 2 per cent the portion thereof in excess of \$10,000. A person with \$10,000 of income would pay \$100; one with an income of \$10,001 would pay 1 per cent on the first \$10,000, and 2 per cent on the remaining \$1, or \$100.02. It would seem on its face as if this did not involve varying the rate on a given amount of income according to the total income of which it formed a part, but this is true only if attention is limited to the crude rate applicable to the different income increments. The effective rate, that is, the rate that the total tax bears to the total taxed income, does vary as between total incomes according as they are comprised of different numbers of income increments carrying different rates,¹⁸ and even as between total incomes comprised of the same number of such increments, the larger total income bearing the higher effective rate.¹⁹ Since the number of increments can increase only as total income increases, the net result is that the effective rate increases as total income increases except in the case of increases within the first or lowest rate increment. But that means that, with the exception indicated, the significant rate applicable to any given amount of income does vary according to the size of the total income of which it is a part. The reason why no such reasoning was required in dealing with this aspect of the former method was because the statutory crude rates are identical with the effective rates. The foregoing considerations also show that the second method also involves a division into classes for tax rate purposes that is ultimately based solely on the size of total incomes. It differs from the former in this

¹⁸The following illustration, based on the statute last mentioned in the paragraph, will make this clear. A has an income of \$9,000; his tax at 1 per cent is \$90; its effective rate, 1 per cent. B has an income of \$15,000; his total tax is 1 per cent of \$10,000 plus 2 per cent of \$5,000, or \$200; its effective rate is 1.33+ per cent. That this is true for all conceivable cases is mathematically demonstrable.

¹⁹The following illustration, based on the statute last mentioned in the paragraph, will make this clear. A has an income of \$15,000; his total tax is 1 per cent of \$10,000 plus 2 per cent of \$5,000, or \$200; its effective rate is 1.33+ per cent. B has an income of \$20,000; his total tax is 1 per cent of \$10,000 plus 2 per cent of \$10,000, or \$300; its effective rate is 1.5 per cent. A's income and B's income were each comprised of two income increments. That this is true for all conceivable cases is mathematically demonstrable.

respect only in the device through which that effect is produced, but resort to that device raises a difficulty of determining just what are the classes created that will be later considered. It is apparent, therefore, that the adoption of either of these methods involves classification on the basis of the size of total incomes for tax rate purposes, that both involve increases in effective rates as the size of total incomes increase, and that under each method the effective rate on a given amount of income varies directly with the size of the total income of which it is a part. The question, therefore, is whether our uniformity clause permits using size of incomes as a basis of classification when its use produces the differences indicated in the analysis just made.

It has been stated by our supreme court that the amendment to section 1 of article 9 of the state constitution which substituted the requirement that taxes should be "uniform upon the same class of subjects" for one that they should be "as nearly equal as may be," removed some of the restrictions theretofore imposed upon the taxing power.²⁰ It follows that decisions holding that the provision as it stood prior to 1906 had been violated have practically no value in determining what the present clause permits, although it is almost certain that a classification valid prior to 1906 would be valid thereafter. The language of the two provisions is, however, so different that it seems desirable to discuss the problems of classification involved in a graduated progressive income tax by reference to the principles developed in interpreting the 1906 amendment. The same kind of considerations make it desirable to limit the reference to cases from other jurisdictions to states whose constitutional provisions are identical with or quite similar to that in our own constitution, and this will be done throughout unless the contrary is specifically indicated. Federal decisions interpreting the uniformity requirement imposed on excises by the federal constitution would, for instance, be quite worthless in deciding what our uniformity clause permits, since the function of the former is extremely limited as compared with the scope of our own provision. And the same is true, although to a lesser extent, of the provisions in many state constitutions that define the legislative power to classify for tax purposes.

The true limits imposed on the power to classify for tax purposes can be defined only by considering the function of the

²⁰Mutual Benefit Ins. Co. v. County of Martin, (1908) 104 Minn. 179, 116 N. W. 572.

limiting clauses and the problem with which they are concerned. That problem is wholly that of distributing the tax burden, and uniformity clauses operate to limit the legislative selection of principles for so doing. The general standard to which such selection must conform in order to comply with the uniformity requirement is that the resulting classifications shall be reasonable.²¹ The legislative classification is binding on the courts "unless clearly fanciful and arbitrary."²² Our supreme court has frequently cited decisions of the United States Supreme Court on the validity of classifications for tax purposes under the equal protection clause of the fourteenth amendment in deciding like problems under our uniformity clause.²³ The federal Supreme Court has also said of our uniformity clause that it seems to it to go "no further than the fourteenth amendment."²⁴ It is a fair inference from these facts that the principles determining the validity of tax classifications under the two provisions are fundamentally the same. That principle was defined in the case last cited as requiring the legislature only to "refrain from clear and hostile discrimination against particular persons or classes." The same principles are constantly announced by courts in other states having similar constitutional provisions. It may, therefore, be taken as established that our uniformity clause permits classifications for tax purposes if they are reasonable, not fanciful, and involve no hostile discrimination against particular persons or classes, and that these furnish the ultimate measure of validity whether the tax be on property or on the exercise of a privilege that is itself the creature of statute as in the case of inheritance taxes.

But these principles constitute no more than a starting point when the issue is as to the validity of a particular classification for the purposes of a particular kind of tax. The problem of their application to such a specific case involves difficulties that far transcend their own derivation from the cases. It is a problem

²¹*Mutual Benefit Ins. Co. v. County of Martin*, (1908) 104 Minn. 179, 116 N. W. 572.

²²*Raymond v. Holm*, (1925) 165 Minn. 215, 206 N. W. 166.

²³See for example *State ex rel. St. P. City Ry. Co. v. Minn. Tax Commission*, (1915) 128 Minn. 384, 150 N. W. 1087. The Oregon court has treated the limits imposed on tax classification by its "uniform upon same class of subjects" provision as practically those imposed by the equal protection clause of amendment 14; *Standard Lbr. Co. v. Pierce*, (1924) 112 Or. 314, 228 Pac. 812.

²⁴*Lake Superior Consol. Iron Mines v. Lord*, (1925) 271 U. S. 577, 46 Sup. Ct. 627, 70 L. Ed. 1093.

that is all too frequently avoided by the positive assertion and reiteration of the proposition in dispute. The reason is that the judgment that a specific case conforms or fails to conform to the standard of reasonableness invariably involves mental processes not reducible to logical propositional form. The standard is not a completely determined major premise, but a variable depending in some measure upon elements that are frequently specific to the particular instance being judged. This factor makes complete logical consistency in the whole body of decisions incorporating judgments of this character quite out of the question, as the diversity in actual results clearly shows. It would be easy, but inaccurate, to conclude from this that each such decision is the result of a process in which the non-logical elements have been the sole determining factors; the probable truth is that logical and rational factors enter into the process as limits on the scope and effect produced by the non-logical elements. On the former assumption it would be futile to rely on past decisions in determining the validity of a new specific instance of tax classification; on the latter prior decisions acquire at least some significance, even though it cannot be expressed in an exact mathematical formula. The discussion will proceed on the assumption that prior judicial pronouncements as to the principles governing the validity of tax classifications and their prior applications of such principles to specific cases, are at least as valuable in predicting judicial action on the constitutionality of a graduated progressive income tax as biographical studies of the personnel of courts. But its employment is useful only if it transcends the derivation of those general and vague principles that have been described above as starting points, and enters into an analysis of the process by which these receive specific content in their application. That is largely a matter of discovering the facts and factors relied on in reaching the final judgment.

The most important single factor in determining whether a classification is reasonable is the purpose for which, or the problem in connection with which, it is made. It is, for example, perfectly valid to put aliens into a class when it is a question of shooting wild game,²⁵ but not when it is a question of the right to pursue the ordinary methods of gaining a livelihood.²⁶

²⁵*Patsone v. Penn.*, (1914) 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. 539.

²⁶*Truax v. Raich*, (1915) 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131.

It follows, therefore, that the reasonableness of a tax classification must take account of the fact that it is really a question of what constitutes a reasonable basis for distributing the burden of supporting a government from whose activities all presumably derive some benefit. The specific factors to which courts have assigned significance in reaching conclusions on this matter have been many. Some of them are scarcely applicable to the instant problem, and will be considered only in so far as they might furnish a basis for doubting the validity of a progressive income tax. Considerations of public policy are a legitimate factor in classifying for tax purposes.²⁷ The Pennsylvania court has said in construing the validity of classifications under its "uniform upon the same class of subjects" provision, that these "may be based upon well grounded considerations of public policy."²⁸ It has also been invoked to sustain classifications in imposing excise taxes in states whose constitutional provisions, identical in terms with our own, applied to such taxes.²⁹ The exemption of incomes under \$1000 from the Delaware income tax, which of course involved a classification into those liable and those not liable to tax, was sustained partly because "the Legislature might very well have thought that such exemption would best promote the public welfare;"³⁰ the language of the Delaware uniformity clause, which applied to all taxes, was identical with our own. The conception of public policy includes a wide variety of specific objects; the best characterization of it in connection with taxation is that of the United States Supreme Court in sustaining against an objection based on the equal protection clause a classification for inheritance tax purposes: "Any classification is permissible which has a reasonable relation to some permitted end of governmental action."³¹ That is to say, a state can use its power to classify for tax purposes as an instrument of policy, and act on its view of what it might fairly deem desirable policy in distributing taxes. It can,

²⁷*Mutual Benefit Ins. Co. v. County of Martin*, (1908) 104 Minn. 179, 116 N. W. 572.

²⁸*Comm. v. Delaware Division Canal Co.*, (1889) 123 Pa. St. 594, 621, 16 Atl. 584, 2 L. R. A. 798.

²⁹*Rosenbloom v. State*, (1902) 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922 *In re Gross Production Tax of Wolverine Oil Co.*, (1906) 53 Okla. 24, 154 Pac. 362.

³⁰*State v. Pinder*, (1919) 30 Del. 416, 108 Atl. 43. See also *Ludlow-Saylor Wire Co. v. Wollbrinck*, (1918) 275 Mo. 339, 205 S. W. 196.

³¹*Watson v. State Comptroller*, (1920) 254 U. S. 122, 41 Sup. Ct. 43, 65 L. Ed. 170.

for example, without denying equal protection, seek to discourage holding companies by taxing corporate shares held by corporations but not those held by individuals.³² Judicial decision in thus recognizing the significance of factors of policy is but reflecting the best thought of writers on public finance and the accepted practices of governments.³³ It is clear, therefore, that the question of the validity of progressive income taxes cannot be intelligently approached without considering the whole problem of what constitute the significant bases for distributing tax burdens. To exclude it would involve eliminating that factor of the problem which would seem to be most relevant to a judgment as to the reasonableness of a proposed classification, and would involve a repudiation of the recognized principle that the reasonableness of a classification depends on its purpose, as well as of the cases recognizing the supreme importance of the factor of public policy.

There are three well recognized theories as to what constitute proper bases for distributing taxes. One of these is the benefit theory. It is frequently invoked by courts in dealing with problems of jurisdiction to tax,³⁴ and in determining whether the establishment of tax districts conforms with the provisions of uniformity, equal protection, and due process clauses.³⁵ It was referred to as a factor in sustaining the mortgage registry tax,³⁶ and is really back of the reasoning sustaining the classification for wheelage tax purposes sustained in *Park v. City of Duluth*.³⁷ The second of these theories is the ability theory. Our court has said of this theory:

"Ability or faculty to pay has come to be the test in determining the justness of taxation . . . The equity and fairness of this theory, in its broadest sense, when we reflect upon the vast fortunes accumulated as the result of especially advantageous opportunities and facilities, not possessed by people in general, is

³²*Fort Smith Lbr. Co. v. Arkansas*, (1920) 251 U. S. 532, 40 Sup. Ct. 304, 64 L. Ed. 396.

³³Seligman, *Essays in Taxation*, 9th ed.

³⁴See *Cook v. Tait*, (1924) 265 U. S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895.

³⁵*Maltby v. Tautges*, (1892) 50 Minn. 248, 52 N. W. 858; *Wilson v. Lambert*, (1897) 168 U. S. 611, 18 Sup. Ct. 217, 42 L. Ed. 599. *Myles Salt Co. v. Iberia & St. Mary Drainage Dist.*, (1916) 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392.

³⁶*Mutual Benefit Ins. Co. v. County of Martin*, (1908) 104 Minn. 179, 116 N. W. 572.

³⁷(1916) 134 Minn. 296, 159 N. W. 627. While not so evident, there is an element of this theory in the reasoning sustaining the various classifications of trucks for motor vehicle tax purposes sustained in *Raymond v. Holm*, (1925) 165 Minn. 215, 206 N. W. 166, and *McReavy v. Holm*, (1926) 166 Minn. 22, 206 N. W. 942.

apparent and obvious. It works no injustice or harm to those thus fortunately situated, does not injuriously affect production or industrial agencies, and relieves in a measure those with lesser opportunities, and those to whom taxation is always an extreme burden."³⁸

This statement, though not the basis for the decision sustaining progressive inheritance taxation since the constitution at that time specifically permitted that, is clear indication of the court's attitude toward the ability theory as a factor for tax classifications. It has received little explicit recognition in deciding cases under the existing uniformity clause;³⁹ the decisions have usually invoked other factors more directly suggested by the classifications involved in the cases. It has, however, been extensively relied on in other jurisdictions. A statute that divided gold and silver mines into producing and non-producing for purposes of applying to the two classes different bases of assessment was held not to violate a provision requiring taxes to be uniform on the same class of subjects since it in general divided mines on the basis of their profitableness or unprofitableness, a clear reference to the ability theory.⁴⁰ The relative productivity of different kinds of property was referred to as a factor in sustaining a statute for applying different rates of assessment to different kinds of property under an identical uniformity clause and also the equal protection clause.⁴¹ The Wisconsin supreme court has stated in sustaining the validity of certain classifications made by its Soldiers' Bonus income tax law that "the legislature had a right to take into account in levying the burdens who was best able to pay."⁴² The same theory is at the basis of the reasoning by which the Mississippi court sustains graduated income taxes as not violating the constitutional provision that "taxation shall be equal and uniform throughout the state" and the equal protection clause, in so far as it supports the principle of graduation by quoting from cases the statement that proportional taxation seldom produces equality of sacrifice.⁴³ The exemption of incomes of \$1000 or less from an

³⁸State ex rel. Foot v. Bazille, (1905) 97 Minn. 11, 106 N. W. 93.

³⁹It is referred to in Mutual Benefit Ins. Co. v. County of Martin, (1908) 104 Minn. 179, 116 N. W. 572.

⁴⁰Foster v. Hart Mining Co., (1912) 52 Colo. 459, 122 Pac. 48.

⁴¹Hilger v. Moore, (1919) 56 Mont. 146, 182 Pac. 477.

⁴²State v. Johnson, (1919) 170 Wis. 218, 175 N. W. 589. It should be noted that the Wisconsin uniformity clause does not apply to income taxes. The opinion does not indicate what constitutional provisions the court had in mind in discussing the problem of classification.

⁴³State v. Gulf, M. & N. R. Co., (1925) 138 Miss. 70, 104 So. 689.

income tax was held not to violate a requirement that taxes should be uniform upon the same class of subjects because "It was a proper and reasonable classification of persons whose incomes are very limited."⁴⁴ There are cases in which the ability theory has been invoked by the federal Supreme Court to sustain tax classifications against objections based on the equal protection clause.⁴⁵

The last theory is that taxes should be so distributed as to promote desirable social policy, and in the light of the probable social consequences of different methods of their distribution. It was shown in a preceding paragraph that this has received judicial recognition, including that by our own supreme court. The governmental and social purposes that may be thus promoted have never yet, and probably never can be, completely determined. That they include distributing taxes on the basis of ability to pay is clear from what has just been said. A state can subject to special tax burdens property that depletes since that depletion involves a permanent diminution of taxable property for the future; that is, it can use its power of classification to carry out a policy of grabbing while the grabbing is good.⁴⁶ To impose a special tax on anthracite, but not on bituminous coal, was held not to deny equal protection partly because of the difference in use in so far as that bore on the state's policy in developing other industries.⁴⁷ The exemption of peddlers vending their own products from a license tax on peddlers was held not to violate a requirement that excises be uniform as to the class on which they operated, because the exempted group was held to be engaged in activities promotive of good social policy.⁴⁸ The prevention of the pauperization of the small income class was held a reason why granting an exemption of \$1000 in an income tax did not

⁴⁴*State v. Pinder*, (1919) 30 Del. 416, 108 Atl. 43. It should be stated that the Delaware constitution specifically authorized the legislature, by general laws, to exempt such property as in its opinion would best promote the general welfare, and that this case held an income tax to be a property tax on the income as property.

⁴⁵*Citizens Tel. Co. v. Fuller*, (1913) 229 U. S. 322, 33 Sup. Ct. 833, 57 L. Ed. 1206.

⁴⁶*Lake Superior Consol. Iron Mines v. Lord*, (1925) 271 U. S. 577, 46 Sup. Ct. 627, 70 L. Ed. 1093.

⁴⁷*Heisler v. Thomas Colliery Co.*, (1922) 260 U. S. 245, 43 Sup. Ct. 83, 67 L. Ed. 237. See same case in 274 Pa. St. 448, in which the tax was sustained under the constitutional provision that taxes should be uniform upon the same class of subjects.

⁴⁸*Rosenbloom v. State*, (1902) 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922.

violate equal protection.⁴⁹ It is clear from these cases that the equal protection clause and uniformity clauses similar to our own permit a state to adjust its distribution of taxes so as to promote its views of desirable social policy, and that courts are extremely loath to circumscribe the elements of policy that it can thus promote. Anyone is privileged to claim that these are not strictly speaking legal theories of taxation, but this must not be equated with a denial of their judicial recognition as significant in deciding questions of tax classification. Such claim, therefore, would leave intact resort to such theories in passing on such a question.

The theory most relevant to the problem of progressive income tax rates is the ability theory. An income tax at a flat rate does distribute taxes with some regard to ability to pay, but progressive rates are a more highly perfected device for securing that result in so far as they include equality of sacrifice as an element in measuring ability to pay. Every case, therefore, in which a classification has been sustained by reasoning that included a reference to that theory is to that extent a ground for concluding that progressive rates are valid. The conclusion is not, of course, a logical necessity for it has never yet been stated by any court that every classification that conforms to this principle is valid. The number of instances in which it has been invoked to sustain classifications, however, makes it highly probable that another classification producing the same kind of result will be sustained as valid. The degree of that probability depends in part upon whether judicial reference to other factors in connection with questions of this character can be construed as interposing a bar to giving the ability theory its natural scope. The theory that the power to make tax classifications may be used as an instrument of policy enhances, rather than weakens, the conclusion that progressive income tax rates are valid. A factor frequently relied on to justify classification in connection with property taxes is the difference in the nature and character of property put into different classes. It was an important factor in sustaining our three mill tax on money and credits,⁵⁰ and the assessment of different kinds of property at different percentages of their actual value.⁵¹

⁴⁹*W. C. Peacock & Co. v. Pratt* (C.C.A. 9th Cir. 1903) 121 Fed. 772, 58 C. C. A. 48.

⁵⁰*State ex rel. Winona Motor Co. v. Minn. Tax Commission*, (1912) 117 Minn. 159, 134 N. W. 643.

⁵¹*State ex rel. St. P. City Ry. Co. v. Minn. Tax Commission*,

The typical progressive rate feature of an income tax effects a classification that has no reference whatever to differences in the nature and character of the units includible in the different classes, unless "nature and character" be given a somewhat unusual interpretation.⁵² The factual differences intended have received practically no discussion, although the mere physical differences between them have been relied on to justify taxing anthracite, but not bituminous coal, against an objection based on the equal protection clause.⁵³ The idea would be meaningless as a basis for sustaining tax classifications if it referred to differences in the legal nature of property unless the concept "legal nature" excluded the position of the property for tax purposes. The cases invoking this factor show clearly that the intended differences have no reference to differences in the content of the right of property as regards its different objects resulting from differences in the extent of their regulation by the state. The differences actually intended seem to refer to mere physical differences or that designated by the terms tangible and intangible, as these are ordinarily used.

It is difficult to see how these, except as indexes to more significant differences such as of use, have any rational connection with sound tax policy, but the position of such differences as factors is too well established to be denied. But that means only that such differences justify tax classifications, not that such differences must exist if such a classification is to be valid. The language in *Mutual Benefit Ins. Co. v. County of Martin*,⁵⁴ that classification must be "such as is suggested by essential differences of nature" is erroneous in its implications and not in accord with prevailing authorities.⁵⁵ It is, therefore, no proof of the invalidity

(1915) 128 Minn. 384, 150 N. W. 1087; *Hilger v. Moore*, (1919) 56 Mont. 146, 182 Pac. 477. (The Montana constitution required taxes to be uniform upon same class of subjects.)

⁵²An income tax that taxed at different rates income received in the form of money and that received in some form of property other than money would involve a classification based on differences in the nature and character of the incomes to at least as great an extent as would be true of a classification of property such as is made by our statute classifying property for purposes of assessment.

⁵³*Heisler v. Thomas Colliery Co.*, (1922) 260 U. S. 245, 43 Sup. Ct. 83, 67 L. Ed. 237, which affirmed 274 Pa. St. 448 in which said tax was also sustained as not violating the state constitutional provision requiring taxes to be uniform upon the same class of subjects.

⁵⁴(1908) 104 Minn. 179, 116 N. W. 572.

⁵⁵See *Comm. v. Delaware Division Canal Co.*, (1889) 123 Pa. St. 594, 621, 16 Atl. 584, 2 L. R. A. 798. (For provisions of Penn. consti-

of progressive income tax rates that all dollars of income, whether the first or the millionth, are alike. This may quite well be true from some points of view, but, unless those points of view are the solely decisive ones when the question concerns what treatment may be accorded them for income tax purposes under our uniformity clause, this fact is quite irrelevant; and that, as has been shown, is the case. It is equally true that from some points of view a dollar of value in the form of tangible property is like a dollar of value in the form of a credit, but that has not prevented our uniformity clause from permitting the latter to be taxed at a lower rate than the former. The uniformity clause does not require that every factor that has ever been invoked to sustain a classification under it be applicable to every problem of classification. It would be unreasonable to hold progressive income tax rates invalid because the units in the various classes resulting therefrom did not differ in nature and character, whatever that may mean, although the classification conformed exactly with a standard employed by the court which is much more fundamental in tax matters. The situation under our inheritance tax is exactly similar to what would be the situation under a progressive income tax, and, as will appear later, the parallel cannot be waved aside by the theory that the former tax is an excise on a privilege conferred by the state. The "difference in nature and character" factor, therefore, is no barrier to carrying to its natural consequences the principle that a tax classification is valid that produces a distribution of tax burdens in accordance with ability to pay, and thereby sustaining the progressive rate feature of an income tax under our uniformity clause.

It has already been shown that the progressive rate feature as such produces classes differentiated by the factor of size. Courts have at times taken a rather critical attitude toward classifications based on size, whether for tax or police power purposes.⁵⁶ The objection, however, has been to situations in which the classifications were based solely on size.⁵⁷ A classification for police

tution see footnote 53); *Hilger v. Moore*, (1919) 56 Mont. 146, 182 Pac. 477. (Montana constitutional provision identical with our own); *Watson v. State Comptroller*, (1920) 254 U. S. 122, 41 Sup. Ct. 43, 65 L. Ed. 170. (Equal protection clause.)

⁵⁶*Estate of Cope*, (1899) 191 Pa. St. 1, 43 Atl. 79, 45 L. R. A. 316, 71 Am. St. Rep. 749 (tax); *Cotting v. Kas. City Stockyards Co.*, (1901) 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92.

⁵⁷*Estate of Cope*, (1899) 191 Pa. St. 1, 43 Atl. 79, 45 L. R. A. 316, 71 Am. St. Rep. 749.

power purposes does not violate equal protection though based on size if size is an index of an evil that a state may deal with;⁵⁸ that a classification for tax purposes based on size is valid under equal protection and uniformity clauses if size is an index of a factor justifying such classification is shown by the many instances in which it has been sustained. The relative sizes of incomes is clearly an index of the relative abilities of their recipients to pay taxes, and that alone should suffice to dispel any notion that progressive rates would be invalid because the resulting classifications do rest on size. Uniformity clauses are intended to prevent certain results. The question is whether these include increasing the tax rate with increases in the amount of the thing taxed. A state, whose constitution required taxes to be uniform upon the same class of subjects, divided gold and silver mines into those with a gross annual production of \$5000 or more and those with a gross annual production of less than \$5000, for purposes of applying different methods of assessment which would produce corresponding differences in the effective tax rates. The statute was sustained in an opinion that relies in part upon the ability theory, although of course it did effect a direct variation in rate with the amount of the things taxed.⁵⁹ It is well recognized that a provision requiring taxes to be uniform and equal confines classification within narrower bounds than does a provision such as our uniformity clause. Despite that, a statute has been held not to violate such a clause which exempted \$500 worth of household goods although the court explicitly admitted that its necessary mathematical effect was to increase the effective tax rate as the amount of assessable property increased.⁶⁰ An almost similar clause was held not to be violated by a statute permitting the deduction in assessing real estate of mortgage debts up to the value of \$700 although the necessary effect would be differences in effective tax rates of property of the same kind even of the same value unless mortgaged to exactly the same amount.⁶¹

The progressive inheritance tax produces exactly the results being discussed, and these have been almost universally sustained. If our uniformity clause permits that tax, and that is not likely

⁵⁸*Engel v. O'Malley*, (1911) 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128.

⁵⁹*Foster v. Hart Mining Co.*, (1912) 52 Colo. 459, 122 Pac. 48.

⁶⁰*City of New Orleans v. Fourchy*, (1878) 30 La. Ann. 910.

⁶¹*State ex rel. Lewis et al. v. Smith*, (1901) 158 Ind. 543, 63 N. E. 25, 214, 64 N. E. 18, 63 L. R. A. 116.

to be questioned at this late date, it should permit progressive income taxes unless the two kinds of taxes are so different in respect of some feature that may reasonably be held determinative in this connection, as to require the constitution to be given different meanings in dealing with them. It has been suggested more than once that such difference is found in the fact that inheritance taxes are on a privilege conferred by the state. Our uniformity clause applies to all taxes, including inheritance taxes. The fact that it is a tax on a privilege, therefore, cannot be held to give the legislature the power of unlimited classification even for such a tax. This is exactly the position of the federal Supreme Court taken in the *Magoun Case*, which involved the validity of progressive inheritance taxes under the equal protection clause, that the state must treat all in the same circumstances alike even in conferring privileges.⁶² If then said difference has any significance it must mean that the courts would permit greater legislative freedom in classifying for purposes of inheritance taxes than for income taxes. Such authority as there is on this matter is clearly to the contrary. A graduated income tax has been held not to violate a provision requiring taxation to be equal and uniform because, among other reasons including reference to the *Magoun Case*, "In so far as the principle of equality is concerned, there is no difference between a graduated income tax and a graduated privilege tax."⁶³ An Oregon graduated income tax was held not to violate a requirement that taxes be uniform upon the same class of subjects by an argument that relies heavily upon a prior state decision sustaining progressive inheritance taxes.⁶⁴ Our supreme court has said in discussing progressive inheritance taxes:

"The progressive rule is applied to income tax, which in principle is identical with the inheritance tax; the only difference being that the income tax is one upon property, while the inheritance tax is upon the right of succession."⁶⁵

The difference, such as it is, has accordingly no bearing upon the problem under discussion, and hence it is practically certain that our uniformity clause interposes no greater barrier to progressive income taxes than to progressive inheritance taxes.

⁶²*Magoun v. Ill. Trust & Savings Bank*, (1898) 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037.

⁶³*State v. Gulf, M. & N. R. Co.*, (1925) 138 Miss. 70, 104 So. 689.

⁶⁴*Standard Lbr. Co. v. Pierce*, (1924) 112 Or. 314, 228 Pac. 812.

⁶⁵*State ex rel. Foot v. Bazille*, (1905) 97 Minn. 11, 106 N. W. 93.

Moreover the effect of our money and credits tax, and of the statutes classifying property for purposes of assessment, produce higher effective tax rates on property of the same value, and these have both been sustained although their results are much more arbitrary than those produced by progressive income tax rates. Our mortgage registry tax, in so far as it levies a specific sum upon each one hundred dollars or fraction thereof of the value of the secured debt, actually results in a degressive effective rate as between secured debts consisting of the same number of hundreds of dollars but differing in their remaining units, but that law too has been sustained. It is immaterial for present purposes that the three provisions last referred to deal with classes of property that are in some respects and from some points of view quite different in nature. The point is that a classification for tax purposes that can be sustained by reference to a factor that courts have determined to be significant in such problems, is not invalid merely because it results in different rates of tax either on equal amounts of dissimilar units or on unequal amounts of similar units. It has already been shown that the "ability" principle justifies progressive rates on income, and hence these are not invalid because they measure tax rates by reference to the amount of taxed units.⁶⁶

Attention was hereinbefore called to the two methods by which income tax rates might be varied according to the size of the incomes. The discussion thus far is equally applicable whichever method be adopted. If, however, increasing rates apply only to successive increments of income instead of to the total

⁶⁶It is, of course, apparent that the logic of these considerations would support *ad valorem* property taxes at progressive rates. It is, however, unlikely that our court would hold that our uniformity clause permitted this. The reason would probably be that this would involve too radical a departure from accepted notions, a factor that would not militate against progressive income taxes. It would, however, be incorrect to argue backward from the probable decision on such a tax to the conclusion that progressive income taxes would be invalid; that process would ultimately lead to the conclusion, contrary to actual decision, that progressive inheritance taxes were invalid. The truth is that logic is but one factor in the problem, and the effect of the argument in the text is not absolute certainty or logical necessity, but a high degree of probability that a court would sustain progressive income taxes. It seems quite desirable to rid discussions as to the meaning of broadly phrased constitutional provisions of a latent dogmatism based on an assumption that such phrases have a fixed meaning ascertainable by applying to them a purely logical process. Nothing in the results, or the process as thus far revealed, warrants such a view.

income as that increases, what appears like a difficulty arises. If all incomes are deemed to belong to the same class that are composed of the same number of such successive increments, then the effective rates on incomes belonging to the same class are not equal.⁶⁷ There would not be exact mathematical equality among the members of the same class. It has been said that our uniformity clause requires all within the same class to be equally treated.⁶⁸ This is the invariable requirement for classification under practically all constitutional provisions relating to that matter. That this does not require exact mathematical equality is shown by the fact that the inheritance tax and the mortgage registry tax are valid though they involve similar inequalities. It is also proved by the cases sustaining progressive income taxes referred to in the next paragraph. However, the results produced by progressive rates might equally well be construed as involving the creation of as many classes as there are sizes of income, and in that case the progressive rate system secures even mathematical equality among the members of the class. Irrespective, therefore, of which of these theories be adopted, the results do not involve inequality among the members of the same class as that conception is understood in constitutional law.

Progressive income taxes have been sustained in states whose constitutions required taxes to be uniform and equal, or uniform upon the same class of subject. Cases from states whose constitutions specifically permit graduated progressive income taxation have no relevance to this discussion and will be omitted.⁶⁹ Such taxes have been held not to violate a constitutional requirement that "taxation shall be equal and uniform throughout the state."⁷⁰ One of the judges stated that they offended his sense of equal and just taxation, but concurred because he deemed the principle too firmly established. They have been sustained in Oregon where the constitution required taxation to be uniform upon the same class of subjects.⁷¹ The opinions in both these cases rely upon cases sustaining progressive inheritance taxes, refer to the fact that federal progressive income taxes have been sustained,

⁶⁷See footnote 19.

⁶⁸*Mutual Benefit Ins. Co. v. County of Martin*, (1908) 104 Minn. 179, 116 N. W. 572.

⁶⁹Such cases are *State v. Frear*, (1912) 148 Wis. 456, 134 N. W. 673, 135 N. W. 164. *Alderman v. Wells*, (1910) 85 S. C. 507, 67 S. E. 781.

⁷⁰*State v. Gulf, M. & N. R. Co.*, (1925) 138 Miss. 70, 104 So. 689.

⁷¹*Standard Lbr. Co. v. Pierce*, (1924) 112 Or. 314, 228 Pac. 812.

and support their judgment that such classifications are reasonable by the fact that they have been approved in practice by many enlightened governments. The effect of permitting a limited amount of all net incomes to be exempt is to produce just that variation of tax rate with the size of incomes that constitutes the essential feature of progressive rates. This has been held to violate neither a uniformity clause identical with our own,⁷² nor the equal protection clause.⁷³ There is an early Pennsylvania case which contains language contrary to these decisions, but the real decision was that the city which levied the tax had no power to tax incomes.⁷⁴ The tax was not graduated, and the lack of uniformity which the court condemned consisted wholly of inequality in assessment. Such authority as there is, therefore, supports the view arrived at in the preceding paragraphs that a progressive income tax would not violate our uniformity clause.⁷⁵

It is a common feature of most income tax acts to exempt from the tax, or some part of it, a limited amount of all incomes. The result is that all net incomes not in excess of the stated exemption escape taxation entirely. Incomes are thus divided into two classes: those that are not taxed and those that are. In so far as such form of exemption merely reduces the taxed net income of those within the second of these classes, it has the same effect as graduated progressive rates, and since all would receive the same exemption, that would be its only effect. Hence, as restricted to that phase, it would not violate the uniformity clause. Whether it would conflict with some other constitutional provision will be subsequently discussed. Hence the only additional problem under the uniformity clause raised by such an exemption is that involved in the complete exemption of some incomes from such taxes. The question is whether our uniformity clause prohibits exemption of some tax subjects of a given kind when others of the same kind are taxed. The effect of uniformity clauses in that respect is a matter on which there

⁷²Ludlow-Saylor Wire Co. v. Wollbrinck, (1918) 275 Mo. 339, 205 S. W. 196.

⁷³W. C. Peacock & Co. v. Pratt, (C.C.A. 9th Cir. 1903) 121 Fed. 772, 58 C. C. A. 48.

⁷⁴Banger's Appeal, (1885) 109 Pa. St. 79.

⁷⁵A proposed income tax might make many other classifications such as making the rate depend on the source of the income, or taxing individuals by one set of rates and corporations by another. The validity of such classifications lies outside the purpose of the present discussion.

is no very general agreement.⁷⁶ It has, however, been held that our former requirement that taxes be "as near equal as possible" did not prevent exempting firemen from a poll tax,⁷⁷ and the same principle would seem applicable to our present clause. Our inheritance tax act makes such exemptions, but it was first enacted at a time when the constitution specifically permitted it; eliminating that provision and substituting our present uniformity clause has not yet been held to invalidate the exemptions. The equal protection clause treats the grant of exemptions in the correct manner as a special case of classification subject to the same principles.⁷⁸ In view of the fundamental similarity of the problems under it and our uniformity clause, the inference is valid that the latter would permit exemptions whenever the exempted class can be justified under the principles governing classification. There is, of course, no exact authority in Minnesota on this point as applied to income taxes, but reference has already been made to the instances of inheritance taxes and the firemen's poll tax. The equal protection clause does not prevent such an exemption;⁷⁹ and it has been held not to violate a uniformity clause identical in terms with our own.⁸⁰ The exemption of incomes of \$1,000 or less was held a reasonable classification not conflicting with an identical uniformity clause.⁸¹ The exemption of the whole income of certain classes has been held valid under the same provisions.⁸² Exemptions of income where the constitutional provisions as to income taxes specifically permit it are not in point and need not be cited. Such authority as there is, therefore, clearly supports the view that our uniformity clause would not be violated by exempting a limited amount of all incomes, or by exempting the entire income of such groups as under the principles governing

⁷⁶See Cooley on Taxation, 4th ed., secs. 271-273.

⁷⁷*City of Faribault v. Misener*, (1874) 20 Minn. 396.

⁷⁸*Citizens Tel. Co. v. Fuller*, (1913) 229 U. S. 322, 33 Sup. Ct. 833, 57 L. Ed. 1206.

⁷⁹*W. C. Peacock & Co. v. Pratt*, (C.C.A. 9th Cir. 1903) 121 Fed. 772, 58 C. C. A. 48.

⁸⁰*Ludlow-Saylor Wire Co. v. Wollbrinck*, (1918) 275 Mo. 339, 205 S. W. 196; *Standard Lbr. Co. v. Pierce*, (1924) 112 Or. 314, 228 Pac. 812. The Mississippi law, sustained in *State v. Gulf, M. & N. R. Co.*, (1925) 138 Miss. 70, 104 So. 689, exempted incomes under \$2,500; the state constitution required taxation to be uniform and equal; the point, however, was not discussed although the court did consider and hold valid the exemption of the whole income of designated classes.

⁸¹*State v. Pinder*, (1919) 30 Del. 416, 108 Atl. 43.

⁸²See cases in footnote 80.

classifications generally could be put into a class for that purpose.

Section 1 of article 9 specifies certain property that shall be exempt from taxation. The usual rule is that such constitutional provision deprives the legislature of power to establish other exemptions from the kind of taxes involved in such provision but not of the power of affirmatively creating exemptions from other types of taxes.⁸³ Our legislature can grant no exemptions from property taxes other than those mentioned in the constitution.⁸⁴ Similar provisions prior to 1906 did not, however, prevent exempting firemen from poll taxes.⁸⁵ It is practically certain, therefore, that the constitutional specification of exemptions from property taxes will prevent the exemption of income from income taxes only if, and in so far as, an income tax is held to be a property tax. Our supreme court has stated that an income tax is one upon property, but this was in an inheritance tax case in contrasting the two kinds of taxes.⁸⁶ This is inconclusive and invites a consideration of the authorities. That the actual money or goods received as income are property in the usual legal sense is not, and could not be denied. That is not, however, the question; that is whether a tax on it is that kind of a tax on property to which the constitutional provision as to exemptions has reference. In answering that, the nature of income as property in the ordinary legal sense has a considerable, but not a conclusive, bearing. It is not legally inconceivable to view a tax on income as an excise despite that consideration, and some courts have done so. The question resolves itself into two problems: (a) Is an income tax a property tax on the income itself as property; and (b) is it, in so far as it is imposed on the income from property, a property tax on such property? The decisions have usually either discussed but one of these, or commingled the two. The distinction is not unimportant. If an income tax is a property tax on the income as property, there can be no exemption from an income tax irrespective of the source of the income. If, however, it is a property tax solely as a tax on the property from which the income is derived, there would be noth-

⁸³Cooley on Taxation, 4th ed., secs. 661 et seq.

⁸⁴Le Duc v. City of Hastings, (1888) 39 Minn. 110, 38 N. W. 803. This case antedates the amendment of 1906, but applies to the existing provision.

⁸⁵City of Faribault v. Misener, (1874) 20 Minn. 396.

⁸⁶State ex rel. Foot v. Bazille, (1905) 97 Minn. 11, 106 N. W. 93.

ing in that provision of the constitution now under consideration which would prevent exempting income from sources other than property, and the uniformity clause would constitute the only limit.

The most complete statement of the position that income taxes are not property taxes has been made by the Mississippi supreme court. The state constitution required property to be taxed in proportion to its value, and the question was whether an income tax was a tax on property within this provision. The court's argument can be summarized as follows: an excise is a charge on the doing of an act, the enjoyment of a privilege or the engaging in an occupation; since income includes an element of the production or receipt of income, a tax on it is to that extent one on the performance of an act resulting in gain to the person performing it; hence such a tax is not on property though property be its measure.⁸⁷ The court admits that the money or goods received as income are property. Its position is, therefore, that an income tax is a property tax neither on the income as property nor on the property from which the income is derived. The Arkansas court has expressed itself on this problem as follows:

"To my mind the distinction is very clear between a tax on the right to own and use property—which is a tax on the property itself—and a tax on the income thereof which is the product of such ownership and use. . . . The word 'income' as used for taxation purposes 'involves time as an essential element in its measurement or definition, and thus differs from capital, which commonly means the amount of wealth which a person has on a fixed date.' . . . The income or gain thus derived from capital, from property, from labor, or from both combined, because of its fluctuating and indeterminate nature, during this period and process of its making, has not yet become an investment or an increment to the permanent wealth or property of the individual who has to pay the tax, and therefore is not a property tax. It is however an income tax, and the one who is the recipient of such an income may be subjected to an excise or portion cut therefrom as his modicum of the revenue necessary to meet the burdens of the government which has guaranteed to him the right to acquire and use his property, or to pursue the avocation or business from which the income is derived, and afforded him its protection for all of these rights while the income was being produced."⁸⁸

⁸⁷Hattiesburg Grocery Co. v. Robertson, (1921) 126 Miss. 34, 80 So. 4; State v. Gulf, M. & N. R. Co., (1925) 138 Miss. 70, 104 So. 689.

⁸⁸Sims v. Ahrens, (1925) 167 Ark. 557, 271 S. W. 720.

It was held, therefore, not subject to a requirement that taxes be ad valorem, equal and uniform. It is clear that this court does not consider an income tax a property tax in either of the senses above mentioned. Missouri has likewise held an income tax not a property tax within a constitutional requirement that all property be taxed in proportion to its value, and the same case held that therefore exemptions from income taxes did not violate a constitutional provision voiding all exemptions of property, other than specified kinds, from taxation.⁸⁹ The Georgia court has reached the same conclusion.⁹⁰ The Wisconsin income tax is not deemed levied on property, but this fact has but slight importance because of the special wording of the Wisconsin constitution.⁹¹

The most complete statement of the position that income taxes are taxes on property is found in *Eliasberg Bros. Mercantile Co. v. Grimes*.⁹² The issue was whether an income tax was a property tax within a constitutional provision limiting the rate of property taxation. The argument is in substance that the items comprising income are property; hence all income consists of property; hence it is property. The position of this court is, therefore, that a tax on income is a property tax on the income as property. The same view is expressed in a dissenting opinion in the Missouri case cited in the last paragraph. The Massachusetts court has held that a "tax upon income derived from property is a tax on property."⁹³ The dissenting opinion in the above referred to Missouri case also adopts this view. A dissenting opinion in the *Hattiesburg Grocery Co. Case* cited in the preceding paragraph supports the same view. Its reasons are that ownership includes the right to use, that income is the result of such use, that a tax on the income is thus a tax on the use and therefore on the ownership and the property itself. All of these

⁸⁹Ludlow-Saylor Wire Co. v. Wollbrinck, (1918) 275 Mo. 339, 205 S. W. 196.

⁹⁰Waring v. Mayor, Etc. of Savannah, (1878) 60 Ga. 93.

⁹¹See *State v. Frear*, (1912) 148 Wis. 456, 134 N. W. 673, 135 N. W. 164; *Paine v. City of Oshkosh*, (1926) 190 Wis. 69, 208 N. W. 790.

⁹²(1920) 204 Ala. 492, 86 So. 56.

⁹³Opinion of the Justices, (1915) 220 Mass. 613. The Massachusetts income tax levied under the provisions of amendment 44 to the Massachusetts constitution is deemed a property tax, *Maguire v. Tax Commrs.*, (1918) 230 Mass. 503, 120 N. E. 162. Since that authorizes taxes on incomes not derived from property, it would seem that Massachusetts in practice adopts the position of the Alabama court.

cases, and the dissenting opinions herein referred to, rely heavily on the *Pollock Cases*,⁹⁴ but these at most support only the view that a tax on the income from property is a tax on the property from which the income is derived. A tax on income from a profession is not on property so as to be a direct tax within the provisions involved in the *Pollock Cases*. In view of the difference in the legal problem in them and the state cases, the argument based on them is exceedingly weak but no more so than the attempt of the cases holding income taxes not to be property taxes to interpret some expressions in the *Brushaber Case*⁹⁵ as reversing the position of the *Pollock Cases*.⁹⁶ Delaware is the only other state that has held income taxes to be property taxes on the theory that income is property.⁹⁷

This division among the authorities makes any prediction of what a court not bound by them will decide extremely hazardous, despite definite statements in some texts that an income tax is an excise.⁹⁸ It is probably true that they are not property taxes as that term is generally understood. Our gross earnings taxes, though in fact on the earnings, are in theory on the property by which they are earned. An income tax would not in legal theory be levied on the property from which derived but on the income itself. There is, therefore, no reason for analogizing the problem as to an income tax to that presented by our gross earnings taxes, but such an argument is conceivable and not beyond the flexible limits within which analogical reasoning functions in legal thinking.

In view of the indecisiveness of results derivable from the authorities, is there any preponderance of reason in favor of either theory? That the act of receiving income is a conceivable subject for an excise cannot be denied. The right to receive the income from property is clearly no more a part of the right of property than is the power to sell it; if the exercise of the latter is a proper subject for an excise, equally so is an exercise of the former. The right to receive income from personal ef-

⁹⁴*Pollock v. Farmers' Loan & Trust Co.*, (1895) 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759. (1895) 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108.

⁹⁵*Brushaber v. U. P. R. Co.*, (1916) 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493.

⁹⁶See *Hattiesburg Grocery Co. v. Robertson*, (1921) 126 Miss. 34, 80 So. 4, and *Sims v. Ahrens*, (1925) 167 Ark. 557, 271 S. W. 720.

⁹⁷*State v. Pinder*, (1919) 30 Del. 416, 108 Atl. 43.

⁹⁸*Black, Income and Other Federal Taxes*, 4th ed., sec. 1.

forts is no more a part of liberty than the power to enter into contracts, and should be as subject to an excise as is the latter. If a tax on a sale is not a tax on the property sold, it is difficult to see why a tax on receiving the income on property is a tax on property itself. If the conclusion that a tax on the income from property is a tax on the property is sought to be derived from some theory of the ultimate incidence of such tax on the owner of the property, the answer is that the conclusion is probably incorrect so far as the income from reproducible forms of property are concerned, and furthermore, it is unlikely any such notions entered into the minds of those who framed the constitutional provisions. The view that income is itself property cannot be denied, and furnishes the strongest support for the theory than an income tax is one on property. But there is much to support the view of the Arkansas court that property taxes have usually had reference to taxes on capital values as of a fixed time, and that, since income as property is inconceivable except as a function of time, a tax on it is not a tax on property in the sense of the constitutional provisions of the kind under discussion. Such preponderance of reason as there is is rather in favor of the view that an income tax is not a property tax, but it rests rather on the weakness of the arguments supporting the other view than on any positive factors of its own. It is, in any case, inconclusive.

There is, therefore, a probability that our court would hold it a tax on property. If it did so on the theory that it was such because income is property, it would prevent exempting limited amounts of all incomes and incomes of stated sizes except in so far as any income belonged to classes of property specified as exempt in the constitution. For instance, income of colleges used for educational purposes would probably be exempt since it is inconceivable that a tax on income would be held a tax on property for purposes of determining the negative aspects of the specific exemptions in article 9, section 1, and not for purposes of defining the right of such income as property to exemption thereunder. If, however, the court should hold that an income tax was a tax on property because, and only in so far as, it taxed income from property, then, subject to the provisions of the uniformity clause, exemptions of income from other than property sources could be conferred. That would probably meet most of the situations which are deemed to make limited exemptions

socially desirable. The only case that directly passed on the question in connection with determining the scope of an exemption provision was the Missouri case, and that supports the view that it is not a tax on property. But the matter is far from certain. Except for administrative considerations, the problem of exemptions could be met by imposing an exceedingly nominal rate on the amount of net income it might seem desirable to exempt; this assumes that the progressive rate feature is valid. Another device is to include living expenses up to a certain amount among the deductions in computing net income. This has, so far as the writer knows, never been tried. At least there are no judicial authorities on its validity. The only conceivable objection to it would have to rest on some theory that some constitutional provision requires the legislature in defining net income to confine itself measurably within the limits determined by economic analysis of income. That any existing provision is likely to receive that construction is improbable. There is, therefore, no certainty that a constitutional amendment is necessary to permit the incorporation of the principle of exemptions into any proposed income tax; the only conclusion possible is that the policy of such exemptions is not as clearly constitutional as is that of graduated progressive rates.⁹⁹

It is quite likely that the state might want to exempt certain property from ad valorem or other forms of property taxation if it adopted an income tax. This raises several questions that demand consideration. If a tax on income, from whatever source derived, is held to be an excise, then such exemption would leave certain property subject to no property taxation whatever. This would violate article 9, section 1, except as to property specifically exempted thereby, unless it be held that the imposition of an excise on the income from property can be considered as legally equivalent to a tax on such property for the purpose of applying the rule that our legislature can grant no exemptions of property from taxation beyond those specified in the constitution. The question is whether that requirement can be satisfied by a com-

⁹⁹The practical effect of our statute assessing property at less than its full value is the same as would be produced by a statute exempting a portion of the taxable property within the state. This has not, however, been held violative of Article 9, Section 1. The legal theory is that such a statute does not create any exemptions. It is accordingly doubtful that the validity of this practice would tend to support the complete exemption of some income if an income tax were held a property tax.

mutative tax. The authorities are not in accord as to whether a constitutional prohibition against exemptions prevents commuting a tax of the kind to which the prohibition relates for some other kind of tax.¹⁰⁰ It is clear that our own provision does not prevent substituting a gross earnings tax for an ad valorem property tax, but that does not exactly meet the case for the former is still a tax on property and the only substitution is that of one measure of property for another, whereas the question is whether a tax that is not a property tax can be substituted for a property tax in applying a rule prohibiting exemptions from the latter kind of tax. To admit such substitution would mean that the imposition of a corporate excise would permit the exemption of corporate property from property taxes. It is highly improbable that the court would adopt such view. If, then, the income tax is construed as an excise tax, it is practically certain that no part of the property now subject to taxation will be permitted to be exempted. The same conclusion would probably be correct if an income tax is held to be a property tax on the income as property. In that case the tax acquires its character as a property tax because levied on property other than that which it would be proposed to exempt, and it is, therefore, unlikely that its taxation would be held a substitute method for imposing a property tax on such property which would validate exempting that from other methods of property taxation. This proposition is not wholly certain, for shares of domestic corporations can be left untaxed if the corporate property itself is taxed, a procedure in many respects analogous to exempting from ordinary property taxes property whose income is taxed. If, however, a tax on income from property is held to be a tax on the property from which such income is derived, then relieving such property from ordinary property taxation would be no more an exemption of such property than is the case with property now taxed by our gross earnings taxes. The discussion in this paragraph has assumed that the only property which would be relieved from ordinary property taxes is property the income from which would be taxable. The mere fact that during some years income prop-

¹⁰⁰That commutative taxation violates constitutional provisions prohibiting exemptions, see *Millers' Mut. Fire Ins. Co. v. Austin*, (Tex. Civ. App. 1919) 210 S. W. 825; *The Life Ass'n of Am. v. Bd. of Rd. Assessors, Etc.*, (1872) 49 Mo. 512; *Hogg v. Mackay*, (1893) 23 Or. 339, 31 Pac. 779, 19 L. R. A. 77, 37 Am. Rep. 682. That it does not, *In re Gross Production Tax of Wolverine Oil Co.*, (1916) 53 Okla. 24, 154 Pac. 362.

erty did not yield an income would not require it to be denied such relief during those years, as its right to relief could almost certainly be made to depend on its character as income property. There are grave doubts, however, that such relief could on any theory be accorded property whose primary function was not to yield income but that of consumption goods, such as household goods. This might be remedied by requiring their use or rental value to be taken into income, but no law is likely to go to such refinements. The validity of relieving certain classes of property from ordinary property taxes upon the adoption of an income tax is doubtful if an income tax be held an excise, also doubtful if it be held a property tax on the income as property, but practically assured if it be held a tax on the property from which the income is derived. It differs in that respect from the exemption of income itself; that is probably invalid if an income tax be held a property tax on the income as property; also if it be held a tax on the property from which the income is derived; almost certainly valid if such a tax be held an excise.

One further problem remains. If an income tax on income from property be held a tax on the property from which such income is derived, there will result a double tax on such property unless it is relieved of other forms of property taxation. Our constitution does not specifically forbid double taxation. The question is whether our uniformity clause or any other constitutional provision prohibits this. In view of the fact that there is likely to be some property, such as consumption goods, that would be in substance untaxed by the income tax method, the result would be some property subject to but one, and other property subject to two, taxes on property. Though this would be in substance merely taxing it at different rates, which is not forbidden by our uniformity clause, nevertheless there is a high probability that the accomplishment of this result by this method would be held violative of uniformity. If, however, by some device such as suggested in the preceding paragraph, provision were made for including income from all property within an income tax, this result would be avoided, and then the question would be squarely raised whether the double taxation of all property was invalid. No authority has been found on this matter as applied to this particular kind of double taxation, and such authority as has dealt with double taxation has involved situations

scarcely comparable.¹⁰¹ There exists, however, a well established judicial prejudice against double taxation,¹⁰² which would raise serious doubts as to the validity of continuing the existing forms of property taxes if an income tax were to be imposed on the income from such property. The foregoing discussion was predicated on the theory that an income tax be held a tax on the property from which the income was derived. If it be held a property tax, solely because the income on which it is levied is itself the property taxed by it, then a tax on it is solely on distinct property not now taxed, and accordingly no question of double taxation would arise from continuing to tax even income property under existing systems. The same is true if it be held an excise. The only circumstance under which, therefore, any question is likely to arise as to whether existing taxes on property can be continued if an income tax on income from property is adopted is if the court should hold such tax on such income a tax on the property from which such income is derived. If it be so held, a doubt would exist as to whether it might not be required to abolish existing methods of property taxes for property the income from which is made taxable. The question would not arise as to taxing incomes from other sources than property.

The preceding discussion warrants the following conclusions. There is nothing in our constitution that prevents the legislature from selecting income as a subject for taxation, but an income tax law would have to conform to the provisions governing other taxes. The principal constitutional provisions that apply are the uniformity clause and that relating to exemptions from taxation. The uniformity clause would prevent neither the adoption of the principle of progressive rates, nor the exemption of a limited amount of all incomes, nor the exemption of some incomes entirely. The limits on the legislative power to exempt from taxation resulting from the constitutional specification of the exemptions from property taxes would prevent exempting income from property, except as such income would come within the constitutionally specified types of property exempted, if an income tax be held a tax on the property from which such income is derived; but, if this theory is adopted, income from sources other than property could be exempted without violating the constitutional prohibition of exemptions. If, however, an income tax

¹⁰¹See Cooley on Taxation, 4th ed. chap. 5.

¹⁰²See *State v. N. P. Ry. Co.*, (1915) 130 Minn. 377, 153 N. W. 850.

be held a tax on property because levied on the income as property, then the prohibition against exemptions would prevent even exempting income from sources other than property. If an income tax be held an excise, the only limit on exemptions will be that provided by the uniformity clause. The legislature will be able to exempt property whose income is taxed from other forms of property taxes if such tax be held a tax on the property from which such income is derived. Such exemption is doubtful if it be held a property tax solely because a tax on the income itself as property; while if an income tax is held an excise it is practically certain that the legislature will be unable to adjust the existing tax system in that manner. The only circumstance under which the exemption of property, whose income is taxed, from other property taxes may be required is if an income tax on such income be held a tax on such property; this proposition, however, is not as well established as are the others herein stated. It must be borne in mind that, in the absence of direct decisions on these problems by our own court, these propositions represent not logical certainties or necessary conclusions, but indicate the highly probable action of our court if it should ever be called upon to decide them. The probabilities have been arrived at by taking into consideration the factors and kinds of reasoning usually employed by courts in deciding such matters when there is no direct authority on them in the jurisdiction involved. The discussion has aimed to set forth the factors that will have to be weighed in intelligently considering whether our constitution must be amended if we are to have an income tax, and in determining just what form that amendment should take. That an amendment would settle some matters now uncertain is clear, but that the legislature can do nothing in regard to income taxes until the constitution is amended is not a well grounded opinion. It might well be said in conclusion that a constitutional provision that has to be supplemented by amendments every time a new departure, purely legislative in nature, is contemplated, might well be subjected to some more fundamental form of revision than merely adding something more if it should be decided to change it again.