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State Constitutional Limits on New Hampshire's Taxing Power: Historical Development and Modern State

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State Constitutional Limits on New Hampshire's Taxing Power: Historical Development and Modern State

MARCUS HURN*

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I. INTRODUCTION

The New Hampshire Constitution is, in most of its fundamental parts, very old.¹ It is long (nearly 200 articles) and wordy, even by the standards of the eighteenth century. It expresses essential principles in more than one place, in more than one way, and in language that to modern eyes is more suited to political philosophy than to positive law. Most of it was copied from the original Massachusetts Constitution,² itself based on a draft by John Adams.³ However, there is no other state in the union with a structure of taxing powers and limits comparable to New Hampshire's.

Part I of the New Hampshire Constitution is the Bill of Rights. Its first article declares "[a]ll men . . . equally free and independent," and "all government . . . instituted for the general good."⁴ Article 10 reiterates that government is "instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men."⁵ Article 12 entitles "[e]very member of the community," to protection "in the enjoyment of his life, liberty, and property," subject to the obligation "to contribute his share in the expense of such protection"⁶ These provisions, combined with part II, article 5's requirement that legislation be "wholesome and reasonable," and "for the benefit and welfare of this state,"⁷ comprehend concepts later expressed in the federal Constitution as Substantive Due Process and Equal Protection. Retrospective laws are prohibited.⁸

The New Hampshire founders had distinct views on the proper ways of funding government. Part II, article 5 requires that "assessments, rates, and taxes," be "proportional and reasonable"⁹ They gave this principle particular content by rejecting the clause of their Massachusetts mod-

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1. The revolution was waged by a provisional government with "undefined and boundless authority, hastily assumed and arbitrarily exercised, for the transient purpose of the war" *Gould v. Raymond*, 59 N.H. 260, 272 (1879). The permanent constitution, refined and ratified by the people through successive rounds of town meetings, became effective in 1784. *State v. Saunders*, 66 N.H. 39, 72 (1889). A comprehensive set of amendments was ratified in 1792. *Id.* While the 1792 revision was quite extensive, it was not strictly a new constitution.

2. *State v. U.S. & Can. Express Co. (State v. Express)*, 60 N.H. 219, 248-49 (1880).

3. 4 CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES WITH A LIFE OF THE AUTHOR* 215-16 (1851).

4. N.H. CONST. pt. I, art. 1 (1784).

5. N.H. CONST. pt. I, art. 10.

6. N.H. CONST. pt. I, art. 12.

7. N.H. CONST. pt. II, art. 5.

8. N.H. CONST. pt. I, art. 23.

9. N.H. CONST. pt. II, art. 5.

el authorizing excise taxes.¹⁰ Taxation was permitted only on polls and “estates” (meaning property owned, possessed, or enjoyed).¹¹ This was reiterated in the original language of part II, article 6 governing modes and frequency of assessment.¹² They also omitted language authorizing the colonial practice of taxing “faculty,” the capacity to earn income.¹³ For over a century, the property tax for each unit of government was just that—the property tax—a single, broad levy at one uniform rate on specified real and personal property.

Despite one significant constitutional amendment¹⁴ and considerable evolution in judicial interpretation, it is still the case that true taxes must be on polls or property. New Hampshire remains unique among the states in denying the legislature the power to levy excise taxes as such.¹⁵ Consequently, while occasionally used, persuasive authority from other states and general treatises are often irrelevant, misleading, or double-edged.¹⁶ Modern “taxes” not levied ad valorem on some class of property must be justified under some other power (as, for example, fees to recover costs,

10. *State v. U.S. & Can. Express Co. (State v. Express)*, 60 N.H. 219, 239 (1880). The excise article was also missing from Adams’s original draft. 4 ADAMS, *supra* note 3, at 233 n.3. Hostility to excises was part of an established political tradition in England as well as the Colonies. Viewed as oppressive and a source of systematic corruption, their abolition was repeatedly demanded under the English Commonwealth. See, e.g., J. Rushworth, *Heads of the Proposals Offered by the Army*, in THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625–1660 324 (Samuel Rawson Gardiner ed., 2d ed. 1899). Dr. Johnson’s famous dictionary defines excise as “a hateful tax levied upon commodities” SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (unpaginated) (facsimile reprint 1990) (London, 1755). In its address inviting Quebec to join the colonial resistance, the Continental Congress referred to the excise as “the horror of all free states.” THE FOUNDERS’ CONSTITUTION ch. 14, doc. 12 (Philip B. Kurkland & Ralph Lerner eds., 1987), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s12.html>.

11. N.H. CONST. pt. II, art. 6; *Conner v. State*, 82 N.H. 126, 127–28, 130 A. 357, 358 (1925).

12. “And, while the public charges of government or any part thereof shall be assessed on polls and estates in the manner that has heretofore been practiced, in order that such assessments may be made with equality there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order.” N.H. CONST. pt. II, art. 6.

13. MAURICE H. ROBINSON, A HISTORY OF TAXATION IN NEW HAMPSHIRE 86 (1903); *Opinion of the Justices*, 76 N.H. 588, 593–94, 79 A. 31, 33 (1911). The implication of this omission was not at first realized. In 1784 the first assessment statute after adoption of the constitution retained “faculty,” but it was omitted in 1789 and did not reappear. *Opinion of the Justices*, 76 N.H. at 595, 79 A. at 33.

14. N.H. CONST. pt. II, art. 6 (amended 1903) (permitting taxation of “other classes of property”).

15. The constitutional amendment of 1903 authorizing taxes on “other classes of property” permits what I call quasi-excises:

In the sense that they are dynamic rather than static, that their incidence is dependent upon the happening of an event rather than upon the mere existence of property, they may properly enough be classed as excises. In the features of being laid upon property and ad valorem, they are like estate taxes.

Opinion of the Justices, 84 N.H. 559, 576, 149 A. 321, 330 (1930) (emphasis added); see *infra* Part II.D.

16. See, e.g., *State v. U.S. & Can. Express Co. (State v. Express)*, 60 N.H. 219, 249–50 (1880) (referencing Chief Justice Doe’s use of Massachusetts cases upholding taxes under the excise clause to demonstrate the unconstitutionality of similar taxes in New Hampshire).

special benefit assessments, or penalties). These non-tax revenues are subject to their own constitutional constraints and have a complex history. Some description of their origin and nature is required to understand taxation, but full analysis of their current status is deferred to a forthcoming article. The modern tax system would be unrecognizable (and probably disturbing) to the founders and the courts of the nineteenth century. Political and economic pressures have led to repeated and increasingly complex efforts to mimic excise taxes by defining special classes of property, layering exemptions and credits, and wielding other revenue powers. Along the way several narrow constitutional amendments have permitted or constrained particular taxes or policies.¹⁷

II. HISTORICAL DEVELOPMENT: FOUR PERIODS

The New Hampshire Supreme Court regularly cites tax opinions as far back as 1829, with little indication of any legal discontinuities. However, the constitutional law of New Hampshire taxation shows four distinct periods of increasing complexity. Only a few general principles survive from the earlier cases, and many specific holdings have been overturned, often indirectly or tacitly.¹⁸ Some early general statements have been given new, very different meanings. The citations to old cases are a tribute to the court's determination to maintain principled consistency with as much of the ancient law as possible, but many once-critical distinctions have been swept away. The modern court is usually much more deferential to legislative judgment than its predecessors. Because decisions from before 1940 are as likely to mislead as to enlighten the reader, some sense of the spirit of each era and the turning points will reduce the risk of confusion. Moreover, the modern law is encrusted with bland generalities and string citations¹⁹ that obscure issues, some of them unresolved. The peculiarities of

17. N.H. CONST. pt. II, art. 83 (amended 1877) (prohibiting use of tax money for religious schools); N.H. CONST. pt. II, art. 5 (amended 1942) (permitting special assessments, rates and taxes on growing wood and timber); N.H. CONST. pt. II, art. 5-b (amended 1968) (real estate may be valued based on current use); N.H. CONST. pt. II, art. 6-a (amended 1938) (revenue from automobile registrations, licenses, gasoline taxes, etc. dedicated solely to highway purposes).

18. Changes have often been indirect or tacit. As a result, the signals in citation services are not reliable—independent examination of later citations is recommended.

19. For example, in 1997, after a long, citation-studded survey of general principles derived from the main sources and limits of taxing authority, the court concluded: "Together, these three constitutional provisions require that taxation be just, uniform, equal, and proportional; in addition, our constitution demands that classifications be made between types of property, not taxpayers." *Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. 681, 686, 692 A.2d 486, 491 (1997). In the author's experience, this offers little practical guidance to legislative committees.

current law make little sense without an understanding of the logic and the concrete cases through which they evolved.

A. 1784–1880: *The Age of Innocence*

From the adoption of the constitution to 1902, there was one principal property tax supporting each level of government. The legislature added and varied items to be included, set uniform statutory valuations for some of them, and experimented with exemptions to encourage various industries. From the beginning there was also an “excise” on alcoholic beverages and assorted other levies indifferently called taxes or fees that, while potentially problematic, were familiar from the colonial period and taken for granted.²⁰

Until 1829, there was little opportunity for the courts to test legislation against the tax philosophy embedded in the constitution.²¹ In that year, the Supreme Court of Judicature took the occasion of an advisory opinion about a proposed local road tax to write a comprehensive dissertation on the constitutional framework.²² The opinion has been regularly cited down to modern times.²³ At least four enduring propositions were developed. First, the “supreme legislative power . . . vested in the senate and house of representatives”²⁴ to “establish, all manner of wholesome and reasonable . . . laws . . . for the benefit and welfare of this state,”²⁵ is not plenary in matters of taxation, but is limited to “proportional and reasonable” levies on the specific subjects mentioned in part II, articles 5 and 6—at that time, only “polls and estates.”²⁶ Second, “proportional” means “the same tax shall be laid, upon the same amount of property, in every part of the [jurisdiction levying it].”²⁷ Third, the additional term “reasonable” adds something beyond mathematical proportionality, permitting variation to make taxes “just . . . so that each individual’s just share, and no more, shall fall upon him.”²⁸ Fourth, “a very considerable latitude of discretion must be

20. See generally ROBINSON, *supra* note 13.

21. “The legislature exercised judicial power after the adoption of the constitution, as they did before, in reversing judgments and granting new trials: and that illegal procedure was not discontinued until it had flourished, under constitutional prohibition, for the space of thirty-four years.” *State v. Express*, 60 N.H. 219, 248 (1880) (citing *Merrill v. Sherburne*, 1 N.H. 199 (1818)).

22. *Opinion of the Court*, 4 N.H. 565 (1829).

23. See, e.g., *Claremont Sch. Dist. v. Governor (Claremont II)*, 142 N.H. 462, 703 A.2d 1353 (1997); *Smith*, 141 N.H. at 681, 692 A.2d at 486.

24. N.H. CONST. pt. II, art. 2.

25. N.H. CONST. pt. II, art. 5.

26. *Opinion of the Court*, 4 N.H. at 566.

27. *Id.*

28. *Id.* at 569. Other than the exemption of infants and idiots from the poll tax, the justices gave no indication how a “just share” differs from mathematical proportionality. *Id.* at 570.

left to the legislature . . . as to the selection of proper subjects of taxation and the proportion of the tax that shall be laid on each subject . . . ”²⁹

The rise of business corporations, particularly railroads, telegraph companies, and various types of banks or insurance companies, strained the simple system. Was the property of a corporation to be taxed to the shareholders, to the corporation, to both, or somehow apportioned?³⁰ What if the corporation itself owned shares?³¹ The full value of the tangible property of network industries and the intangible property of moneyed corporations could not reasonably be assessed and taxed by particular towns. The statutes of the mid-nineteenth century are strewn with experiments raising revenue from these industries by statewide levies in addition to, or in lieu of, localized taxes on tangible property.³² The courts became increasingly concerned about double taxation and the actual incidence of various taxes.

In surveying this period (as he joined in bringing it to a close), Chief Justice Doe wrote:

Inequality of operation, gradually introduced by new subjects of taxation, and by increased differences in the values and varieties of old ones, has been met by legislative efforts to rectify the wrong. Such changes have taken place that methods of dividing the public expense, equitable enough for practical purposes in the last century, would now be good cause of complaint. A great mass of questions of constitutional administration, to be raised by the progress of society, and the enlarged and complicated industries and interests of future generations, were left for those generations to solve.³³

B. 1880–1903: *New Rigor, Powers and Limits Refined*

In 1880, the New Hampshire Supreme Court began to strictly define proportionality and to strike down or advise against³⁴ a great deal of legis-

29. *Id.* at 570.

30. *Smith v. Burley*, 9 N.H. 423 (1838); *see also* *Cheshire County Tel. Co. v. State*, 63 N.H. 167 (1884); *Robinson v. Dover*, 59 N.H. 521 (1880).

31. *Nashua Sav. Bank v. City of Nashua*, 46 N.H. 389 (1866).

32. This history is somewhat surveyed in *Wyatt v. State Board of Equalization*, 74 N.H. 552, 70 A. 387 (1908), where it became necessary to determine whether the savings bank deposit tax was a property tax, in order to determine the proper formula for assessing the railroad tax.

33. *State v. U.S. & Can. Express Co. (State v. Express)*, 60 N.H. 219, 247 (1880).

34. As economic and political demands for legislation increasingly ran afoul of constitutional limits, the House and Senate began to invoke part II, article 74 of the New Hampshire Constitution to secure advisory opinions on proposed legislation. Their precedential value is somewhat qualified:

The true standing to be ascribed to them seems to be that while they are persuasive they are not controlling; and their persuasive value may be greater or less, as the circumstances under

lation. In that year, it declared three tax statutes unconstitutional,³⁵ and two years later another.³⁶ It also began to develop the criteria for tax exemptions and the constitutional bases and limits for revenues that could be raised without qualifying as taxes.

The decisive step was taken in *State v. U.S. & Canada Express Co.*, when the court struck down a “license” fee of 2% on the gross revenues of express companies.³⁷ Although still cited and regarded as fundamental, by normal standards *State v. Express* should have had little precedential value. There was no opinion of the court. Two Justices did not sit, two wrote individual opinions, and the others concurred only in the result without opinion. The opinions of Justice Stanley and Chief Justice Doe display quite different approaches to the relevant constitutional provisions. Subsequent decisions long reflected Stanley’s attitude toward proportionality. Doe’s lasting contribution was to ground many exemptions and substantial non-tax revenues in the “protective power,” New Hampshire’s version of the police power.³⁸

The attorney general argued that modern conditions required the court to recognize it had been wrong in 1829—that the legislative power to tax was not intended to be limited to proportional levies on polls and estates, but extended to “privilege” taxes on business. This was demonstrated by a century of business licensing and business taxes assessed at fixed sums or according to income.³⁹ The state maintained there was no difference between a license fee and a tax.⁴⁰

Both Justice Stanley and Chief Justice Doe believed that there was a difference, and that despite its terminology this statute’s object was “to raise revenue by taxation.”⁴¹

That made the case easy for Justice Stanley. He adhered to the prevailing view that the references to polls and estates in part II, articles 5 and 6

which they were rendered show finality of judgment or the reverse in the minds of their authors.

Opinion of the Justices, 84 N.H. 559, 583, 149 A. 321, 333 (1930). They comprise, by far, the bulk of the court’s analysis in this field and are rarely renounced.

35. *Boston, Concord & Montreal R.R. v. State*, 60 N.H. 87 (1880) (railroad tax disproportional to extent it was a state tax); *Berlin Mills Co. v. Wentworth’s Location*, 60 N.H. 156 (1880) (taxation of property in unincorporated place by adjacent town); *State v. Express*, 60 N.H. 219 (1880) (levy on gross receipts of railroad express companies).

36. *Curry v. Spencer*, 61 N.H. 624 (1882) (legacy and succession tax).

37. 60 N.H. at 248–50.

38. This expression, rooted in the social contract language of articles 10 and 12 of the New Hampshire Bill of Rights, emphasizes that the New Hampshire legislature has never exercised sovereign prerogatives, only delegated powers subject to express reservations.

39. *State v. Express*, 60 N.H. at 228.

40. *Id.* at 224–25.

41. *Id.* at 234 (Stanley, J.); *see also id.* at 262–63 (Doe, C.J.).

were exclusive, limiting the legislature's more general powers.⁴² Therefore, the statute was obviously unconstitutional in several ways: it taxed only express business carried by railroads, not other express business; it was not a "tax on property, or on polls or estates," because it did "not regard the capital invested, the expenses incurred, or the losses sustained;" and if it were, it could not be reasonable and proportional because it was "not on net profits, but on gross receipts."⁴³ It would also be a double-tax on the income producing power of property already taxed at full value.⁴⁴ Justice Stanley also presumed that if a business tax were permissible, it necessarily would have to be "on all business alike."⁴⁵

Chief Justice Doe had a very different constitutional theory. He did not consider the references to polls and estates in part II, articles 5 and 6 to be exclusive.⁴⁶ The omission of the excise clause was not meaningful—there was a plenary taxing power limited only by the more general clauses of the New Hampshire Bill of Rights, "the tax power of New Hampshire is included in the grant of the supreme legislative power (subject to the limitation of equality on which the whole government is founded)"⁴⁷ He thought business taxes, even on particular industries, could be constitutionally equal if assuredly passed along to consumers. In the previous year he had taken a dramatic position:

It is the consumer or user who pays the tax laid upon the manufacture, production, or importation of personal property, whether the tax is assessed by statute to him, or to the manufacturer, producer, or importer Legislative power may reenact the law of nature by assessing the taxes of manufactured and imported goods upon the consumer and the land-tax upon the tenant, or assess the former upon the manufacturer and importer and the latter upon the owner, and leave the law of nature, without reenactment, to employ the manufacturer, importer, and landlord as tax-collectors . . .

42. *Id.* at 235.

43. *Id.* at 244. Both sub-classification and measurement by gross receipts are now permissible as a result of the 1903 amendment to part II, article 6.

44. *Id.* at 245. As will appear later in this article, while "double taxation" remains a concern, the 1903 amendment permits taxes on the income generated by property, in addition to those on the possession of the same property.

45. *Id.*

46. *Id.* at 250 (Doe, C.J.).

47. *Id.* at 249. Doe's view seems to have later contributed to an ambivalence in the court's analysis in *Curry v. Spencer*, 61 N.H. 624 (1882), which held the legacy and succession tax unconstitutional under part II, article 5 if characterized as a property tax and hypothetically, at least under the New Hampshire Bill of Rights, a tax on a civil right or privilege.

Whether the public expense is more justly and wisely divided by an inevitably unsuccessful effort to tax all property, or by the taxation of some class or classes of property that can be easily, equally, and certainly taxed, and the tax of which is equitably collected for the public from all classes of people by the higher government, is not a judicial question. If there is a class of property, the tax of which, by force of the natural law of tax distribution and equalization, would be eventually paid in just proportion by the whole community, the common burden may be wholly put upon that class.⁴⁸

Consequently an express company tax could be constitutional if

designed to be an act of taxation, laying upon railway-express transportation a burden to be equally distributed, by natural law, among the purchasers of such transportation and their customers, as a tax laid on any articles of property is distributed among the consumers or users of the article. The object might be to make the expressmen mere collectors of the tax.⁴⁹

However, the Chief Justice discerned no such design and in the absence of contrary evidence presumed “the legislature did not intend to authorize such expressmen either to add to their charges as much as this statute requires them to pay to the state, or to raise their charges above the reasonable standard of the common law.”⁵⁰ Without this (and without the possible police power justifications addressed below) the tax failed, whatever its classification:

Whether it is a tax imposed upon person, property, income, business, gross receipts, profits, or earnings, is immaterial. It is a tax which one class of men are required to pay, and from which all others are exempt. It is a perfect example of unequal division of public expense.⁵¹

What of the array of income-based assessments of businesses, license fees, and industry-specific exemptions cited by the attorney general that appeared to fall short of the constitutional standard? Justice Stanley dis-

48. *Morrison v. Manchester*, 58 N.H. 538, 555–56 (1879). After *Morrison* (in which it was dicta), this view never secured a majority of the court, and Chief Justice Doe appears to have thereafter deferred to his colleagues' more conservative position. However, in the modern world of quasi-excises on “classes of property,” his original conception may give both comfort and guidance to courts determining the justice of particular classifications.

49. *State v. Express*, 60 N.H. at 262 (Doe, C.J.).

50. *Id.*

51. *Id.* at 263.

posed of the first by showing the income provisions to be merely methods of determining the value of property: “Ferries, wharves, and mills are tangible; and their value can be estimated in different ways, either by taking their income, or the market or salable value, as the basis.”⁵²

Chief Justice Doe cautiously discounted the value of early practices as evidence of constitutional intent by contemporaneous construction,⁵³ and dealt with the remainder through an elaborate explication of the protective power as an alternative to the taxing power.

An act entitled an act of taxation may be valid, although not an exercise of the power of collecting the constitutional shares of expense. The title may be an immaterial misnomer and error of form only, and the act may be an exercise of some of the other powers which provide for the common benefit, protection, and security, and which may be conveniently grouped under the name of the protective power. A fine, imposed by this power, is practically as useful to the government as a tax of equal amount; and a protective law is not invalid merely because it produces public revenue.⁵⁴

This disposed of the so-called excise on intoxicating liquor,⁵⁵ the dog tax,⁵⁶ the lightning rod salesman’s tax,⁵⁷ other peddlers’ taxes,⁵⁸ and the like. He could have justified

a railroad-express tax law, so called . . . designed to be an act of discouragement, like a liquor excise . . . to discourage the employment of railroad expressmen by increasing their rates, and to encourage other carriers who cannot successfully compete with railroad expressmen without the assistance of a protective tariff.⁵⁹

52. *Id.* at 239 (Stanley, J.).

53. *Id.* at 246–47 (Doe, C.J.). Doe believed the founding generation frequently did not apprehend the full meaning of the constitutional principles and language they adopted. *Id.* at 247–48. For example, slaves were held and taxed for some years before it was realized that the New Hampshire Bill of Rights had abolished slavery. *Id.* at 248. Similarly, during the constitution’s first four decades, the legislature reversed judgments and granted new trials, contrary to the separation of powers mandated in part I, article 37. *Id.*

54. *Id.* at 257.

55. *Id.* at 257–58.

56. *Id.* at 260.

57. *Id.* at 261. This was a common source of consumer fraud at the time. As the tax discriminated between citizens of New Hampshire and those of other states, it was ultimately held unconstitutional. *State v. Wiggin*, 64 N.H. 508, 15 A. 128 (1888).

58. *State v. Express*, 60 N.H. at 261 (Doe, C.J.). Peddling was strictly regulated and had been entirely prohibited in the founding era. *State v. Angelo*, 71 N.H. 224, 51 A. 905 (1902).

59. *State v. Express*, 60 N.H. at 261–62 (Doe, C.J.).

The Chief Justice, however, did not discern, and declined to presume, such a purpose.⁶⁰ Also, taking it at face value, Justice Stanley declined to consider whether the statute “could be regarded as an exercise of the police power.”⁶¹

That left the problem of exemptions. Industry-specific exemptions from the general property tax were apparent violations of proportionality. These seemed different from the implicit exemption of types of property by omission from the taxable list.⁶² In the latter sense, “the selection of proper subjects of taxation” had long been held a necessary legislative prerogative,⁶³ but having once taxed manufacturing property generally, how could the legislature exempt such industries like linseed oil mills, plating iron mills, and factories for the manufacture of cotton, woolen yarn, and cloth?⁶⁴ As straight-forward bounties, Chief Justice Doe said that a subsidy to promote desirable activities was as much within the protective power, as a penalty to discourage the undesirable.⁶⁵ A tax exemption was simply an efficient type of direct subsidy:

The protective power has been exercised by giving bounties of exemption from taxation, as well as by giving bounties of money obtained by taxation. The generation by whom the constitution was adopted understood the state could pay a sum of money to an individual, for a public purpose, by exempting him from the payment of the same amount of tax. They did not understand there would be any constitutional virtue in going through the form of collecting money from him, and immediately paying it back to him.⁶⁶

Otherwise, disproportionate exemptions within classes of taxed property may be justified as expenditures for a public purpose. The court closed the logical circle later in 1880: “Every exemption is an indirect tax upon other property, and can only be justified where a direct tax upon other property in its behalf would be within the power of the legislature.”⁶⁷

60. *Id.* at 262. This unwillingness to indulge in saving assumptions stands in marked contrast to the modern practice. Modern standards of review are discussed *infra* Part III, particularly sections D and F.

61. *Id.* at 233 (Stanley, J.).

62. This is a recurring problem in the modern era, as will appear several times below. The significance of the distinction is addressed *infra* Part III.D.

63. Opinion of the Court, 4 N.H. 565, 570 (1829).

64. *State v. Express*, 60 N.H. at 259 (Doe, C.J.).

65. *Id.* at 260.

66. *Id.*

67. *Franklin St. Soc’y v. Manchester*, 60 N.H. 342, 345–46 (1880) (no implied or constitutionally required exemption of church property). There is no general establishment clause in the New Hampshire Constitution. Federal First Amendment theory does not treat a non-discriminatory religious exemption as a subsidy. The more general proposition stated was overbroad, even at the time—a great

Despite pejorative rhetoric in both opinions about taxes on particular businesses, *State v. Express* did not hold them unconstitutional. Earlier in the same term, the court indicated how a flawed, statewide tax on railroad property could be made constitutional by substituting a statewide uniform assessment and rate for a patchwork levy, based on assessments and rates in various towns where the railroad had property.⁶⁸ “[T]he rule of uniformity is coextensive with the territory to which a tax applies, and prevents unjust discriminations. A state tax must be uniform throughout the state, a county tax throughout the county, a town tax throughout the town.”⁶⁹ The hint was promptly taken and the statute amended in 1881 to levy the railroad tax in proportion to the statewide average of other property taxes.⁷⁰ On the same day, a new 1% levy on the property of telegraph companies (which had formerly been a 2% gross receipts tax) was converted to one “as near as may be in proportion to the taxation of other property throughout the state.”⁷¹ The legislature had made statewide assessment and averaging possible by creating, in 1878, a state board of equalization.⁷² This became the generally accepted method of taxing business at the state level. A matching tax was levied on telephone companies in 1883,⁷³ on express companies and sleeping, dining, and parlor cars in 1907,⁷⁴ and on the intangible value of electric utility franchises in 1931.⁷⁵ All these taxes were at the same rate.

No reference was made in *State v. Express* (or any other opinion before the constitutional amendment of 1903) to *Opinion of the Justices*, 53 N.H. 634 (1866), which apparently upheld an income tax of 25% on “all incomes received . . . during the year previous, accruing from notes, bonds, or any other securities whatsoever, not otherwise taxed”⁷⁶ The court

deal of property remained untaxed at various times simply as a matter of practicality. See *Opinion of the Court*, 4 N.H. at 565; see also *Morrison v. Manchester*, 58 N.H. 538, 555–56 (1879).

68. *Boston, Concord & Montreal R.R. v. State*, 60 N.H. 87 (1880).

69. *Id.* at 95.

70. ROBINSON, *supra* note 13, at 115–16.

71. *Id.* at 122–23.

72. *Id.* at 115, 220.

73. *Id.* at 123.

74. *Wyatt v. State Bd. of Equalization*, 74 N.H. 552, 552–53, 70 A. 387, 388 (1908).

75. See *Pub. Serv. Co. of N.H. v. State*, 101 N.H. 154, 136 A.2d 600 (1957). This tax had been generally approved the prior year in *Opinion of the Justices*, 84 N.H. 559, 149 A. 321 (1930).

76. *Opinion of the Justices*, 53 N.H. 634, 635 (1866) (Published several years out of sequence in the Official Reporter. Notable discrepancies between date of decision and sequence in the Reports, particularly for advisory opinions, lasted well into the twentieth century.). This tax could have been sustained as a property tax, taxing (once) property acquired after the annual tax day for the general property tax. However, it was not proportional according to the view prevailing after *State v. Express* because it was levied at a rate different from the rate for other property. In the one subsequent case, *Opinion of the Justices*, 77 N.H. 611, 93 A. 311 (1915), the majority adopted the view that this opinion had actually affirmed the constitutionality of the tax as a tax on property. Perhaps because it appeared to extend

at that time saw “nothing in the form in which the tax is to be assessed and raised, nor in the general description of the property proposed to be taxed, that can be alleged as a legal objection to the validity of the law.”⁷⁷ This cannot be reconciled with *State v. Express* and its kin. It would be decades before such a view was again expressed by a majority of the court.⁷⁸ From 1880 to at least 1923, it was generally believed that all property taxes at a given level of government had to be levied not only ad valorem, but also at the same rate and valuation.⁷⁹

This model could not be reconciled with existing taxes on banks and insurance companies. These were levied as percentages of deposits, capital, premiums, and the like. Such taxes at fixed rates necessarily differed from the annually floating rate of the basic property tax, and the bases were not all easily described as property or estates. Their existence was one basis of the attorney general’s argument for a plenary taxing power in both *Boston, Concord & Montreal Railroad v. State* and *State v. Express*.⁸⁰

Most of these were rationalized, albeit at the cost of confirming an alternative revenue theory—the concept of a voluntary payment for an accepted privilege. As such, the tax on commercial banks had already been removed from the “true” tax category:

It has been argued that the annual payment of one per cent. on the capital of banks required to be paid to the literary fund is in substance a double tax. But it is not named nor assessed as a tax; it is a fixed sum paid yearly, and not varying in amount like other taxes, according as they are voted in different places and in different years; and has more the character of a bonus voluntarily paid for the right to exercise the privilege of banking than of an ordinary tax.⁸¹

The tax of 1% on the premiums paid to foreign insurance companies was expressly structured as a condition voluntarily accepted, to secure the li-

to U.S. securities exempt under the U.S. Constitution, the tax seems not to have been put into effect. It is not mentioned in MAURICE H. ROBINSON, A HISTORY OF TAXATION IN NEW HAMPSHIRE (1903).

77. *Opinion of the Justices*, 53 N.H. at 635 (out of chronological sequence in the Official Reports).

78. *Opinion of the Justices*, 77 N.H. at 611, 93 A. at 311. The court cited the 1866 opinion in support of an income tax, but even then the proposed tax was to float at the same rate as the general property tax, not at a separate, fixed rate. *Id.* at 617, 93 A. 314.

79. *Opinion of the Justices*, 81 N.H. 552, 120 A. 629 (1923) (interest and dividend income were taxable, but only at the uniform rate). A different rate for income taxes was not approved until *Opinion of the Justices*, 82 N.H. 561, 138 A. 284 (1927).

80. *Boston, Concord & Montreal R.R. v. State*, 60 N.H. 87, 92 (1880); *State v. U.S. & Can. Express Co.* (*State v. Express*), 60 N.H. 219, 224–33 (1880).

81. *Nashua Sav. Bank v. City of Nashua*, 46 N.H. 389, 399 (1866); *accord Rockingham Ten Cent Sav. Bank v. Portsmouth*, 52 N.H. 17 (1872); *Wyatt v. State Bd. of Equalization*, 74 N.H. 552, 70 A. 387 (1908).

cense to do business in New Hampshire.⁸² It stood unchallenged until 1937, when the supreme court ratified this view:

The “tax” imposed in 1869 [on foreign insurance company premiums], whatever its name, appears, at least until the constitutional amendment of 1903, to have been unsustainable as a tax. But it was sustainable as a condition for prosecuting business in New Hampshire in somewhat the same manner as the gasoline “tax” was conceived to be properly levied as a toll for the use of the highways.⁸³

In 1896, a requirement that railroads pay statutorily defined excess profits into the state treasury was sustained against taking and disproportionality attacks on the same basis—it was a condition on privileges voluntarily assumed by railroads.⁸⁴

Unfortunately, the very lucrative⁸⁵ tax on savings bank deposits had been repeatedly and explicitly held to be a property tax.⁸⁶ The savings bank tax could not be fit into the court’s constitutional framework until 1927, when the constitutional amendment of 1903 was interpreted to permit different tax rates on different classes of property.⁸⁷ The nineteenth-century court frankly admitted this and “grandfathered” the tax with a combination of prescription and necessity: “The savings-bank tax . . . is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality.”⁸⁸

Modest license charges needed no privilege theory or special protective power analysis, so long as they were “merely an equivalent for the service rendered” in a legitimate regulatory scheme.⁸⁹ Throughout this era, there were also anomalous fees or taxes on certain corporations when chartered or re-capitalized on the basis of amount of authorized capital, with declining rates as capitalization increased.⁹⁰ Such graduation was not consistent with the fee theory and was impermissibly disproportional in a true tax. Nor is it clear that it could have been justified under the police power

82. ROBINSON, *supra* note 13, at 119.

83. *New York Life Ins. Co. v. Sullivan*, 89 N.H. 21, 29, 192 A. 297, 301 (1937) (citation omitted).

84. *State v. Manchester & Lawrence R.R.*, 69 N.H. 35, 38 A. 736 (1897).

85. In 1877, it produced over \$30 million. ROBINSON, *supra* note 13, at 118. By 1893, it produced over twice as much as the taxes on tangible personal property and more than half the total taxes for all real estate. *Id.*

86. *Nashua Sav.*, 46 N.H. at 398–99; *Rockingham Sav.*, 52 N.H. at 27.

87. *Opinion of the Justices*, 82 N.H. 561, 138 A. 284 (1927).

88. *Boston, Concord & Montreal R.R. v. State*, 62 N.H. 648, 649 (1883); *see also* *Wyatt v. State Bd. of Equalization*, 74 N.H. 552, 556, 70 A. 387, 390 (1908).

89. *State v. Forcier*, 65 N.H. 42, 42, 17 A. 577, 577 (1889) (apothecary and druggist license).

90. ROBINSON, *supra* note 13, at 126–27.

or as a condition on a privilege.⁹¹ However, the court was not called on to resolve its constitutionality, perhaps because of the small amounts involved.⁹²

After *State v. Express*, there was one more dramatic nineteenth-century tax case. In 1879, the legislature adopted a death duty on legacies and successions.⁹³ The rate was 1%, with an exemption for property passing to surviving spouses, children, and grandchildren. In 1882 the court declared it unconstitutional in *Curry v. Spencer*.⁹⁴ Once again, the court was ambivalent about whether there could be taxes on “privileges,” but if there could be, the equality and proportionality rules would still govern:

All measures for the imposition or collection of taxes must therefore conform to this general principle of just equality; and hence it is immaterial whether the tax imposed by *c. 64* is to be regarded as a tax on property or upon a civil right or privilege, for the same principle of equality and due proportion applies to every species of tax alike.⁹⁵

Either theory left the tax unconstitutional: “If it is to be regarded as a tax on property, it is open to the objection of unequal and double taxation, and if it is to be regarded as a tax on a civil right or privilege, it is discriminating and disproportional.”⁹⁶ Nor would a cost-recovery, fee theory save it—because of the exemptions.⁹⁷ Such exactions must fall proportionally on all classes of beneficiaries.⁹⁸

The requirement that fees be uniform was reemphasized in an 1889 decision that became the lead case in New Hampshire on equal protection in general.⁹⁹ The State indicted Dr. Pennoyer for practicing medicine without

91. Such fees and privilege charges had to be uniform and proportional, apparently without exemptions. *Curry v. Spencer*, 61 N.H. 624, 631 (1882) (legacy and succession tax unsustainable as a fee to support the probate system). “If one estate was entitled to be . . . settled [in probate] without payment of fee, all were.” *Thompson v. Kidder*, 74 N.H. 89, 97, 65 A. 392, 396 (1906) (sustaining a similar tax as authorized by the constitutional amendment of 1903). It is not clear whether, and if so why, an exemption under these theories could not be sustained under a protective power subsidy theory.

92. ROBINSON, *supra* note 13, at 127 (listing amounts realized).

93. 1879 N.H. Laws ch. 64, *invalidated by Curry v. Spencer*, 61 N.H. 624 (1882).

94. *Curry*, 61 N.H. at 631.

95. *Id.*

96. *Id.* It would be a double property tax because much of the property passing would have already paid the annual general property tax. *Id.* It would also be disproportionate because of the exemption of surviving spouses, children, and grandchildren. *Id.* This latter view of disproportionality no longer prevails because the court accepted a protective power justification in distinguishing charitable or intra-family transfers. *Thompson v. Kidder*, 74 N.H. 89, 65 A. 392 (1906); *Estate of Robitaille v. N.H. Dep’t of Revenue Admin.*, 149 N.H. 595, 827 A.2d 981 (2003).

97. *Curry*, 61 N.H. at 631, 632.

98. *Id.* at 632.

99. *State v. Pennoyer*, 65 N.H. 113, 18 A. 878 (1889). The court stated:

a license.¹⁰⁰ His constitutional objection was that certain practitioners had been grandfathered on an arbitrary basis (continuous residence in one town) unrelated to qualification.¹⁰¹ On a motion to quash, the supreme court declared the statute unconstitutional:

For the right to continue the pursuit of his profession, one physician is not, while another, his neighbor, who may be his equal or superior in learning, experience, and ability, is, required to pay five dollars. This is not the equality of the constitution. The magnitude of the unequal burden is not material. If any inequality were permissible, the discrimination might be made prohibitory, and a monopoly of the business given to physicians who have resided in a town or city for a specified time.¹⁰²

At least five rules were settled in this era. First, all taxes had to be on polls or estates. Second, except for the savings bank tax, all taxes on estates by a given unit of government had to be at one rate with uniform valuation. Third, express tax exemptions were permissible to the extent that a bounty or subsidy under the protective power would be. Fourth, regulatory penalties and license fees were exercises of the protective power, not taxes, but subject to general requirements of uniformity and equality. Fifth, monetary charges for privileges voluntarily accepted were not taxes. All of these, but the first (changed by constitutional amendment), have endured.¹⁰³

C. 1903–1940: Constitutional Change, the Struggle to Give it Meaning

There were no significant constitutional challenges to the state's tax system in the two decades after *State v. Express* and *Curry v. Spencer*, nor were there any new attempts to assert a plenary taxing power. However, there was increasing demand for constitutional revision to broaden the taxing power. The Constitutional Convention of 1902 considered several

The fourteenth amendment of the constitution of the United States, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws," adds nothing to the rights and liberties of the citizens of this state. It merely confirms to them by federal sanction the rights secured by the action of their ancestors a century ago. It has wrought no change in the law of the state. An enactment obnoxious to this provision of the national constitution is in New Hampshire no more ineffective than it would be in its absence.

Id. at 115, 18 A. at 880 (omission in original).

100. *Id.*

101. *Id.* at 117, 18 A. at 880.

102. *Id.* at 117, 18 A. at 881.

103. Revenues based on the protective power or privilege theories will be addressed in a forthcoming article about non-tax revenues.

proposals to permit new forms of taxation. It rejected a general power to impose “any kind of tax under heaven or known among civilized men”¹⁰⁴ Instead, the Convention proposed narrower revisions. The voters rejected an amendment permitting a tax on income from certain intangibles.¹⁰⁵ They adopted, however, a seemingly modest addition to the legislature’s authority to tax property. The reference in part II, article 6 to “polls and estates” was supplemented with the phrase “and other classes of property, including franchises and property when passing by will or inheritance.”¹⁰⁶ For more than three decades the court struggled with the necessary implications of this seemingly simple phrase.

The new power was exercised in 1905 with the adoption of a tax on legacies and succession,¹⁰⁷ and promptly challenged in *Thompson v. Kidder*.¹⁰⁸ Perhaps inspired by Chief Justice Doe’s theory that the taxing clauses of part II of the constitution were subordinate to the equality clauses of the New Hampshire Bill of Rights,¹⁰⁹ the challengers argued the tax violated part I, article 12 and the unchanged proportionality requirement of part II, article 5:

It is not claimed that the language of article 6, as it now stands, is not sufficient to authorize legislation of this character; but the contention is that such action is contrary to the requirements of other provisions of the instrument, namely, article 12 of the bill of rights,—“Every member of the community has a right to be protected by it in the enjoyment of his life, liberty, and property. He is, therefore, bound to contribute his share in the expense of such protection,”—and the provision of article 5, part

104. STATE OF NEW HAMPSHIRE, CONVENTION TO REVISE THE CONSTITUTION 597 (1903) (remarks of delegate Chandler). This seems to refer to an early proposal by Chandler to amend article 6 allowing taxes on polls and estates “by taxation in such other method as may be equal, equitable, and just.” *Id.* at 250. That proposal was later postponed indefinitely on Chandler’s own motion. *Id.* at 684. Strangely, in *Opinion of the Justices*, 77 N.H. 611, 93 A. 311 (1915), the majority seemed to assert that the amendment submitted to the people was the one characterized as permitting “any kind of tax under heaven” and to partly rely on that to permit taxing income. *Id.* at 77 N.H. at 616, 93 A. at 313. Both the CONVENTION TO REVISE THE CONSTITUTION and the final language of the amendment demonstrate that this was mistaken. That the amendment actually adopted was intended more narrowly was soon clarified, and that view has since prevailed. *Conner v. State* 82 N.H. 126, 130 A. 357 (1925).

105. *Opinion of the Justices*, 77 N.H. at 627, 93 A. at 318 (Peaslee, J., dissenting).

106. The choice of article 6 and neglect of Article 5 was a bit odd:

Article 6, as it stood before the amendment . . . while assuming that only polls and estates were proper subjects of taxation, was intended to secure proportional assessments by requiring frequent revaluations. The main purpose of the amended article is to declare the subjects of taxation. Logically, in its main purpose article 6 might now perhaps more properly stand as an addition to article 5, devoted to an enumeration of powers granted to the general court.

Thompson v. Kidder, 74 N.H. 89, 95, 65 A. 392, 395 (1906).

107. 1905 N.H. Laws ch. 40.

108. 74 N.H. 89, 65 A. 392 (1906).

109. See *State v. U.S. & Can Express (State v. Express)*, 60 N.H. 219, 249–50 (1880).

second, granting “full power and authority” to the general court “to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and residents within, the said state, and upon all estates within the same.”¹¹⁰

Such an argument could hardly prevail over a constitutional amendment with “express language admittedly sufficient for the purpose.”¹¹¹ As with poll taxes, which had never been proportional in the commonly accepted senses,¹¹² a tax expressly authorized was necessarily constitutional, despite disproportionality.¹¹³

However, the exception to the general constitutional rule did not extend beyond logical necessity. It was not

necessary to conclude, because by amendment an additional disproportional tax has been authorized, that it was intended to abrogate the fundamental rule of equal rights or the general rules of equality and proportion as to other taxes. All taxes that can be made proportional must be so assessed.¹¹⁴

The tax, where applicable, was at a uniform rate of 5%, so there was no issue of graduation.¹¹⁵ All persons were equally privileged to dispose of property in either taxable or non-taxable ways, and similarly to inherit.¹¹⁶ The only possible inequality was in the exemption, which the court found permissible: “There are good reasons why the passing of property to near relatives, or the gift of it to charitable purposes or directly to the public, should not be subject to an exaction by the state.”¹¹⁷

110. *Thompson*, 74 N.H. at 90, 65 A. at 393.

111. *Id.* at 94, 65 A. at 395.

112. *Id.* at 96, 65 A. at 396.

113. *Id.*

114. *Id.*

115. Different rates based on relationship to the deceased were tentatively approved in *Opinion of the Justices*, 76 N.H. 597, 79 A. 490 (1911), an opinion declining to reach the question of graduation based on the amount of estate or legacy. Graduation based on amount was later rejected in an advisory opinion. *Opinion of the Justices*, 81 N.H. 552, 120 A. 629 (1923). Both forms of graduation were ultimately rejected in *Williams v. State*, 81 N.H. 341, 125 A. 661 (1924).

116. *Thompson*, 74 N.H. at 97, 65 A. at 396.

117. *Id.* The court did not elaborate on those reasons. It cited two cases from other states. The first, *Minot v. Winthrop*, 38 N.E. 512 (Mass. 1894), refers to the lesser “moral claim of collaterals and strangers.” *Minot*, 38 N.E. at 516. The other referred to a widow or daughter deprived of “her natural protector.” *Nunnemacher v. State*, 108 N.W. 627, 637 (Wis. 1906). The exemption seems to be based on a protective power theory, but the court also invoked a general power to reasonably “omi[t] . . . from the description of the property required to be taxed.” *Thompson*, 74 N.H. at 97, 65 A. at 396. The difference is that between a permissible subsidy of the acts or parties benefited by the exemption, and simply confining the taxable class of property as that passing to collateral relatives and unrelated persons. See *infra* Part III.C–D.

For some time, the legacy and succession tax seems to have been thought the only innovation permitted under the 1903 amendment.¹¹⁸ The new power to tax “other classes of property” did not immediately change the rule that all taxes on property (other than legacies and successions and deposits in savings banks) had to be at the same rate throughout each taxing district.¹¹⁹ The people rejected constitutional amendments permitting the “tax[ation] of credits at a less[er] rate than other property,”¹²⁰ and a lesser rate for standing timber¹²¹ in 1912, and graduated income taxes in 1920 and 1921.¹²²

Without apparently realizing it, the court took the first step toward differential tax rates on classes of property in 1915. The House of Representatives requested an advisory opinion on a proposal to exempt certain securities from the general property tax and to instead tax the income derived from them “at the uniform rate” (taken to mean the same rate as imposed on other property).¹²³ This was the beginning of the interest and dividends tax (IDT). A four-justice majority advised that the proposal was constitutional. Removing classes of property from the list of taxable estate was incontestable.¹²⁴ They believed using the uniform property tax rate cured the disproportionality fatal to a previous interest and dividends tax proposal.¹²⁵ Taxing money which might also have been taxed as part of the property of the securities issuer raised issues of double taxation, but the majority resolved them.¹²⁶

The remaining question was whether this apparent income tax was constitutionally authorized:

118. General corporate franchise taxes, when ultimately considered, ran into insuperable obstacles. See *infra* text accompanying notes 151–53.

119. The possibility of a different rate of taxation on railroad property was raised without decision in *Wyatt v. State Board of Equalization*, 74 N.H. 552, 553, 70 A. 387, 388 (1908), but the court reasserted that all property was to be taxed at the same rate in *Opinion of the Justices*, 76 N.H. 588, 596, 79 A. 31, 34–35 (1911)—which proposed differential assessment of stocks and similar investments—and in *Opinion of the Justices*, 76 N.H. 609, 85 A. 757 (1913)—which proposed differential rate for standing timber.

120. *Opinion of the Justices*, 77 N.H. 611, 616, 93 A. 311, 314 (1915).

121. *Id.* at 625, 93 A. at 318 (Peaslee, J., dissenting).

122. *Convention to Revise the Constitution, January 20, 1920*, in NEW HAMPSHIRE CONSTITUTIONAL CONVENTION, CONVENTION TO REVISE THE CONSTITUTION, JUNE 5, 1918, JAN. 13, 1920, JAN. 28, 1921 376 (1918) [hereinafter CONVENTIONS 1918–21]; *Special Session, Convention to Revise the Constitution Held January 28, 1921* in CONVENTIONS 1918–21 at 393, 432; see also *Williams v. State*, 81 N.H. 341, 348, 125 A. 661, 665 (1924), *overruled by* *Amoskeag Trust Co. v. Trs. of Dartmouth Coll.*, 89 N.H. 471, 200 A. 786 (1938) (overruling the holding that in the absence of testamentary directions, the federal estate tax must be charged pro rata against all the beneficiaries rather than solely against the residuary legatee).

123. *Opinion of the Justices*, 77 N.H. at 612–13, 93 A. at 312.

124. *Id.* at 612, 93 A. at 312.

125. *Id.* at 613, 93 A. at 312. The court again required the same rate for incomes and other property in *Opinion of the Justices*, 81 N.H. 552, 554, 120 A. 629, 630 (1923).

126. *Opinion of the Justices*, 77 N.H. at 613–15, 93 A. at 312–13.

It may be said that the proposed tax is in effect an income tax. An income tax is generally understood to be a tax an arbitrary rate—an excise tax. It has even been held not to be a property tax, and to be a direct tax under the federal Constitution. But the fact that this tax in certain of its features resembles an income tax does not place it beyond the legislative power of classification.¹²⁷

Although it referred to the anomalous 1866 opinion upholding an income tax,¹²⁸ the majority did not “express an opinion as to the validity of the taxation of incomes” when approving the proposal as a tax on property received by the investor, which would otherwise have been taxable in the hands of the issuer.¹²⁹ This was just a rearrangement of the formal incidence of a tax on estates; it was as constitutionally indifferent as whether real estate was taxed to the mortgagor or mortgagee.¹³⁰ Possible implications of the new constitutional authority to tax “other classes of property” were not considered or, apparently, even noticed.¹³¹ Treating income as a category of estate, the court said investment income had to be taxed at the same rate as other property.¹³²

Justice Peaslee wrote a long and compelling dissent, demonstrating that taxing some incomes at the same rate as property could not be in any meaningful sense proportional. The resulting *effective* rates were radically different:

The practical situation presented by the proposed law is this: The owner of a farm worth \$ 1,000 pays (at a two per cent rate) a tax of \$ 20, while the owner of a five per cent note for \$ 1,000 pays a tax of \$ 1. Upon whatever theory it is founded and by whatever argument it is justified, the practical, everyday result is that this inequality exists as between those two neighbors. Two property taxpayers of equal property, of equal ability to pay, and with equal duty to support the state, are taxed unequally by the ratio of 20 to 1.¹³³

Despite Justice Peaslee’s analysis, the court clung for some years to the irrational proposition that gross incomes were a taxable “estate” and while taxing them was permissible, the rate applicable to static property was re-

127. *Id.* at 615, 93 A. at 313 (citations omitted).

128. *Id.* at 617, 93 A. at 314 (citing *Opinion of the Justices*, 53 N.H. 634 (1866)).

129. *Id.* at 617, 93 A. at 314.

130. *Id.* at 613, 93 A. at 312 (citing *Morrison v. Manchester*, 58 N.H. 538 (1879)).

131. *Conner v. State*, 82 N.H. 126, 128–31, 130 A. 357, 358–60 (1925) (Peaslee, C.J.) (Chief Justice Peaslee had dissented in 1915).

132. *Opinion of the Justices*, 77 N.H. at 616, 93 A. at 318.

133. *Id.* at 625, 93 A. at 318 (Peaslee, J., dissenting).

quired.¹³⁴ However, in 1925, with Justice Peaslee writing for the court, it discovered the rationale for taxing incomes as property, but differently, despite manifest disproportionality.

The occasion was a constitutional challenge to the interest and dividends tax adopted in 1923.¹³⁵ Invoking nineteenth-century decisions forbidding taxation of shares in the hands of shareholders of corporations already taxed on their property,¹³⁶ the challengers alleged it was a disproportionate double-tax. The court conceded this, but found the disproportion necessarily authorized by the 1903 amendment permitting taxation of “other classes of property”:

In 1903 a fundamental change was made in the people's grant of the taxing power. In the generation just preceding that time, the idea that the constitutional provision for contribution of “his share” by each taxable party meant a share determined by a common and unvarying method had been upheld and amplified in great detail and with a wealth of argument.

. . . .

What was intended by the grant of power to tax “other classes of property”? Other provisions of the amendment show, by elimination, what it does not mean. It does not refer to any form of tax upon estates—that is, to taxes upon ownership, possession or enjoyment of property. It had theretofore been decided that the term estates covers all these matters.¹³⁷

As all ownership, possession, or enjoyment of property was already taxable under existing powers, the new language must have intended something else:

[T]he provision means that property may be taxed for reasons other than ownership. The test of taxability may be put upon other grounds. “Other classes of property” is here used as the equivalent for property otherwise classified. The incidence of the tax is to be determined by some fact other than mere ownership.¹³⁸

134. Opinion of the Justices, 81 N.H. 552, 554, 120 A. 629, 630 (1923).

135. *Comer*, 82 N.H. at 126, 130 A. at 357.

136. *E.g.*, *Robinson v. Dover*, 59 N.H. 521 (1880); *Smith v. Burley*, 9 N.H. 423 (1838).

137. *Comer*, 82 N.H. at 127–28, 130 A. at 358.

138. *Id.* at 128–29, 130 A. at 359.

Once it was clear that other classes of property could be taxed on a different basis from, and necessarily in addition to, estates, the logic that permitted double taxation of inheritances¹³⁹ in *Thompson v. Kidder*¹⁴⁰ applied.¹⁴¹

The power to tax other classes of property, or property classified in some way other than as estate, was granted. No form of tax coming within this description, which would not impinge upon the rules theretofore laid down as to constitutional limitations upon the power to tax property, has been suggested. It is believed that none can be found. The implied exception from earlier provisions is necessary if this phrase in the amendment is to be given any effect.¹⁴²

The expressed power to define and tax classes of property based on something other than ownership, possession, or enjoyment necessarily precluded a challenge to any double taxation or other disproportionality inherent in the difference between the classes.¹⁴³ Taxable estates were “static” property, the new classes were “dynamic.”¹⁴⁴ The distinction has also been described in the modern era as the difference between static property and “property in motion.”¹⁴⁵

This re-conceptualization of the 1903 amendment is the foundation of most modern state taxes. It was not, however, the breakthrough hoped for by the advocates of plenary taxing power. In 1927, during a burst of fiscal creativity, the legislature submitted to the court two proposals: a comprehensive scheme of occupational taxes with “118 separate classes, each with one or more schedules of stated charges,” and an income tax.¹⁴⁶

The court, apparently shocked, declared that the occupational taxes “appear[ed] to have been drawn without any reference to the structure of our state government” and “unquestionably exceed[ed] the legislative power.”¹⁴⁷ The legislature characterized these as “privilege” taxes, but the court noted that

[m]any of the occupations or acts thus sought to be levied upon involve only the ordinary transactions of private life. They contain no

139. While the constitutional language is “property passing by will or inheritance” and the related legislation usually refers to legacies and succession, I will sometimes follow the frequent practice of the court by referring to these as inheritance taxes.

140. 74 N.H. 89, 65 A. 392 (1906).

141. *Comer*, 82 N.H. at 129, 131, 130 A. at 360.

142. *Id.* at 129, 130 A. at 359.

143. *Id.* at 130, 130 A. at 359.

144. This distinction was first made by Justice Peaslee in his dissent in *Opinion of the Justices*, 77 N.H. 611, 621, 93 A. 311, 316 (1915) (Peaslee, J., dissenting), and adopted in the same terms by the court in *Opinion of the Justices*, 84 N.H. 559, 576, 149 A. 321, 330 (1930).

145. *Opinion of the Justices*, 95 N.H. 537, 539, 64 A.2d 320, 321 (1949).

146. *Opinion of the Justices*, 82 N.H. 561, 563, 566, 138 A. 284, 286–87 (1927).

147. *Id.* at 563, 138 A. at 286.

element subject to supervision either under the police power or as things affected with a public use.¹⁴⁸

This would not have been permitted even under the rejected excise clause of the Massachusetts Constitution.¹⁴⁹

The same proposals were addressed as taxes on “franchises,” a form of tax expressly permitted by the 1903 amendment. Such a franchise was a “right to do certain things, giving a power to enter upon transactions which is not possessed by the people as of common right”¹⁵⁰ Not only did many of the occupations taxed lack this quality, they were also subject to different rates, and franchise taxes were subject to the same rules of proportionality among all holding the franchise.¹⁵¹

In reply to a general question about taxing corporations differently from those engaged in similar businesses, the court laid down what became a fundamental principle of New Hampshire tax law:

If the privilege is taxed when held by a corporation, it must be when exercised by collective owners associated together under some other form of agreement, or by an individual. Singling out corporations, and taxing them upon privileges, while permitting other holders of like privileges to go tax free, is a discrimination not permitted by the constitution.¹⁵²

Of course, a corporate charter of perpetual succession and limited liability is itself a franchise, but if

the bare franchise to be a corporation is to be considered as property, and therefore taxable, it could be taxed only upon an *ad valorem* basis. The valuation would necessarily be confined to an appraisal of the worth of the power to be a corporation, as distinguished from the power to do certain business.¹⁵³

The court volunteered an alternative. A franchise, being both a property right and a privilege voluntarily assumed, could be either taxed as prop-

148. *Id.*

149. *Id.* (citing *O’Keeffe v. City of Somerville*, 76 N.E. 457 (Mass. 1906)). That clause has been subject to widely varying construction. The history is recounted in *Opinions of the Justices to the Governor*, 556 N.E.2d 1002 (Mass. 1990), in which a bare majority finally concluded that the word “commodities” was sufficiently comprehensive to permit a tax on the sale of services.

150. *Opinion of the Justices*, 82 N.H. at 564, 138 A. at 286.

151. *Id.* at 565, 138 A. at 287.

152. *Id.*; *accord* *Opinion of the Justices*, 111 N.H. 206, 278 A.2d 348 (1971); *Opinion of the Justices*, 84 N.H. 559, 149 A. 321 (1930). The concept has been applied evenhandedly—it would be fatal to a proposed tax on business incomes to exclude income of corporations. *Opinion of the Justices*, 84 N.H. at 573, 149 A. at 328.

153. *Opinion of the Justices*, 82 N.H. at 565, 138 A. at 287.

erty or, without need of proportionality, be granted on condition of a payment. “[T]he power to impose conditions upon grants is not to be treated as a power to tax, as taxation is understood in this jurisdiction.”¹⁵⁴ It had long been held that a payment could be exacted as a condition on granting a true privilege.¹⁵⁵ The court did not choose to identify anything other than corporate capacity that could be treated as a privilege. Concluding that, as a whole, the specific legislation before them was irretrievably unconstitutional, the court declined “to examine the long list of occupations, etc., which the bill declare[ed] to be privileges, or to attempt to ascertain the validity of such a classification.”¹⁵⁶

The income tax would have been constitutional, despite being levied at a rate different from that on “estates” (i.e. the general property tax), but for the fact that different rates were hypothesized for different types of income.¹⁵⁷ The previous opinion that all taxes on “other classes of property” had to be at common rate¹⁵⁸ was “no longer tenable.”¹⁵⁹ This however, was done in a way that introduced the idea that classification of property, by distinctive events, created classes of taxes:

The rule is firmly established that all *taxes of a given class* must be laid at a common rate. This rule applies to annual taxes upon estates, and to inheritance taxes. The reasoning in the case last cited leads to the conclusion that the principles there enunciated must be applied in the *taxation of incomes*. The rate must be uniform.¹⁶⁰

In 1930, and again in 1937, the court confirmed that taxes on receipts from sales were a fourth class of tax that could not be correlated with those on estates, inheritances, and incomes, justifying a different rate.¹⁶¹ They might be thought a fifth class, but franchises as such are static property, to be correlated by rate and valuation with the general property tax.¹⁶²

154. *Id.* at 565, 138 A. at 287. Monetary exactions in return for grants of privileges are dealt with *infra* Part IV.F.

155. *Rockingham Ten Cent Sav. Bank v. Portsmouth*, 52 N.H. 17 (1872); *Nashua Sav. Bank v. City of Nashua*, 46 N.H. 389, 399 (1866); *accord Wyatt v. State Bd. of Equalization*, 74 N.H. 552, 70 A. 387 (1908).

156. *Opinion of the Justices*, 82 N.H. at 566, 138 A. at 287.

157. *Id.* at 570, 138 A. at 289.

158. *Opinion of the Justices*, 77 N.H. 611, 93 A. 311 (1915).

159. *Opinion of the Justices*, 82 N.H. at 570, 138 A. at 289.

160. *Id.* (emphasis added) (citations omitted). The court also stated that “all income taxes must be laid at a common rate.” *Opinion of the Justices* 84 N.H. 557, 571, 149 A. 321, 327 (1930).

161. *Opinion of the Justices*, 88 N.H. 500, 190 A. 801 (1937); *Opinion of the Justices*, 84 N.H. 559, 149 A. 321 (1930).

162. *Opinion of the Justices*, 84 N.H. at 576, 149 A. at 330.

Throughout this era, differences in rate or valuation between taxes on classes of property were justifiable only when the type of tax could not be “correlated and made uniform with the average of the general property tax . . . and disproportion [was] inevitable.”¹⁶³ So firm was the notion that uniform rates were required within broad classes of taxes, that a proposed tax on the annual increment of growing timber was “in the nature of an income tax,” and had to be “coordinated with other income taxes.”¹⁶⁴ However, the broad classes were not exhaustive. On the same day it issued the timber increment opinion, the court advised that a timber *severance* tax would be in a class by itself, and it “could not be correlated with other taxes, and therefore the rate could be fixed without direct relation to that imposed by other taxing statutes.”¹⁶⁵

There were several opinions during this era attempting to clarify and apply standards for exemptions.¹⁶⁶ The use of conditional grants of privileges as an alternative to taxation was expressly affirmed.¹⁶⁷ However, the great and lasting work of this period was the court’s determination that the “other classes of property” made taxable in 1903 necessarily included property determined by “some element other than ownership, possession or enjoyment,”¹⁶⁸ that the power to define and tax such property necessarily permitted some forms of double taxation, and that, when differing classes of property could not be rationally correlated, uniformity of rate and assessment were not meaningful and therefore not required.

D. 1940–Present: Proliferation of Categories

1. Latent Issues About the Power to Classify

At least as early as 1930, the court recognized that taxes on “distinctive class[es] of property . . . imposed upon a certain event” shared some of the

163. *Opinion of the Justices*, 88 N.H. at 505, 190 A. at 805.

164. *Opinion of the Justices*, 84 N.H. at 578, 149 A. at 334.

165. *Id.* at 575, 149 A. at 329.

166. *See generally* *Opinion of the Justices*, 84 N.H. 559, 149 A. 321 (proposed exemptions from income tax excessive); *Eyers Woolen Co. v. Town of Gilsum*, 84 N.H. 1, 146 A. 511 (1929) (aid to a new textile mill not a public purpose). “[I]ndustrial welfare and general prosperity is not a valid reason for the aid.” *Opinion of the Justices*, 88 N.H. 484, 488, 190 A. 425, 428 (1937). The court has since recanted this position. *Opinion of the Justices*, 142 N.H. 95, 100, 697 A.2d 120, 123 (1997) (citations omitted).

167. *See generally* *New York Life Ins. Co. v. Sullivan*, 89 N.H. 21, 192 A. 297 (1937) (business by foreign insurance companies); *Opinion of the Justices*, 82 N.H. 561, 138 A. 284 (1927) (charge for corporate capacity); *Opinion of the Justices*, 81 N.H. 552, 554, 120 A. 629, 287 (1923) (gasoline “tax” as toll for privilege of motor vehicle use of highways).

168. *Conner v. State*, 82 N.H. 126, 128, 130 A. 357, 359 (1925).

characteristics of an excise.¹⁶⁹ However, they remain property taxes and must be laid *ad valorem*.¹⁷⁰ “[T]he taxing power is fixed by the language of the amendment and not by a classification of taxes by authorities upon economics.”¹⁷¹

Classes of “property in motion” could be defined and taxed. Some of those classes were so incommensurable with others that meaningful proportionality was impossible and differing rates were justified. However, the nature and limits of the classification process had not been explored. When a tax was levied on something other than the “ownership, possession, or enjoyment” of property, what connection, if any, was there between the kind of property in the class and the “other grounds”¹⁷² for levying the tax, the “characteristic event”¹⁷³ that justified classification? Timber, when severed, was an approved classification.¹⁷⁴ Yet that was based on “a characteristic event, *not common to other property*.”¹⁷⁵ What of an event that was common to multiple types of property? Before 1940, the court appeared to believe that the event was the controlling factor, at least to the extent rates or valuations differed between classes. The 1903 amendment gave authority to

lay various kinds of *ad valorem* taxes upon property, incident upon some characteristic event, which may fairly be considered to reasonably delimit a class of property, so that the selection cannot be rejected as arbitrary, if the event itself affords some rational basis for the imposition of a tax.¹⁷⁶

Thus one could tax sales, incomes, and inheritances; but must each kind of taxed property, sharing the defining event, be taxed at the same rate? Exemptions could differ within sub-classes,¹⁷⁷ producing different effective rates. The principal opinion authorizing exemptions varying by type of income referred equivocally to both the protective power and the power of classification.¹⁷⁸

“The rule [was] firmly established that all taxes of a *given class* must be laid at a common rate.”¹⁷⁹ But classes were anything but “given.” If,

169. *Opinion of the Justices*, 84 N.H. at 575–76, 149 A. at 329–30 (approving a timber severance tax).

170. *Id.* at 576, 149 A. at 330.

171. *Id.*

172. *Conner*, 82 N.H. at 128, 130 A. at 359.

173. *Opinion of the Justices*, 84 N.H. at 575, 149 A. at 329.

174. *Id.* at 575, 149 A. at 330.

175. *Id.* at 575, 149 A. at 329 (emphasis added).

176. *Id.* at 576, 149 A. at 330.

177. *Id.* at 571, 149 A. at 328; *Opinion of the Justices*, 82 N.H. 561, 573, 138 A. 284, 290–91 (1927).

178. *Opinion of the Justices*, 82 N.H. 561, 570–71, 138 A. 284, 289 (1927).

179. *Id.*

for example, sale of goods at retail defined the class, was failure to include all such sales an exemption? Among those sales taxed, could there be differing rates for separate classes or subclasses? If so, on what basis? The court had approved taxing one sort of income defined by its source. What were acceptable classes of income? Were some so incommensurable that the rates could differ? Ultimately, what was a distinct class of property in the constitutional sense?

I will deal with the modern era first by analyzing the decision that inaugurated it, then by tracing the court's treatment of sales, income, franchise, and estate taxes, as well as some issues that cross all categories. These categories, however commonly used, are also highly artificial in New Hampshire. As our taxes are on property, not persons, formal incidence in terms of the payor is largely irrelevant.¹⁸⁰ Who pays and how are matters of convenience, efficiency, and the politics of appearances. Labels, as opposed to actual operation, can skew arguments and confuse analysis, but, in principle, are meaningless under the state constitution. However, their political significance has sometimes led to judicial efforts for truth in labeling.¹⁸¹ When the focus is on the property moving or being transformed, for example, there is no constitutionally meaningful distinction between a sales tax on the consumer and a gross receipts tax on the seller. A franchise can be taxed as a personal estate or as the source of income. At least when it involves a regulated utility, a tax on even net income recovered in the rates can be indistinguishable from a sales tax on the utility's consumers. Classification and exemption issues cross all these lines. The categories nevertheless are a necessary part of the common vocabulary, and they have sometimes shaped the arguments and decisions.

2. *The Tobacco Tax, Narrower Classification Permitted*

In 1940, *Havens v. Attorney General*¹⁸² opened the modern era by confronting some of these questions. The plaintiff, a tobacconist, challenged on several constitutional grounds a new 15% tax on retail sales of tobacco.¹⁸³ The court split three to two, with the majority holding that the law was "a sales tax and not an occupation tax."¹⁸⁴ At the time, a tobacco tax

180. *Morrison v. Manchester*, 58 N.H. 538 (1879) (mortgagor or mortgagee). Sometimes the payor is significant for federal constitutional reasons. *See, e.g., Ne. Airlines, Inc. v. N.H. Aeronautics Comm'n*, 111 N.H. 5, 273 A.2d 676 (1971) (passenger emplaning fee levied on carrier, not passenger).

181. *E.g., Opinion of the Justices*, 123 N.H. 349, 357, 461 A.2d 132, 137 (1983) (dissent insisting that a franchise tax on gross receipts was a sales tax "to be borne by the consumers").

182. 91 N.H. 115, 14 A.2d 636 (1940).

183. *Id.* at 116–17, 14 A.2d at 637 (examining agricultural exemption, valuation methods, mechanics of collection, and differential rates between distributors and retailers).

184. *Id.*

was considered a revenue matter, not an exercise of the police power to protect public health.¹⁸⁵

Chief Justice Allen dissented, calling the decision “a revolutionary departure from the views expounded and developed in this State.”¹⁸⁶ The court’s prior opinions approving a sales tax were no warrant for a tax on the sale of a single commodity. The event defining the class was a sale. If there were to be a tax on some sales but not others, that involved an exemption—an exemption of the kind that required a public purpose sufficient to justify disproportionality.¹⁸⁷ “If out of ten subjects or forms of property only one is taxed, the others are exempted.”¹⁸⁸ While Chief Justice Allen could conceive of a separate class of luxuries, he could not discern a public interest:

[I]t is not perceived how it can be found to be for the public welfare, in taxing the sale of tobacco products, to exempt the sale of such articles, for example, as smoking accessories, chewing gum, playing cards, certain forms of cosmetics, and certain forms of jewelry.¹⁸⁹

The Chief Justice argued that the various bases on which the majority permitted separate classification of tobacco sales could be used to selectively tax nearly any other business selling a particular commodity,¹⁹⁰ or further sub-classify tobacco based on use in cigars, cigarettes, or pipes.¹⁹¹

Although dissenting separately, with additional alternative grounds, Justice Page agreed that the Chief Justice had articulated “the judicial theory of classification consistently held in New Hampshire for over a hundred years.”¹⁹² “[A] retail sales tax must operate alike on all retail sales which cannot be distinguished upon reasonable and just grounds.”¹⁹³ Of

185. *Id.* at 118, 14 A.2d at 638. While restriction of sales to minors was mentioned, all the published opinions said or assumed the sole purpose of the tax was revenue. Chief Justice Allen’s dissent did discuss possible health issues, but only hypothetically, and in a way he found these insufficient to justify singling out one potentially unhealthy commodity. *Id.* at 124–26, 14 A.2d 642–43.

186. *Id.* at 121, 14 A.2d at 640 (Allen, C.J., dissenting).

187. *Id.* at 121–22, 14 A.2d at 640.

188. *Id.* at 123, 14 A.2d at 641.

189. *Id.* at 124, 14 A.2d at 641.

190. *Id.* at 121–31, 14 A.2d at 640–46.

191. *Id.* at 130–31, 14 A.2d at 645. The chief justice was prophetic. In 1951 the court was skeptical of an exemption for cigars, but said a tobacco tax could be levied on cigarettes alone as class, tacitly exempting all other forms of tobacco. Opinion of the Justices, 97 N.H. 543, 544, 81 A.2d 851, 852 (1951). In 1955 the court advised that to tax cigarettes at 20% and other tobacco products at 15% with no apparent justification for the difference would be unconstitutional. Opinion of the Justices, 99 N.H. 517, 517–18, 113 A.2d 119, 120 (1955).

192. *Havens*, 91 N.H. at 131, 14 A.2d at 646 (Page, J., dissenting).

193. *Id.* at 133, 14 A.2d at 646.

course, as will appear below, the majority concluded there were reasonable and just grounds.

The majority declined to survey the slippery slopes posited by Chief Justice Allen. It considered the issue to be selection, not exemption: “[T]he essential inquiry would appear to be whether the selection of tobacco as the subject of the tax is so arbitrary and unreasonable as to violate the legal requirements of classification.”¹⁹⁴ Although not directly citing them, the court appeared to be invoking opinions reaching back to 1829 recognizing very broad discretion in the legislature to select objects of taxation.¹⁹⁵ The one decision actually cited was *Town of Canaan v. Enfield Village Fire District*.¹⁹⁶

The *Canaan* decision, along with those cited in support of legislative discretion in the selection of subjects of taxation, involved only the tax on estates—the general property tax; the only selectivity involved was whether to include particular kinds of property in the one class then permitted, with the entire class taxed at one uniform rate and valuation. Selection was in part necessary—it would be impractical if not impossible to tax all conceivable kinds of property. It also presented little threat of narrowly selective, discriminatory taxation. None of the taxes struck down in the nineteenth century involved including particular categories of property in the general tax on estates, or excluding them. Each was a special levy with differing rates, valuations, or exemptions. Until 1903 there was no power to create “other classes of property” specially defined and taxed at differing rates and valuations.¹⁹⁷ The implications of selection in the latter case for proportionality, equality, and just shares are manifestly different than when there was one class and one rate. As later recognized by the court, it was this new power that entailed the “danger of creating, by narrow classification, a tax upon occupations or privileges.”¹⁹⁸

The nineteenth-century opinions of the court gave support for both the majority view and the dissent. The court had treated the legislature’s decision to put a particular class of property on the taxable list (selection) as being almost unreviewable:

194. *Id.* at 117, 14 A.2d at 638 (majority opinion).

195. *See, e.g.*, Opinion of the Court, 4 N.H. 565 (1829). “The reasons which may justify the use of the selective power as to the subjects for taxation may be as various as the motives which induce any rational action.” Opinion of the Justices, 82 N.H. 561, 574, 138 A. 284, 291 (1927). A key phrase from the 1829 opinion regarding the legislature’s “wide latitude of discretion” was used without citation. *Havens*, 91 N.H. at 118, 14 A.2d at 638.

196. 74 N.H. 517, 70 A. 250 (1908); *see Havens*, 91 N.H. at 117, 14 A.2d at 638.

197. *See supra* note 106 & accompanying text.

198. Opinion of the Justices, 97 N.H. 546, 548, 81 A.2d 853, 855 (1951); *see also* Opinion of the Justices, 111 N.H. 131, 135, 276 A.2d 817, 820 (1971) (per curiam).

Whether the public expense is more justly and wisely divided by an *inevitably unsuccessful effort to tax all property*, or by the taxation of some class or classes of property that can be easily, equally, and certainly taxed, and the tax of which is equitably collected for the public from all classes of people by the higher government, *is not a judicial question*. If there is a class of property, the tax of which, by force of the natural law of tax distribution and equalization, would be eventually paid in just proportion by the whole community, the common burden may be wholly put upon that class. *The non-assessment of other classes of property would not be an exemption of any class of people.*¹⁹⁹

The court of that era referred to exemption as occurring either by failure to list property as taxable or by express exceptions for property that was otherwise on the taxable list.²⁰⁰

Some ambiguity seems to have arisen from the fact that both inclusion (selection) and exclusion (tacit or express exemption) were used to define taxable “estates.” Under the statutory scheme all real estate was taxed unless expressly exempted,²⁰¹ but personal property was taxed only if listed.²⁰² There was also a practical problem with judicial review of any failure to list a type of personal property. The court could not order a tax unauthorized by the legislature and would have had to void the entire personal property tax to give a remedy for underinclusion.²⁰³ However, ex-

199. *Morrison v. Manchester*, 58 N.H. 538, 555–56 (1879) (emphasis added); *see also* *Brewster v. Hough*, 10 N.H. 138 (1839); *Opinion of the Court*, 4 N.H. at 565. *But see* *Boston, Concord & Montreal R.R. v. State*, 60 N.H. 87 (1880) (conceding differences of opinion on judicial and legislative roles in achieving constitutionally required equality).

200. “[T]he legislature may provide, by general laws, for the exemption of certain classes of property from taxation, as well as exempt it, in fact, by omitting it in the description of property required to be taxed.” *Brewster*, 10 N.H. at 142. *Brewster* or decisions echoing it have been cited repeatedly, as recently as *Smith v. N.H. Dep’t of Revenue Admin.*, 141 N.H. 681, 692 A.2d 486 (1997), and *Estate of Robitaille v. N.H. Dep’t of Revenue Admin.*, 149 N.H. 595, 827 A.2d 981 (2003). These later decisions applied the broad language of legislative discretion to classes of dynamic property without noting the shift in context.

201. As is still the case: “All real estate, whether improved or unimproved, shall be taxed except as otherwise provided.” N.H. REV. STAT. ANN. § 72:6 (2009).

202. “[T]he policy of our law has been to tax all real estate and the enumerated personal property.” *Nashua Sav. Bank v. City of Nashua*, 46 N.H. 389, 408 (1886). Thus, the list for personal property included “carriages if exceeding fifty dollars in value” as a *class*, not carriages of fifty dollars value or less as an *exemption* from a class of personal property or carriages. *Id.* at 396. At this level there is no practical significance in the choice of verbal formula. In 1927 the court recognized this and declared that in either case, the issue was one of exemption, which had to be based on the protective power. *Opinion of the Justices*, 82 N.H. 561, 570–71, 138 A. 284, 289 (1927).

203. To do so would violate part I, article 28 of the New Hampshire Constitution. The problem is best explained in *Eyers Woolen Co. v. Gilsun*, 84 N.H. 1, 146 A. 511 (1929): “[I]n matters of taxation the constitution is not self-executing. . . . legislative authority . . . is required.” 84 N.H. at 4, 146 A. at 513; *see also* *Town of Canaan v. Enfield Vill. Fire Dist.*, 74 N.H. 517, 70 A. 250 (1908).

press exemptions were often thought of as somehow different.²⁰⁴ They could be nullified if unconstitutional. They involved differential treatment of persons or of property that the legislature *had already determined was a suitable subject of taxation*—a direct shifting of the burden among taxpayers *prima facie* situated similarly. “Every exemption is an indirect tax upon other property, and can only be justified where a direct tax upon other property in its behalf would be within the power of the legislature.”²⁰⁵

The payment of a bounty or subsidy out of the public treasury, by the protective power, may be made in the form and under the name of a tax exemption. . . . The generation by whom the constitution was adopted understood the state could pay a sum of money to an individual, for a public purpose, by exempting him from the payment of the same amount of tax.²⁰⁶

As expressed in Chief Justice Allen’s dissent in *Havens*, “to aid some . . . without aiding others can be justified only by a line of distinction based on a public benefit for those aided not applicable to those not aided.”²⁰⁷

None of this, even had it been less ambivalent, was of much use to either side in *Havens*. Whatever approach one took when there was only one class of taxable “estate,” the problem now was how to define additional, differing classes. Was the court facing a highly selective, discriminatory occupational tax, or a simple sales tax on tobacco? And if the latter, could it, or should it be distinguished, as the court would come to be asked, from a sales tax on bottled soft drinks,²⁰⁸ apples,²⁰⁹ milk,²¹⁰ or barber and beauty services?²¹¹

The majority said the view that “an act of the legislature imposing a tax should be considered primarily as an exemption statute is believed to

204. *State v. U.S. & Canada Express Co.*, 60 N.H. 219 (1880) (Doe, C.J.) (discussing the subsidy theory); *Franklin St. Soc’y v. Manchester*, 60 N.H. 342 (1880) (stating a partial exemption for religious property was justified because a direct appropriation would have been permissible). This view was affirmed in *Opinion of the Justices*, 82 N.H. 561, 571 (1927), and, although the proper degree of deference to legislative judgment was left obscure, the bases for proposed exemptions were thoroughly scrutinized.

205. *Franklin St. Soc’y*, 60 N.H. at 345–46.

206. *U.S. & Canada Express Co.*, 60 N.H. at 259–60 (Doe, C.J.).

207. *Havens v. Att’y Gen.*, 91 N.H. 115, 127, 14 A.2d 636, 643 (1940) (Allen, C.J., dissenting).

208. *Opinion of the Justices*, 94 N.H. 506, 52 A.2d 294 (1947) (holding proposed tax at same rate as tobacco tax constitutional).

209. *Opinion of the Justices*, 95 N.H. 555, 65 A.2d 876 (1949) (holding apple excise unconstitutional occupation tax).

210. *Opinion of the Justices*, 98 N.H. 527, 96 A.2d 733 (1953) (holding milk excise unconstitutional occupation tax).

211. *Opinion of the Justices*, 111 N.H. 131, 276 A.2d 817 (1971) (per curiam) (determining array of service taxes at different rates probably unconstitutional).

be wholly without foundation.”²¹² Unless the word “primarily” was employed to convey an unexplained qualification, the court was mistaken. In 1927 the court had been presented with two possible income taxes, one that taxed only incomes above \$2,000 and one that taxed incomes categorically but exempted amounts below \$2,000.²¹³ Some question was raised about the difference, but the court dismissed it: “The terminology used does not control. The substance of the provision must be considered. The question is one of power to grant exemption.”²¹⁴ Even Chief Justice Doe, who long before the 1902 amendment believed the taxing power was not limited to polls and estates, rejected the railway express tax precisely because it was too narrow:

Whether it is a tax imposed upon person, property, income, business, gross receipts, profits, or earnings, is immaterial. It is a tax which one class of men are required to pay, *and from which all others are exempt*. It is a perfect example of unequal division of public expense.²¹⁵

For the proposition that imposition of a tax could not be treated as an exemption, the majority quoted only a different proposition from the problematic opinion in *Canaan*:²¹⁶ “No case is to be found holding a tax invalid because of the exemption of other property by either express provision or failure to enumerate it as taxable.”²¹⁷ While literally true in the original context, that passage in *Canaan* did not mean that unjustified exemption could not invalidate a tax. One ground for the unconstitutionality of the inheritance tax in *Curry v. Spencer* had been that the state “cannot lawfully make discriminations and cast the burden upon one class of beneficiaries, and exempt all other classes from its operation.”²¹⁸ Between *Canaan* and *Havens* the court had twice declared that a general \$2,000 exemption from an income tax would be fatally excessive: “The duty to contribute to the maintenance of government is a primary one, the performance of which is

212. *Havens*, 91 N.H. at 117, 14 A.2d at 638 (majority opinion).

213. Opinion of the Justices, 82 N.H. 561, 570, 138 A. 284, 289 (1927).

214. *Id.*

215. *State v. U.S. & Canada Express Co.*, 60 N.H. 219, 263 (1880) (emphasis added). Of course, Chief Justice Doe would have been willing, with evidence of the proper motive, to uphold a tobacco “tax” as a protective power penalty, but that was not the theory in *Havens*.

216. 74 N.H. 517, 70 A. 250 (1908). *Canaan* was a case of statutory interpretation involving exemption of property owned by public bodies outside their own boundaries. The principal opinion is a far-ranging discourse filled with broad propositions on many topics, much of it dicta. As Chief Justice Allen observed, only two justices of the three who sat joined in the opinion and perhaps only one on the point cited. *Havens*, 91 N.H. at 124, 14 A.2d at 641 (Allen, C.J., dissenting). *Canaan*’s precedential value was expressly discounted by a unanimous court in *Town of Keene v. Town of Roxbury*, 81 N.H. 332, 126 A. 7 (1924). Despite this, it has been cited for one proposition or another by the court at least forty-three times, and at the time of this writing has no cautionary signal in LexisNexis’s Shepard’s.

217. *Canaan*, 74 N.H. at 540, 70 A. at 259; *see also Havens*, 91 N.H. at 117, 14 A.2d at 638.

218. 61 N.H. 624, 632 (1882).

not to be excused for light reasons.”²¹⁹ It had also said that leaving corporate income out of a taxed class of business income would be unconstitutional.²²⁰

The majority invoked two specific post-1903 classification decisions involving sub-classification of franchises and incomes. When taxation of electric and gas utility franchises was challenged for failure to include other utility franchises, the court had said:

The power of the legislature to classify property as taxable or non-taxable is a broad one, and the validity of its exercise has rarely been called in question. Classification of property by kind has always been recognized as proper. So, too, classification by use is said to be permissible. So long as there is a reasonable line of demarcation, and there is no attempt to make taxability depend upon a classification of owners, the legislative power in this matter is supreme.²²¹

However, *Havens* appears to have overlooked the fact that the franchise issue was one of inclusion in, or exclusion from, a statewide tax on estates, not the creation of a new “other” class of property to be taxed at a different rate.²²² The power to select particular types of property for inclusion in a general estate tax had long been settled. The power to tax “[o]ther classes of property” was not based on classification by kind, but “by some fact other than mere ownership.”²²³ A non-estate tax could be levied on a “distinctive class of property” depending upon “a certain event . . . a characteristic event, not common to other property.”²²⁴ The *Havens* majority quoted this and declared that with “slight changes in phraseology,” it could be applied to sustain the tobacco sales tax.²²⁵ Tobacco was a distinctive class of property. The characteristic event was a sale. The majority ignored the original qualification that the event *not be common to other property*.²²⁶

219. Opinion of the Justices, 84 N.H. 559, 571, 149 A. 321, 328 (1930); see also Opinion of the Justices, 88 N.H. 500, 507, 190 A. 801, 806 (1937) (citing *Opinion of the Justices*, 84 N.H. at 771, 139 A. at 328).

220. *Opinion of the Justices*, 84 N.H. at 573, 149 A. at 328.

221. *Havens*, 91 N.H. at 118, 14 A.2d at 638 (citations omitted).

222. *Id. passim*; see also 1 COOLEY ON TAXATION § 280 (4th ed. 1924) (1881). General propositions from a national treatise could not have been applied to New Hampshire when the question involved a possible occupation or excise tax. New Hampshire was already well recognized as peculiar in its prohibition of such taxes. See, e.g., *State ex rel. Botkin v. Welsh*, 251 N.W. 189, 200 (S.D. 1933) (examining the concept of taxable privilege).

223. *Conner v. State*, 82 N.H. 127, 128–29, 130 A. 357, 359 (1925).

224. *Opinion of the Justices*, 84 N.H. at 575, 149 A. at 329 (approving timber severance tax).

225. *Havens*, 91 N.H. at 119, 12 A.2d at 638.

226. *Id.*

The only clear precedent for an arguably under-inclusive tax on a new class of property was the court's treatment of taxes on income. Money at interest was, of course, property, and the legislature had very broad authority to sub-classify it and subject any or no part of the classes to the general tax on estates at the common rate.²²⁷ In 1915 the court approved a proposal to remove from the taxable list various interest or dividend-bearing items and levy instead a tax at the common rate on the income they produced.²²⁸ The bill explicitly defined such incomes as "personal estate," and the court upheld it as such, with the understanding that it would be taxed at the same rate as other property.²²⁹ Legislative power to make such exclusions from and additions to the list of taxable estates could not "be regarded as open to investigation."²³⁰ The court went further in response to the objection that they had approved an income tax. The proposal remained a tax on "personal estate."²³¹ As such, "[t]he failure to tax all incomes would not be a constitutional objection. The taxation of a class only would present the situation of our present tax laws, which do not tax all classes of property."²³² Despite the fact that it resulted in different effective tax rates on differently invested "estates,"²³³ the same plan was approved in 1923.²³⁴ However, one dissenting justice foresaw hazards in applying the old concepts of classification and selection to new classes of property:

[D]isproportion in taxation within the meaning of the constitution can be accomplished as effectually by taxing a part of a given class of taxable or non-taxable property and giving it a fictitious name, as by varying the rules governing the ascertainment of value, or by varying the rate. There is no limit to the diverse classifications which might be made once we embark on this method. To adopt such a method would be . . . an elimination of the word "proportional" from the constitution²³⁵

In *Conner v. State*, the court upheld the 1923 IDT, using it as the vehicle for announcing its conclusion that the 1903 amendment authorizing

227. Opinion of the Justices, 76 N.H. 609, 612, 85 A. 757, 758 (1913); Opinion of the Justices, 76 N.H. 588, 597, 79 A. 31, 35 (1911).

228. Opinion of the Justices, 77 N.H. 611, 93 A. 311 (1915).

229. *Id.* at 612-13, 93 A. at 312.

230. *Id.* at 612, 93 A. at 312.

231. *Id.* at 615, 93 A. at 313.

232. *Id.*

233. See Opinion of the Justices, 81 N.H. 552, 560, 120 A. 629, 633 (1923) (Snow, J., dissenting); *Opinion of the Justices*, 77 N.H. at 619, 93 A. at 315 (Peaslee, J., dissenting).

234. *Opinion of the Justices*, 81 N.H. at 553-54, 120 A. at 630 (majority opinion).

235. *Id.* at 562-63, 120 A. at 634 (Snow, J., dissenting).

taxation of “other classes of property” permitted what had previously been considered double taxation.²³⁶ The *Havens* majority conceded that no issue involving the breadth of the class was raised.²³⁷ The *Conner* opinion recognized that other questions about the new theory were likely to arise and declined to explore them.²³⁸ However, the court had approved treating income as a new class of property and upheld a tax applicable to only certain types of income. It has repeatedly done so since, approving differential taxation of an extraordinary variety of sub-classifications of gross, net, or blended incomes.²³⁹

However, *Havens* involved only one type of tax at one rate on the movement of one kind of property.²⁴⁰ Taxonomical complexities would arise after the attempt to settle whether a class was defined by the “characteristic event” or a combination of the event with other factors. In *Havens* the court tacitly repudiated the position it had taken in 1930 and decided that, at least in some cases, factors other than the characteristic event could justify separately classifying and taxing only some of the property subject to the event.²⁴¹

Although unwilling to treat the allegedly narrow classification as a type of exemption, the majority also declined to treat the definition of “other classes of property” as unreviewable in the way it had been for personal estates. The majority offered some criteria for determining “the legal requirements of classification.”²⁴² In addition to the characteristic event-triggering incidence of the tax, the levy was on a commodity distinguished by a restriction on sales or gifts to minors, one “so distinctively in a class of its own that it is generally considered by economists as an appropriate

236. 82 N.H. 126, 130 A. 357 (1925).

237. *Havens v. Att’y Gen.*, 91 N.H. 115, 117, 14 A.2d 636, 638 (1940).

238. *Conner*, 82 N.H. at 133, 130 A. at 361.

239. Opinion of the Justices, 132 N.H. 777, 584 A.2d 1342 (1990) (net business profits plus compensation; scheme unconstitutional on other grounds); Opinion of the Justices, 123 N.H. 349, 461 A.2d 132 (1983) (gross receipts of franchised utilities); Opinion of the Justices, 117 N.H. 512, 374 A.2d 964 (1977) (capital gains); *Austin v. State Tax Comm’n*, 114 N.H. 137, 316 A.2d 165 (1974) (N.H. wages of non-residents), *rev’d on other grounds*, *Austin v. New Hampshire*, 420 U.S. 656 (1975); Opinion of the Justices, 110 N.H. 117, 262 A.2d 290 (1970) (net business profits); Opinion of the Justices, 101 N.H. 549, 137 A.2d 726 (1958) (income from exercise of utility franchises); Opinion of the Justices, 97 N.H. 543, 81 A.2d 853 (1951) (income from sale of stock in trade by merchants and manufacturers); Opinion of the Justices, 95 N.H. 537, 65 A.2d 876 (1949) (gross incomes a proper class, specific proposal invalid for lack of uniform rate); Opinion of the Justices, 88 N.H. 500, 190 A. 801 (1937) (earned incomes and rents); Opinion of the Justices, 84 N.H. 559, 149 A. 321 (1930) (earned incomes and income from intangibles); Opinion of the Justices, 82 N.H. 561, 138 A. 284 (1927) (net incomes from manufacturing and mercantile business).

240. *Havens*, 91 N.H. at 119, 14 A.2d at 639 (involving one express exemption for agricultural uses that would meet any of the extant tests for exemption).

241. *Id.* at 118–19, 14 A.2d at 638–39 (examining *Opinion of the Justices*, 84 N.H. at 576, 149 A. at 330 (1930)).

242. *Havens*, 91 N.H. at 117, 14 A.2d at 638.

subject of taxation.”²⁴³ Its sale was distinct from “the ordinary transactions of private life which contain no element subject to supervision either under the police power or as things affected with a public use.”²⁴⁴ It was not a necessity.²⁴⁵

As bulwarks against discriminatory taxation, these distinctions were hardly formidable. Chief Justice Allen’s dissent observed that a justification for regulatory exercise of the police power bore no logical connection to an exercise of the taxing power, and that such a basis for classification would leave “any selection . . . just and reasonable and the legislative will . . . uncontrolled.”²⁴⁶ “[A] law taxing only bread . . . would not be validated by including in the law requirements for the weight and quality of the bread.”²⁴⁷ He could have pointed to special regulation of many other commodities, including milk,²⁴⁸ and many common activities, including hunting and fishing.²⁴⁹ Other commodities were dangerous and subject to sales restrictions.²⁵⁰ The opinions of economists were a poor guide for the court—they generally also supported constitutionally forbidden progressivity.²⁵¹

Although the Chief Justice was merely dismissive, the criterion of economic theory was manifestly unsound. Economic writing about state taxation presupposes the nearly universal power to levy excises, grounded in a power to declare any occupation “a privilege and tax it as such.”²⁵² It takes for granted the very authority New Hampshire’s founders withheld. As observed in one of the opinions cited by the *Havens* majority itself, “the taxing power is fixed by the language of the amendment and not by a classification of taxes by authorities on economics.”²⁵³

243. *Id.* at 118, 14 A.2d at 638.

244. *Id.* Had medical science been sufficiently advanced, the court could have followed Chief Justice Doe’s robust view of protective power penalties rather than make vague references to supervision. See *State v. U.S. & Canada Express Co.*, 60 N.H. 219, 257 (1880).

245. *Havens*, 91 N.H. at 119, 14 A.2d at 639.

246. *Id.* at 124, 14 A.2d at 642 (Allen, C.J., dissenting).

247. *Id.* at 126, 14 A.2d at 643; see also *State v. Normand*, 76 N.H. 541, 85 A. 899 (1913) (upholding state board of health’s bread-wrapping requirement).

248. Opinion of the Justices, 88 N.H. 497, 190 A. 713 (1937) (quality and price regulation).

249. *Musgrove v. Parker*, 84 N.H. 550, 153 A. 320 (1931) (regulations restricting taking of fish and game).

250. *Havens*, 91 N.H. at 125, 14 A.2d at 642 (Allen, C.J., dissenting) (“poisons, intoxicants, certain weapons”).

251. *Id.* at 122, 14 A.2d at 640.

252. *Seven Springs Water Co. v. Kennedy*, 299 S.W. 792, 793 (Tenn. 1927). For New Hampshire’s peculiarity, see also *State ex rel Botkin v. Welsh*, 251 N.W. 189, 200 (S.D. 1933). Even Professor Robinson’s *A History of Taxation in New Hampshire* glosses over this critical distinction.

253. Opinion of the Justices, 84 N.H. 559, 576, 149 A. 321, 330 (1930).

Subsequent decisions reveal that the listed distinctions in *Havens* have been neither necessary nor sufficient to define a distinctive “other class” of property separately from the “characteristic event.”

3. *Developments by Type of Tax*

a. *Other Sales and Commodity Taxes*

Questions remained about what sales of other commodities might be classified and whether tax rates could vary among them. In 1947 the advice of the court was sought regarding a tax proposed on the sale of bottled soft drinks.²⁵⁴ The sponsors had cautiously proposed the same 15% levy and valuation method as the tobacco tax,²⁵⁵ so any issue was confined to classification. The court said the tax was on a distinctive class of property, depending on a characteristic event, a sale. There was no reference to the police power. Instead, the court relied on other

abundant reasons. Soft drinks, like tobacco, are not necessities, but may be properly classified as luxuries which were recognized by the dissenting judges in *Havens v. Attorney General*, as proper subjects for taxation. Their fitness as subjects of taxation has been generally recognized. Similar taxes have been imposed in many of the states. The fact that this burden of the tax will be very widely distributed over almost the entire population of the state indicates that it is a good tax, according to accepted theories of taxation. The incidence of the tax depends upon a characteristic event, a sale, which has been held to a proper criterion for determining the incidence of a tax.²⁵⁶

Two years later the same justices peremptorily condemned conversion of the electric utility franchise tax to one on kilowatt-hours of electricity produced, since it would have been a “privilege tax.”²⁵⁷ Although the levy might not have been strictly ad valorem,²⁵⁸ that seems to have been beside

254. Opinion of the Justices, 94 N.H. 506, 52 A.2d 294 (1947).

255. “The original copy of HB from the 1947 NH legislative session, section 5 ‘Tax Imposed’, reads ‘A tax is hereby imposed at the rate of fifteen percent upon the value of all bottled soft drinks sold at retail in this state measured by the usual selling price.’” Letter from Z. Moore, Reference Librarian, N.H. State Library, to Marcus Hurn, Professor, Franklin Pierce Law Center (Feb. 9, 2009) (on file with author).

256. *Opinion of the Justices*, 94 N.H. at 508, 52 A.2d at 295.

257. Opinion of the Justices, 95 N.H. 543, 543, 64 A.2d 324, 324 (1949).

258. The levy was 1/4 mill per kilowatt hour. Although the value of electricity in principle varies depending on when it is produced and consumed, a flat rate has been levied on consumption for some years without challenge. N.H. REV. STAT. ANN. § 83-E:2 (2008) (adopted in 1997). Even if kilowatt hours were not of equal value, an ad valorem tax on their sale could easily have been devised. Altern-

the point at the time. It is hard to avoid the conclusion that the briefs and arguments failed to reveal an attempted and salvageable sales or gross income tax behind all the references to franchises and privileges.²⁵⁹ Some years later, the court used the flat rate distinction to “harmonize” this decision with its approval of a proposed conversion of the tax on a franchise as property to a tax on income generated by a franchise.²⁶⁰ Many years later the court approved such a tax on the gross receipts of electric and gas utilities, essentially a “sales tax on the consumption of electricity and gas.”²⁶¹

The same year a proposed tax on apples “moving into the channels of commerce” was rejected as a forbidden “occupation tax.”²⁶²

The raising and selling of apples involves “only the ordinary transactions of private life.” It contains “no element subject to supervision either under the police power or as things affected with a public use.” “The mere statement of the general proposition is sufficient to show that it unquestionably exceeds the legislative power.”²⁶³

As drafted the tax had a structural flaw (flat rate again), but the court ignored that.²⁶⁴ That the proceeds of the apple levy were devoted to promoting the sale and use of apples did not enter into the analysis.²⁶⁵ An effort similar to the apple excise regarding milk distribution in 1953 failed as either a tax or a fee.²⁶⁶ No mention was made in either the electric franchise or milk distribution cases of the unique and elaborate police power regulations and price controls to which those industries were subject.²⁶⁷ Contrary to its practice in some cases,²⁶⁸ the court made no effort to advise

tively, the tobacco tax had reached an essentially flat rate per pack without violating valuation principles. *Havens v. Att’y Gen.*, 91 N.H. 115, 135–36, 14 A.2d 636, 648 (1940) (Page, J., dissenting) (explaining the mechanism resulting in a flat tax).

259. There is now a consumption tax. *See* N.H. REV. STAT. ANN. 83-E:2 (2008).

260. *Opinion of the Justices*, 101 N.H. 549, 137 A.2d 726 (1958).

261. *Opinion of the Justices*, 123 N.H. 349, 358, 461 A.2d 132, 137 (1983) (per curiam).

262. *Opinion of the Justices*, 95 N.H. 555, 556, 65 A.2d 876, 877 (1949).

263. *Id.* (quoting *Opinion of the Justices*, 82 N.H. 561, 563, 138 A. 284, 286 (1927)).

264. The apple tax was one cent per bushel.

265. Either a fee theory or a special benefit assessment theory might have had some merit. In a subsequent, more thorough analysis of a similar charge on milk distributors, the court held that establishing a fund for advertising and “stimulating milk consumption is not in aid of regulation as the definition is understood,” although promotion of the sale of milk was “not of itself an invalid purpose.” *Opinion of the Justices*, 98 N.H. 527, 528–29, 96 A.2d 733, 734 (1953).

266. *Id.*, 96 A.2d at 735.

267. *See generally* *Opinion of the Justices*, 88 N.H. 497, 190 A. 713 (1937) (discussing milk dealer licensing and price control system).

268. The principal decision cited by the court had included an elaborate suggestion regarding how revenue could be raised from corporations without unconstitutional discrimination. *Opinion of the Justices*, 82 N.H. at 566, 138 A. at 287. Finding a proposal to exempt cigars from the tobacco tax of

the legislature how it could lawfully achieve its purposes in any of these decisions. The criteria laid out in *Havens* and supplemented in the soft drinks decision were not used in the kilowatt, apple, or milk opinions.

In 1951, confronting proposed sales taxes at differing rates on a miscellaneous assortment of goods and services, the court had to reconcile its expansive language in the tobacco and soft drinks opinions with its duty to the constitution. Leaving tobacco at 15%, the bill would have taxed restaurant meals at five, soft drinks at twenty, and admissions at five.²⁶⁹ The court maintained its view that tobacco was in a class by itself, and expressly stated it could be taxed “at a rate distinct from the rate of a general sales tax.”²⁷⁰ This was a bit awkward without resort to stronger justifications than laid down in *Havens*. Just the week before—in the immediately preceding opinion in the official reports—the court had insisted that all incomes were one class and that intangibles and income from mercantile and manufacturing had to be taxed at one rate.²⁷¹ No attempt was made to reconcile the differing approaches to classification.

On “the issue of still further classification,” the court hypothesized justifiable distinctions based on various differences—sales of real property versus personal, of luxuries versus necessities.²⁷² It wrote of permitted disproportion “inherent in the tax itself,”²⁷³ but cautioned against failure

[t]o promote “equal or honest division of [the] common burden.” The danger of creating, by narrow classification, a tax upon occupations or privileges is apparent. “Under our constitution, the power to tax is a power not to destroy the right of property by a discriminating process of classification or selection, but to equitably defray the expense of protecting the right of property and other rights.”²⁷⁴

Referring to the “complexities of the subject” and the limited time available for answering the inquiry, the court expressed its “tentative conclusion” on the limited information before them.²⁷⁵ The justices were “unable to declare the proposed bill constitutional.”²⁷⁶ When it was proposed to tax cigarettes at 20% and other tobacco products at fifteen, the court saw

doubtful constitutionality, the court suggested simply narrowing the taxable class to cigarettes. *Opinion of the Justices*, 97 N.H. 543, 81 A.2d 851 (1951).

269. *Opinion of the Justices*, 97 N.H. 546, 547, 81 A.2d 853, 854 (1951).

270. *Id.*

271. *Opinion of the Justices*, 97 N.H. at 545, 81 A.2d at 853.

272. *Opinion of the Justices*, 97 N.H. at 547–48, 81 A.2d at 854.

273. *Id.* at 548, 81 A.2d at 854.

274. *Id.* (citations omitted).

275. *Id.*

276. *Id.*

no “regulatory or just reason” for the difference and declared it unconstitutional.²⁷⁷ A 1971 proposal would have taxed another assortment of services at a different rate from that on rooms and meals.²⁷⁸ The court still left open the possibility of information not before them justifying subclassification, but

[a]lthough they may exist, no reasons have been presented to us “which may fairly be thought just and in the public interest” for the selection of the services taxed by RSA ch. 78-A (supp.) for taxation at one rate, and those enumerated in House Bill 382 for taxation at another.²⁷⁹

There was one class, not two. While each activity in the two classes presumably had “some unique trait,” the “‘characteristic event’ which justifies imposition of a tax differing from the general property tax is the same—namely, the furnishing or sale of a service.”²⁸⁰ Without equalizing the rates the bill would be unconstitutional. With a uniform rate it could stand.²⁸¹ Tobacco was special—the default position is apparently “a general sales tax” at one rate.²⁸²

In contrast to the tobacco and soft drinks decisions, these later opinions warning of the dangers of narrow classification have no judicial elaboration of distinctions justifying the classifications in issue. The court has clearly applied the *Havens* criteria to goods and services in only two later cases: once to justify narrowing the class of taxable tobacco to cigarettes,²⁸³ and once to validate a proposed tax on production of refined petroleum products.²⁸⁴ Since then the court has apparently forsaken any effort to comprehensively define “the legal requirements of classification.” Instead it has fallen back on more general language like that in the soft drinks opinion requiring “reasons which may fairly be thought just and in the public interest” for selecting goods and services to be taxed at different rates.²⁸⁵

277. Opinion of the Justices, 99 N.H. 517, 518, 113 A.2d 119, 120 (1955).

278. Opinion of the Justices, 111 N.H. 131, 276 A.2d 817 (1971).

279. *Id.* at 135, 276 A.2d at 820 (citations omitted).

280. *Id.* at 134, 276 A.2d at 820 (citations omitted).

281. *Id.* at 135, 276 A.2d at 820.

282. Opinion of the Justices, 97 N.H. 546, 547, 81 A.2d 853, 854 (1951).

283. Opinion of the Justices, 97 N.H. 543, 81 A.2d 851 (1951).

284. Opinion of the Justices, 114 N.H. 174, 317 A.2d 568 (1974).

285. Opinion of the Justices, 94 N.H. 506, 509, 52 A.2d 294, 296 (1947); *see also* Starr v. Governor, 148 N.H. 72, 802 A.2d 1227 (2002) (finding “[n]o legitimate reason . . . presented to create . . . distinction” between ordinary retail sales of items and sale through prison commissary); Cagan’s, Inc. v. N.H. Dep’t of Revenue Admin., 126 N.H. 239, 490 A.2d 1354 (1985) (stating no “just reason” or “rational basis” to distinguish sales of packaged food through vending machines or supermarkets).

b. Taxes on Incomes or Expenses

As noted above, the court had approved taxes on various classes of income some years before *Havens*.²⁸⁶ It did not have to confront two different classes of income taxed at two different rates. It had, however, said that the rate for taxation of incomes “must be uniform.”²⁸⁷

In 1949 the court’s advice was sought on a proposal to tax gross incomes.²⁸⁸ The House of Representatives described it as “classifying gross income with regard to its type, rather than with regard to its recipient.”²⁸⁹ The court rejected varying rates for the “types” of income:

A gross income tax does not differ from a net income tax with respect to the constitutional requirements. Either form of income constitutes a *class* of property taxable under the 1903 amendment to our Constitution. They are what is sometimes called property in motion as distinct from static property. Both classes are subject, however, to the constitutional requirement of proportionality or equality of rate *within each class*.²⁹⁰

On the same day, in response to a net income tax proposal, the court approved defining net income with reference to the U.S. Internal Revenue Code, observing that it would “greatly facilitate the administration of the act.”²⁹¹ Later it made clear that a tax could be levied as a percentage of federally defined income, but not as a percentage of federal taxes. To do so would introduce unconstitutional graduation.²⁹²

When it was first proposed to except the stock in trade of merchants and manufacturers from taxable personal estate and replace it with a tax on their net income, the court reaffirmed its previous approval of such reclassifications.²⁹³ However it also reaffirmed its position that all income taxes “constitute one class for purpose of establishing a rate,” expressly stating

286. Opinion of the Justices, 88 N.H. 500, 190 A. 801 (1937) (earned incomes and rents); Opinion of the Justices, 84 N.H. 559, 149 A. 334 (1930) (earned incomes and income from intangibles); Opinion of the Justices, 82 N.H. 561, 138 A. 284 (1927) (net incomes from manufacturing and mercantile business).

287. *Opinion of the Justices*, 82 N.H. at 570, 138 A. at 289; *accord Opinion of the Justices*, 84 N.H. 559, 149 A. 334.

288. Opinion of the Justices, 95 N.H. 537, 64 A.2d 320 (1949).

289. *Id.* at 538, 64 A.2d at 320.

290. *Id.* at 539, 64 A.2d at 321 (emphasis added).

291. Opinion of the Justices, 95 N.H. 540, 542, 64 A.2d 322, 323 (1949). Once business profits came to be taxed, reference to the federal code and forms required considerable adjustment due to varying federal treatment of business entities, a practice unconstitutional in New Hampshire.

292. Opinion of the Justices, 99 N.H. 525, 113 A.2d 547 (1955).

293. Opinion of the Justices, 97 N.H. 543, 81 A.2d 851 (1951).

the same rate would apply to the tax on intangibles, namely interest and dividends.²⁹⁴

The first opinion approving taxation of one type of income at a special rate came in 1958.²⁹⁵ The previous year the court had held the public utility franchise tax unconstitutional.²⁹⁶ It had been a traditional property tax on the intangible value of the franchise as measured by the difference between the value of the utility as a whole, based on capitalization of earnings, and its net assets.²⁹⁷ The earnings part of the statutory formula was irrational and had long notoriously been “a farce.”²⁹⁸

Facing budgetary shortfall and the need for a special legislative session, the governor and executive council asked the court for comprehensive advice about utility taxation.²⁹⁹ As a franchise was personal property, it could be taxed as “estate,”³⁰⁰ but that meant it would have to be taxed at the same rate and valuation as other property taxes at the state level (principally the railroad tax).³⁰¹ The statutory formula producing a differing valuation had therefore been unconstitutional. However, franchises had been one of the two examples of “other classes of property” listed in the 1903 amendment, and incomes were also a recognized “other class.” Therefore it was the court’s

opinion that franchises of utilities may properly be taxed at a special rate, distinct from that imposed upon incomes, or inheritances, or by the general property tax. We see no reason why such a special tax upon utility franchises may not validly be imposed by reason of the receipt of income from the exercise of such franchises, or why it may not be levied at a special rate, and in proportion to the amount of income received through exercise of the franchises.³⁰²

The court was still speaking in terms of classes of taxes so it had a choice to make: income, franchise, or both. It said, “uniformity and proportionality must be maintained within this separate class of franchise taxes.”³⁰³ As

294. *Id.* at 545, 81 A.2d at 853; *see also* Opinion of the Justices, 99 N.H. 512, 513–14, 112 A.2d 44, 45–46 (1955) (recapitulating the decisions that permitted the rate of income taxes to differ from the rate for “the annual property taxes,” but requiring them to have their own “common and uniform rate”).

295. Opinion of the Justices, 101 N.H. 549, 137 A.2d 726 (1958).

296. *Public Serv. Co. of N.H. v. State*, 101 N.H. 154, 136 A.2d 600 (1957).

297. *Id.* at 158–59, 136 A.2d at 604.

298. *Id.* at 162, 136 A.2d at 607 (quoting a former chairman of the Tax Commission).

299. *Opinion of the Justices*, 101 N.H. at 551, 137 A.2d at 728.

300. *Id.* at 556, 137 A.2d at 731.

301. *Id.* at 554–55, 137 A.2d at 730.

302. *Id.* at 557, 137 A.2d at 732.

303. *Id.*

with other classes, this one need not be comprehensive—inclusion of other income-generating franchises was not required.³⁰⁴

But the court considered the issue of a rate differing from the IDT “difficult.”³⁰⁵ The rates could differ if the franchise tax were levied on net income, as the intangibles tax was on the gross. That gross and net income were different classes had already been stated in the abstract.³⁰⁶ Yet, without regard to gross or net, the court also said that franchise income could be separately classified, and “[t]he class so selected is as distinctive as that of the class upon which the tax upon interest and dividends is imposed.”³⁰⁷ The tax had characteristics of both classes, and the distinctive qualities of the franchises justified a different rate on the incomes.

There was another proposal in 1965 to repeal the troublesome stock in trade tax and replace it with an income tax at a uniform rate.³⁰⁸ It had one easily corrected flaw—a portion was characterized literally as a property tax, a misnomer that would have been fatal for lack of coordination with the other state property taxes.³⁰⁹ More seriously, however, the tax would not apply to income from personal services “for which wages or salaries are received from an employer.”³¹⁰ Consequently the self-employed would pay the tax, while those doing the same work but drawing a salary from a corporation would not. This not only made the tax easily circumvented; it was an unconstitutional discrimination among taxpayers.³¹¹ Coordinating the deductibility of compensation among various business forms has been a recurrent design problem in New Hampshire taxation as the state has increasingly relied on definitions from a federal internal revenue code that promiscuously discriminates among taxpayers.

In 1969 a legislatively created Citizens Task Force worked out a “Grand Bargain” to thoroughly revise the state’s revenue structure.³¹² The tax on stock in trade and many other business-related classes of personal property would be repealed.³¹³ A tax on the net profits of any corporation, partnership, or proprietorship would take its place, with revenue sharing compensation provided to cities and towns to reduce their tax bases.³¹⁴ Definitions were based on the federal internal revenue code, but unincor-

304. *Id.* at 558, 137 A.2d at 732. The court cited *Opinion of the Justices*, 84 N.H. 559, 149 A. 321 (1930), which turned on the selective power as applied to taxation of franchises as personal estate.

305. *Opinion of the Justices*, 101 N.H. at 558, 137 A.2d at 733.

306. *Opinion of the Justices*, 95 N.H. 537, 539, 64 A.2d 320, 321 (1949).

307. *Opinion of the Justices*, 101 N.H. at 558, 137 A.2d at 733.

308. *Opinion of the Justices*, 106 N.H. 202, 208 A.2d 458 (1965).

309. *Id.* at 204, 208 A.2d at 460.

310. *Id.* at 206, 208 A.2d at 461.

311. *Id.*, 208 A.2d at 462.

312. *Opinion of the Justices*, 110 N.H. 117, 262 A.2d 290 (1970) (per curiam).

313. *Id.* at 121–22, 262 A.2d at 293–94.

314. *Id.*

porated entities were allowed a state deduction for the value of owners' services to equalize the treatment of all business forms. State credits or exclusions were designed to avoid possible double taxation where taxes on other revenue streams overlapped with business profits. In anticipation of a special legislative session, the governor and council asked the court's advice on the constitutionality of the proposal; the court saw no constitutional flaws.³¹⁵ This was the genesis of the business profits tax (BPT).

In its scrutiny of the proposed BPT, the court had to distinguish other classes of property taxed differently or implicitly created where the BPT base overlapped them. The IDT rate could differ as it was levied on gross income. To the extent interest and dividends were taxed under the IDT, that income was excluded from the BPT base. This, however, had the effect of denying businesses the benefit of certain exemptions allowed under the IDT and also of creating a different effective rate for some intangible business income. However, the court said business income could be "classified separately from salaries, wages, and unearned income of individuals," and taxed at a rate differing from intangibles "held to the accounts of nonbusiness interests."³¹⁶ As to the better rate for business income from intangibles, the court characterized it as a rational "partial exemption" to avoid discouraging investments.³¹⁷

The state taxes on railroads and telephone companies were traditional property taxes that did not need to be coordinated with an income tax. The taxes on gas and electric franchise income were of a distinct class justifying a different rate, and making their higher taxes a credit against the BPT prevented double taxation.³¹⁸ The tax on interest and dividends paid out by banks was called a franchise tax and remained in a class by itself.³¹⁹ Taxes on insurance companies were distinguished on the traditional theory that they were not taxes but voluntary payments for special privileges.³²⁰

At about the same time it was signaling that sales of ordinary goods and services might fit in only one or two classes, each with a common rate,³²¹ the court was allowing a profusion of distinct categories of income: gross or net; business receipts, wages and salaries, or unearned income; of the latter, rents or interest and dividends; franchise income with subclasses of franchises. More distinct classes were to come (presumably subdivisible by other recognized factors): earnings of non-resident commu-

315. *Id.* at 125, 262 A.2d at 296.

316. *Id.* at 123, 262 A.2d at 295.

317. *Id.* at 124, 262 A.2d at 296.

318. *Id.*, 262 A.2d at 295.

319. *Id.*, 262 A.2d at 296.

320. *Id.*

321. Opinion of the Justices, 111 N.H. 131, 134, 276 A.2d 817, 820 (1971) (per curiam) ("[T]he 'characteristic event' . . . is the same—namely, the furnishing or sale of a service.").

ters;³²² capital gains, both ordinary and from residences;³²³ interest and dividends paid by domestic financial institutions;³²⁴ and net business profits with compensation added back.³²⁵ Double taxation issues and the complexities of taxing multi-state or international business groups have also produced many credits and exemptions sometimes indifferently referred to as acts of classification.³²⁶ Except for franchised utilities, however, the court was skeptical of classification of income by industry. In 1975 it was proposed to exclude from the reach of the business profits tax net income derived from sales of spirits and wine “under the express direction of, or under an agreement with, the State liquor commission for sale to the commission.”³²⁷ With no apparent irony, the court said:

If the effect of the proposal is to exempt certain taxpayers, i.e. those who sell “spirits and wines” to the State liquor commission, from this State’s general business profits tax, it is unconstitutional. If, however, Senate bill No. 138 merely classifies net income from the sale of “spirits and wines” to the State liquor commission as property exempt from taxation and if a “just reason” can be found for doing so, it is constitutional.³²⁸

The justices indulged in no speculation about possible “just reasons” and said no more.

A separate corporate income tax remained forbidden.³²⁹ However, the BPT’s necessary allowance of a reasonable compensation deduction for working owners of unincorporated businesses meant that many small businesses, particularly professional and other service businesses, paid little or no tax. The narrow incidence of the BPT in practice and its volatility in relation to the business cycle led to repeated efforts to find a way to reach more businesses that was both politically viable and constitutional.³³⁰

In 1981 the legislature created a complicated minimum business tax of \$250 on any business with gross income over \$12,000 and insufficient

322. *Austin v. State Tax Comm’n*, 114 N.H. 137, 316 A.2d 165 (1974), *rev’d*, *Austin v. New Hampshire*, 420 U.S. 656 (1975).

323. *Opinion of the Justices*, 117 N.H. 512, 374 A.2d 964 (1977).

324. *Smith v. N.H. Dep’t of Revenue Admin.*, 141 N.H. 681, 692 A.2d 486 (1997).

325. *Opinion of the Justices*, 132 N.H. 777, 584 A.2d 1342 (1990) (neither net nor gross).

326. For example, see the difficulties with the Water’s Edge Taxation Bill reviewed in *Opinion of the Justices*, 128 N.H. 1, 509 A.2d 734 (1986). Part II.D.4.a, *infra*, discusses double taxation.

327. *Opinion of the Justices*, 115 N.H. 306, 308, 339 A.2d 450, 451 (1975) (per curiam).

328. *Id.* at 309, 339 A.2d at 452 (citations omitted).

329. *Opinion of the Justices*, 111 N.H. 206, 278 A.2d 348 (1971) (per curiam). This opinion repudiated, *sub silentio*, a bizarre advisory opinion delivered earlier that year approving a corporate net income tax in *Opinion of the Justices*, 111 N.H. 129, 276 A.2d 489 (1971) (per curiam).

330. See, e.g., *Opinion of the Justices*, 123 N.H. 296, 460 A.2d 93 (1983) (per curiam) (examining the request of the House of Representatives).

profit to trigger the BPT.³³¹ Applying a flat rate to varying income necessarily produces effective rates that are regressively graduated.³³² Despite an effort to distinguish between gross and net, the formula reached the same income—the purported classes were indistinguishable.³³³ From a different perspective, there was no “just reason” to tax income below the BPT threshold at a higher rate than that above.³³⁴ The tax was void ab initio and refunds were due.³³⁵ Further experiments in this direction were pre-tested through advisory opinions.

The next effort was to define two classes of business profits, one broadly defined and taxed at 1%, the other the existing BPT class, then taxed at 8.75%. They were to be alternatives, a business being required to pay whichever was greater.³³⁶ The court saw both as “essentially classifications of *business income*.”³³⁷ Therefore, there was one class of property taxed at two different rates. What really was going on was a classification of taxpayers, not property. However laudable its motive, the legislature “may not create alternative systems of taxation which inevitably result in two classes of taxpayers, paying differing rates of tax on essentially the same class of property, business income.”³³⁸ In the same opinion the court approved a proposal to reconfigure the BPT by adding back all compensation paid, granting a uniform \$25,000 deduction for all entities, and taxing at a lower rate.³³⁹ While constitutional, it was not politically successful.

Later that month the court advised on another two-class proposal under which tax paid at a low rate on the more broadly defined base could be taken as a credit against the BPT.³⁴⁰ Because the court still saw the two classes as essentially the same, differential rates doomed the proposal.³⁴¹ The idea of two layers with a credit however, was itself viable and ultimately produced the solution. The court simply required that the broader low rate tax be on a clearly different class of property such as, it suggested,

331. *Johnson & Porter Realty Co. v. Comm’r of Revenue Admin.*, 122 N.H. 696, 448 A.2d 435 (1982).

332. *Id.* at 698, 448 A.2d at 436.

333. *Id.*

334. *Id.* at 699, 448 A.2d at 436.

335. *Id.*

336. Opinion of the Justices, 123 N.H. 296, 460 A.2d 93 (1983) (per curiam).

337. *Id.* at 301, 460 A.2d at 97.

338. *Id.* at 302, 460 A.2d at 97. There was another flaw in the class of alternate business profits. Taxpayers were given a choice of two different adjustment systems, which also had the effect of classifying taxpayers. *Id.* at 300, 460 A.2d at 96.

339. *Id.* at 304–08, 460 A.2d at 98–102.

340. Opinion of the Justices, 123 N.H. 344, 461 A.2d 129 (1983) (per curiam).

341. *Id.* at 347, 461 A.2d at 130.

compensation or payroll.³⁴² There was another decade of false starts before the legislature took this advice.

One idea was to cap BPT compensation deductions at \$100,000 per employee. “The effect . . . would be to impose differing tax burdens and differing [effective] tax rates on business organizations which have identical gross income and aggregate reasonable compensation expenses.”³⁴³ Those with any employees paid more than the cap would, to that extent, pay tax at a higher rate than others. This “would violate the constitutional principle that the legislature must substantially treat *all* business entities uniformly and equally.”³⁴⁴ Repealing all the compensation deductions and replacing them with a flat credit per worker (pro-rated for part-timers under 1,800 hours per year) was seen as having the same flaw.³⁴⁵ The court declared the credit proposal unconstitutional despite a stated purpose to encourage employment.³⁴⁶ As employment is a recognized public purpose justifying tax exemptions,³⁴⁷ this seems to have been a misstep by the court. Alternatively, the court may have concluded that other motives and likely practical effects outweighed that recital. It is in any case hard to reconcile with the “rational basis” analysis that the court was applying in other tax classification cases.³⁴⁸

The solution suggested by the court in 1983 was adopted in 1993 with the business enterprise tax (BET). Instead of some variation of business income, the BET base is roughly business *expenses*. It is the sum of compensation, interest, or dividends paid out—the cost of labor and most capital.³⁴⁹ It comes out of the third part of the income equation (gross minus cost equals net), manifestly a different class of property in motion. Levied at a low rate and credited against the BPT, the BET can reach all operating businesses. Those operating at no or low BPT net because of compensation paid to owners now contribute to state revenues. What the constitution prohibited in one tax was, through deft use of the classification power, possible with two coordinated taxes.

342. *Id.* at 348, 461 A.2d at 131.

343. Opinion of the Justices, 131 N.H. 640, 643, 557 A.2d 273, 275 (1989) (per curiam).

344. *Id.* (citations omitted).

345. Opinion of the Justices, 132 N.H. 777, 783, 584 A.2d 1342, 1347 (1990) (per curiam).

346. *Id.* at 779, 584 A.2d at 1343.

347. *See, e.g.*, Opinion of the Justices, 111 N.H. 199, 278 A.2d 357 (1971) (per curiam); *see also* N.H. REV. STAT. ANN. § 77-A:5, VII (2008) (five-year job creation credit against BPT).

348. *E.g.*, *Cagan's, Inc. v. N.H. Dep't of Revenue Admin.*, 126 N.H. 239, 490 A.2d 1354 (1985).

349. N.H. REV. STAT. ANN. § 77-E:1, IX. The cost of capital in the form of intellectual property is not taxed—royalties are not included in the base.

c. Franchises

Much of this ground has already been covered. It has long been settled that franchises are intangible personal property, taxable ad valorem.³⁵⁰ The legislature may tax some franchises and not others.³⁵¹ So long as they were so taxed, it was done at the common rate.³⁵² Franchises are also listed in the 1903 amendment among “other classes of property.” However, in the modern era the court ruled that when they are taxed directly as property, the common rate is required,³⁵³ as is a rational valuation formula.³⁵⁴

Income from franchises can be taxed as a class of dynamic property.³⁵⁵ When it is, it may be taxed at a rate differing from other income taxes.³⁵⁶ However, if the tax is on income, it must be income actually received and rationally defined.³⁵⁷

d. Property Taxes

The modern history of traditional property taxes, the ancient tax on “estates,” does not involve constitutional issues directly. The nineteenth-century decisions on proportionality remain sound. All estates in a given taxing jurisdiction are to be taxed at a uniform rate and valuation. If, despite the statutory command to appraise property at full value, a different proportion in fact prevails, the constitutional proportionality rule controls. It is neither necessary nor sufficient to show flawed assessment methodology—“disproportionality, and not methodology, is the linchpin.”³⁵⁸ To secure abatement, the taxpayer must show his appraisal is above the average of other property in the taxing district.³⁵⁹ When differing types of property in the base are generally assessed at differing proportions of value, a taxpayer need not compare subclasses—the ratio of full value of all district property to the total of assessed values is the test.³⁶⁰ There is one

350. Opinion of the Justices, 84 N.H. 559, 149 A. 321 (1930); Opinion of the Justices, 82 N.H. 561, 138 A. 284 (1927).

351. *Opinion of the Justices*, 84 N.H. at 569, 149 A. at 326.

352. *Id.*

353. Opinion of the Justices, 101 N.H. 549, 554, 137 A.2d 726, 733 (1958).

354. *Pub. Serv. Co. of N.H. v. State*, 101 N.H. 154, 136 A.2d 600 (1957).

355. *Opinion of the Justices*, 101 N.H. at 558, 137 A.2d at 733.

356. *Id.*

357. *In re Pub. Serv. Co. of N.H.*, 122 N.H. 919, 451 A.2d 1321 (1982).

358. *Porter v. Town of Sanbornton*, 150 N.H. 363, 369, 840 A.2d 778, 784 (2003).

359. *In re Town of Sunapee*, 126 N.H. 214, 489 A.2d 153 (1985); *Berthiaume v. City of Nashua*, 118 N.H. 646, 392 A.2d 143 (1978); *Rollins v. City of Dover*, 93 N.H. 448, 44 A.2d 113 (1945).

360. See *Bemis Bros. Bag Co. v. Claremont*, 98 N.H. 446, 102 A.2d 512 (1954); *accord Town of Sunapee*, 126 N.H. at 214, 489 A.2d at 153. In the days of the stock-in-trade tax, the method of calculating it ensured current market values, while land, buildings, and waterpower tend to lag. *Bemis*

recently developed exception to the general rule requiring proof of actual disproportionality to secure an abatement. If a similarly situated class of persons is subject to a tax, and, with no rational basis, some are singled out for tax and others not taxed at all, there is an independent violation of equal protection. The tax is unconstitutional as applied until the discrimination is ended.³⁶¹

Taxes on estates are now primarily land taxes.³⁶² As a legislative and judicial dialectic developed and defined the power to tax other classes of property, most personal property taxation flowed into the new channels. The general tax on personal estate was repealed in 1981.³⁶³ Utility taxes are now on receipts for or consumption of the service, not the franchises themselves. With the real property transfer tax, even land has developed a dynamic side.³⁶⁴ However, less land is taxable at full value. Concerns about conservation, agriculture, and open space led to the constitutional amendment of 1968 permitting valuation of land based on "current use."³⁶⁵ Exemptions have accumulated for various public purposes.³⁶⁶ Yet these real property taxes are the main support of local government. Consequently the modern cases have involved the increasing pressure for tax relief and challenges to exemptions.³⁶⁷ The state's long-running struggle over school funding also put state-level general property taxes on the table, sharpening some controversies and obliging the court to declare that legislative power to classify and exempt could not be used to defeat the constitutional requirement of uniformity and equality.³⁶⁸

shows that when a district allowed this without adjustment, a merchant taxed mostly on stock in trade could always secure an abatement.

361. See *Verizon New England, Inc. v. City of Rochester*, 156 N.H. 624, 940 A.2d 237 (2007) (involving taxation for use of public property under an exception to the general exemption provided for in N.H. REV. STAT. ANN. § 72:23, I(b) (2008)).

362. There are, of course, others. For example, the railroad tax remains. N.H. REV. STAT. ANN. § 82:1.

363. N.H. REV. STAT. ANN. § 72:15 (stating that the statute in question was repealed in 1981).

364. N.H. REV. STAT. ANN. § 78-B:1.

365. "The general court may provide for the assessment of any class of real estate at valuations based upon the current use thereof." N.H. CONST. pt. II, art. 5-b (1968); see N.H. REV. STAT. ANN. § 79-A:1 (involving the "Declaration of Public Interest"). Note that this permits different *assessment*, but not variation of the tax rate.

366. *E.g.*, N.H. REV. STAT. ANN. § 72:12-a (Water and Air Pollution Control Facilities); N.H. REV. STAT. ANN. § 72:37-a (Improvements to Assist Persons With Disabilities); N.H. REV. STAT. ANN. § 72:38 (dealing with aviation facilities); N.H. REV. STAT. ANN. § 72:76 (dealing with new commercial or industrial construction).

367. See, *e.g.*, *Town of Peterborough v. MacDowell Colony, Inc.*, 157 N.H. 1, 943 A.2d 768 (2008) (involving charitable uses); *In re Town of Rindge*, 158 N.H. 21, 959 A.2d 188 (2008) (involving university wastewater treatment plant as pollution control facility); *In re Kat Paw Acres Trust*, 156 N.H. 536, 937 A.2d 925 (2007) (involving improvements to assist persons with disabilities); *In re Town of Bethlehem*, 154 N.H. 314, 911 A.2d 1 (2006) (involving solid waste facility; statute subsequently changed).

368; *Opinion of the Justices*, 142 N.H. 892, 712 A.2d 1080 (1998).

4. *Other Developments*

a. *Tax Relief*

The first modern decision on exemptions for tax relief appears to be an advisory opinion in 1963.³⁶⁹ The questions involved additional exemptions from the interest and dividends tax for taxpayers aged sixty-five and over and for the totally disabled, neither with a means test.³⁷⁰ In approving the age exemption, the court broke with older decisions without acknowledging it had done so.

When analyzing proposals in 1927 to levy a tax on all business income with a \$2,000 exemption and to levy the IDC only on income above \$2,000, the court said it was not merely a matter of classification. “The terminology used does not control. The substance of the provision must be considered. The question is one of power to grant exemption.”³⁷¹ It then struggled to define “general” as opposed to “special” exemptions, reviewed various grounds for minimum amounts, and made some very broad statements about legislative discretion.³⁷² The only specific grounds for a low-income exemption was that “[t]he recipient of the small income is not in a position to pay, and the exemption tends to promote thrift.”³⁷³ At the end, the court hedged: “the problem of legislative power to make quantitative exceptions from taxability is a difficult one. There are substantial arguments for either view. There are difficulties in attempting to define limitations, if the power is thought to exist.”³⁷⁴

By 1930 the court had resolved its doubts. Substantial quantitative exemptions were personal, not matters of property classification:

The question presented concerns the power to exempt because of the amount of income received by the individual. It does not relate to the power to grant a general exemption as to a certain class of income. Such personal exemptions are granted upon a theory that everyone should have a certain amount of income tax free, and, except in a general way, they have no relation to the nature of the income. The ground upon which a substantial quantitative person-

369. Opinion of the Justices, 105 N.H. 22, 192 A.2d 22 (1963).

370. *Id.*

371. Opinion of the Justices, 82 N.H. 561, 570, 138 A. 284, 289 (1927).

372. *Id.* at 570–75, 138 A. at 289–91.

373. *Id.* at 571, 138 A. at 289.

374. *Id.* at 575, 138 A. at 291.

al exemption is here sustained is that the exempted party is too poor to pay.³⁷⁵

Quantitative personal exemptions above some ability to pay threshold were simply a way of importing progressivity, and “our constitution does not permit the laying of a graduated or progressive tax. A tax levy cannot be sustained here upon any theory that the richer one is the higher his tax rate should be.”³⁷⁶ The court concluded that particular amounts lower than those in the proposal were the most that could be thought reasonable.³⁷⁷ The next year the court declared that public benefits based on age without a means test would violate both the pensions clause of the constitution³⁷⁸ and the prohibition on taxes for private purposes found in part I, article 12 and part II, article 6.³⁷⁹ A backdoor way of achieving an age exemption by excluding pensions and retirement allowances from an income tax was blocked in 1937.³⁸⁰

Despite this, the 1963 opinion said a blanket, quantitative exemption based on age was a permissible classification. “While . . . age and poverty are by no means synonymous, . . . in many cases they may have some common attributes. . . . [and] poverty and misfortune have long been regarded as just grounds of relief.”³⁸¹ The court cited eligibility for old age assistance and medical assistance to the aged at age sixty-five, and the exemption from poll tax at age seventy.³⁸² Without articulating the connection, it suggested that retirement ages had some relationship to income from “sources other than earnings.”³⁸³ Remarkably, the court cited its 1930 opinion without comment as if it supported this radical departure, and it ignored the 1931 opinion on pensions.³⁸⁴ It seems unlikely the court would have permitted sending a check to every resident over the age of sixty-four. Yet by conflating classification of property with personal exemptions the court had upheld a classification of persons on speculative grounds without the traditional requirement of a public purpose sufficient to justify a public expenditure.

When the more visible and politically touchy property tax was involved, proponents of relief for the elderly were more circumspect. A means test was built into a 1970 bill to exempt the first \$5,000 of assessed

375. Opinion of the Justices, 84 N.H. 559, 571, 149 A. 321, 327 (1930).

376. *Id.*, 149 A. at 328.

377. *Id.* at 572, 149 A. at 328.

378. N.H. CONST. pt. I, art. 36 (1784).

379. Opinion of the Justices, 85 N.H. 562, 154 A. 217 (1931).

380. Opinion of the Justices, 88 N.H. 500, 506, 190 A. 801, 806 (1937).

381. Opinion of the Justices, 105 N.H. 22, 24, 192 A.2d 22, 23 (1963) (citations omitted).

382. *Id.*

383. *Id.*

384. *Id.*

value of residences owned by those aged seventy or more.³⁸⁵ The court, with no reference to the means test, declared the bill consistent with the state constitution in one long quotation from its 1965 IDT opinion.³⁸⁶

A 1971 income tax proposal included a limited property tax “circuit-breaker” in the form of a credit for property taxes or, to the extent the taxpayer did not owe property taxes, a direct payment.³⁸⁷ The credit was designed to provide limited relief for low- and moderate-income households from tax on their residences, whether owned or rented. By working through an income tax, the expense would be borne by the state rather than the municipalities. There were three limitations: Only property tax in excess of 6% of household income was considered; no more than \$900 of that excess could be counted; and the credit was capped at \$300.³⁸⁸ Faced with potential cash payouts and a scheme classifying people by income and tax burden, the court invoked traditional exemption analysis. The limitations were “an essential prerequisite to constitutionality.”³⁸⁹ The court quoted the pension decision’s prohibition on “assignment of public funds to other than public purposes,” and, citing that decision, said “[p]ublic assistance, afforded in a limited way and without discrimination, to persons eligible therefor [sic] by reason of a lack of means of their own, is a recognized exercise of the protective power.”³⁹⁰ Echoing the depression-era decisions, the court apparently made its own determination that the amount involved was “reasonable.”³⁹¹ A later proposal to “return” state funds to homeowners failed as discriminating among taxpayers. “A rebate out of public funds to some taxpayers but not others would clearly constitute discrimination unless sustainable upon grounds of reasonable classification.”³⁹²

The one major property tax relief measure to have been adopted was declared unconstitutional in 1974.³⁹³ It was a local-option system under which cities and towns could adopt a partial exemption from local taxes (not county or state) for owner-occupied residential property. The court discussed the public-purpose aspect of the exemption extensively, finding encouragement of home ownership itself a legitimate public purpose.³⁹⁴ Thus a means test was not strictly necessary, and the lack of provision for

385. Opinion of the Justices, 110 N.H. 206, 266 A.2d 111 (1970) (per curiam).

386. *Id.* at 208, 266 A.2d at 113.

387. Opinion of the Justices, 111 N.H. 136, 276 A.2d 821 (1971).

388. *Id.* at 141, 276 A.2d at 823–24.

389. *Id.*, 276 A.2d at 824.

390. *Id.* at 142, 276 A.2d at 824.

391. *Id.* This seems to differ from “not unreasonable.”

392. Opinion of the Justices, 113 N.H. 87, 89, 302 A.2d 112, 114 (1973) (per curiam).

393. *Felder v. City of Portsmouth*, 114 N.H. 573, 324 A.2d 708 (1974).

394. *Id.* at 577, 276 A.2d at 710.

renters irrelevant.³⁹⁵ The previous year's opinion regarding state payments to homeowners was distinguished, as that scheme "displaye[d] overtones of public welfare" with "no criteria by which to limit its assistance to those homeowners in financial straits."³⁹⁶ The scheme, unfortunately, had a fatal design flaw. Instead of exempting the first dollars of home valuation, the statute applied the full tax rate on the first \$8,000, exempted the next \$5,000 (\$10,000 for taxpayers over age sixty-five), and applied the full tax rate to the anything higher. The reason for taxing the first \$8,000 was to assure that every homeowner paid some taxes to the community.³⁹⁷ However, the result was that only those with properties assessed at \$8,000 or less³⁹⁸ paid the full tax rate, which had increased 10% to fund the exemption.³⁹⁹ There were other paradoxical effects, but this was sufficient: "In our view the law is unconstitutional because the minimum valuation provision discriminates against the poor by unreasonably raising their taxes to finance tax relief for persons owning more expensive homes."⁴⁰⁰

b. Exemptions for Economic Development

Exemptions to encourage economic development were once of uncertain constitutionality. In 1929 the court decided *Eyers Woolen Co. v. Town of Gilsum*.⁴⁰¹ A special act had authorized "the town of Gilsum . . . to exempt from taxation for a term of not more than ten years a new woolen mill and the machinery to be installed therein proposed to be erected in said town by or for the Eyer Woolen Mill."⁴⁰² The actual issue was easy—the exemption was unique and granted to a named private business, thus violating the principle of equality.⁴⁰³ However, the court wrote extensively about broader issues, and much of this dictum argues that industrial development was an insufficient public purpose to justify tax exemption. "Aiding a private manufacturing corporation is not a public purpose."⁴⁰⁴ A few years later the court held the same view:

The indirect public advantage of industrial welfare and general prosperity is not a valid reason for the aid. Even if the public ad-

395. *Id.* at 577–78, 324 A.2d at 710–11.

396. *Id.* at 578, 324 A.2d at 710.

397. *Id.* at 579, 324 A.2d at 711.

398. This was not a tiny class, especially considering that these were 1974 dollars and both mobile homes and condominiums were covered.

399. *Felder*, 114 N.H. at 576, 324 A.2d at 709.

400. *Id.* at 579, 324 A.2d at 711.

401. 84 N.H. 1, 146 A. 511 (1929).

402. *Id.* at 3, 146 A. at 512.

403. *Id.* at 16, 146 at 519.

404. *Id.*

vantage takes specific form, such as work for those in need of employment and without employment dependent on public assistance, public aid to the employer is a violation of the constitutional principle against taxation for private purposes.⁴⁰⁵

Eyers Woolen Co. has been frequently cited for various propositions, but its view of the legitimacy of aid to industry by uniform, general exemptions was repudiated in the modern era:

The State and its citizens presumably receive direct benefits from tax exemptions for industrial construction by attracting new industries into the State and keeping existing industry here, thereby creating economic growth. Since all industrial uses that meet the statutory definition may qualify for limited tax exemptions, the bill does not improperly classify property. The legislature has determined that the public welfare would benefit from the encouragement of industrial construction in the State and that this may be accomplished through the proposed bill. The purpose of stimulating economic growth is one properly within the legislature's discretion in acting for the welfare of the state.⁴⁰⁶

This seems to have replaced an intermediate position that allowed the exemption of industrial facilities, but only if a "just share of the public expense" was secured through a payment in lieu of taxes, set by a quasi-judicial body taking into account all relevant factors including "employment opportunities to be created or retained."⁴⁰⁷

c. Double Taxation

Double taxation has been described as one form of disproportionality.⁴⁰⁸ It comes in two kinds—constitutional or not. Nineteenth-century cases on double taxation lost their meaning with the 1903 amendment. When for a given level of government there was only one rate and valuation for any property taxed, any duplication was unconstitutional. Then problems arose with questions such as whether the stock of a corporation, taxed to the shareholder in his town of residence, was the same property as

405. Opinion of the Justices, 88 N.H. 484, 488, 190 A. 425, 428 (1937).

406. Opinion of the Justices, 142 N.H. 95, 100, 697 A.2d 120, 123 (1997) (citations omitted) (involving municipal tax exemptions for industrial construction); see also Opinion of the Justices, 144 N.H. 374, 746 A.2d 981 (1999) (involving municipal tax exemptions for electric utility on personal property).

407. *Eltra Corp. v. Town of Hopkinton*, 119 N.H. 907, 914, 409 A.2d 1145, 1149 (1979). Payments in lieu of taxes (PILOTs) remain a feature of New Hampshire exemption provisions.

408. *Conner v. State*, 82 N.H. 126, 130, 130 A. 357, 359 (1925).

the physical assets of that corporation taxed in their location.⁴⁰⁹ From the beginning, however, proportionality has been judged only within taxing jurisdictions—district, municipality, county, or state.⁴¹⁰ A statewide property tax layered on property subject to local taxes is not (and has never been) disproportional.⁴¹¹

When the 1903 amendment permitted taxation on “other classes of property” in addition to taxes on estates (rather than in place of them), it necessarily permitted the same property to be taxed in two or more ways depending on what classes it fit into and the extent to which they overlapped. “Disproportion in the tax, in the sense that taxes are laid in several ways rather than in one way, is not objectionable, in the absence of some constitutional prohibition of such procedure. The power to impose disproportional taxes is put beyond question when it is specifically permitted by constitutional provisions.”⁴¹² What was once denounced as an unconstitutional assertion of “despotic power”⁴¹³ is now permissible, even routine.

Double taxation is now a problem of classification. If a given dollar or thing fits within or passes through two or more classes, it may constitutionally be subject to two or more taxes if the classes are so defined that “the incidence of the two taxes is determined by separate and distinct factors.”⁴¹⁴ This is frequently misunderstood. The court itself took some time to work out the distinction. It had briefly taken the position that a net profit tax on a business paying gross sales tax would be unconstitutionally double,⁴¹⁵ but, noting that profit was net of expenses (which would include the sales tax), it later concluded each tax’s incidence was different and reversed its position.⁴¹⁶ The focus is on practical effect rather than taxonomy—although the gasoline “toll” is not even a tax, the court has said gasoline would have to be exempted from a general sales tax.⁴¹⁷ As recently as 1951, the House of Representatives was concerned that taxing goods as personal estate in the manufacturing process might be incompatible with a retail sales tax on the same goods. It was not.⁴¹⁸ Nor did the railroad tax

409. The court found that it was the same property. *Smith v. Burley*, 9 N.H. 423, 427 (1838).

410. See generally *Boston, Concord, & Montreal R.R. v. State*, 60 N.H. 87 (1880).

411. Opinion of the Justices, 112 N.H. 32, 35, 287 A.2d 756, 758 (1972) (discussing the homestead exemptions at state level).

412. *Comner*, 82 N.H. at 130, 130 A. at 359.

413. *Robinson v. Dover*, 59 N.H. 521, 524 (1880).

414. Opinion of the Justices, 84 N.H. 559, 577, 149 A. 321, 330 (1930), criticized by Opinion of the Justices, 88 N.H. 500, 190 A. 801(1937).

415. *Id.*

416. *Opinion of the Justices*, 88 N.H. at 504, 190 A. at 805.

417. *Id.* at 805.

418. Opinion of the Justices, 97 N.H. 533, 536–37, 81 A.2d 845, 849 (1951).

on tangible property need to be credited against the BPT: “the incidence of the two taxes is determined by separate and distinct factors.”⁴¹⁹

Difficulties developed with the proliferation of classes of taxable income. The interest and dividends tax first occupied the field. Each proposal to adopt a more general income tax had to deal with it.⁴²⁰ One version of the proposed gross income tax of 1949 provided for exempting income subject to the IDT.⁴²¹ As the tax was pervasively flawed, the court did not reach that issue. In 1965, the proponents of a net income tax overlooked the layering, and the court held that stacking another income tax on the IDT would be unconstitutionally double.⁴²² The successful business profits tax of 1970 excluded from the definition of income any income that had been taxed under the IDT.⁴²³ In all of these cases, the general income tax rate was different from the IDT. Although the incidence of two classes of tax might be so similar they could not be stacked, they could still be sufficiently distinct to justify different rates. “The Constitution does not require the rate of a tax upon net income to be uniform with that of the existing interest and dividends tax, which is a tax upon certain gross income, now fixed at 4 1/4%.”⁴²⁴ Similarly, although stacking was avoided by allowing a BPT credit, there was no constitutional problem in the difference between the BPT and the significantly higher tax on electric and gas franchise income.⁴²⁵ While capital gains have been held sufficiently distinct from business profits to be taxed at a different rate, business capital gains could not be subject to double taxation as both.⁴²⁶

There is also potential for double taxation on receipt by a shareholder (individual or corporate) of dividend income that may have already been taxed as dividend income of the corporation. This is the reason corporations are not subject to the IDT itself.⁴²⁷ Similarly, a parent subject to the BPT has a deduction for dividends received from subsidiaries also paying

419. Opinion of the Justices, 111 N.H. 210, 212, 279 A.2d 741, 742 (1971).

420. See, e.g., *Opinion of the Justices*, 88 N.H. at 500, 190 A. at 801. One income tax proposal in 1971 would have solved the problem by repealing the IDT. *Opinion of the Justices*, 111 N.H. 136, 137, 276 A.2d 821, 821 (1971).

421. Opinion of the Justices, 95 N.H. 537, 538, 64 A.2d 320, 320 (1949).

422. Opinion of the Justices, 106 N.H. 202, 207, 208 A.2d 458, 462 (1965).

423. Opinion of the Justices, 110 N.H. 117, 120, 262 A.2d 290, 293 (1970).

424. *Id.* at 122, 262 A.2d at 295.

425. *Id.* at 120, 262 A.2d at 293.

426. Opinion of the Justices, 117 N.H. 512, 517, 374 A.2d 964, 966–67 (1977).

427. *Conner v. State*, 82 N.H. 126, 132, 130 A. 357, 360 (1925). They are still excluded. N.H. REV. STAT. ANN. § 77:3 (2008). Partnerships and LLCs are subject to the tax, but distributions to the partners or members are not. N.H. REV. STAT. ANN. § 77:15.

the tax.⁴²⁸ The BET deals with a similar cascading problem through deductions for previously taxed distributions.⁴²⁹

The court's position that classes could be sufficiently distinct to justify differential rates, but sufficiently similar to justify a credit or exclusion to avoid double taxation, is what made our present combination of the BPT with a broader business enterprise tax (BET) possible.⁴³⁰

d. Retrospectivity

The New Hampshire Constitution prohibits retrospective laws.⁴³¹ A retrospective law is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past"⁴³² Imposition of a new tax on transactions completed in prior years is prohibited.⁴³³ However, the taxable event may trigger recognition of appreciation attributable to periods prior to the adoption of the tax.⁴³⁴

The few cases on retrospective taxation are fairly recent. At one point a bare majority of the court advised that a change in the rate of the land use change tax after the owner had opted for current use valuation would be unconstitutionally retrospective.⁴³⁵ In a subsequent contested case, the court unanimously renounced that view and adopted that of the dissenters.⁴³⁶ The taxability of property defined by an act or event is determined by the law at the time of the act or event, not by some prior law on which the taxpayer may have relied. As the legislature lacks power to grant an irrevocable exemption, repealing one cannot be retrospective.⁴³⁷ However, a statute may not retroactively annul a contract for a payment in lieu of taxes that was lawfully authorized when made.⁴³⁸

428. N.H. REV. STAT. ANN. § 77-A:4(IV) (since repealed); *Gen. Elec. Co. v. Comm'r*, 154 N.H. 457, 458–59, 914 A.2d 246, 248 (2006).

429. *See* N.H. REV. STAT. ANN. § 77-E:3(II), (III).

430. *See supra* Part II.C.

431. N.H. CONST. pt. I, art. 23 (1784).

432. *Woart v. Winnick*, 3 N.H. 473, 479 (1826) (internal citation omitted) (quoting *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1807) (No. 13,156)).

433. *Cagan's, Inc. v. N.H. Dep't of Revenue Admin.*, 126 N.H. 239, 249, 490 A.2d 1345, 1361 (1985).

434. *Shangri-La, Inc. v. State*, 113 N.H. 440, 442, 309 A.2d 285, 287 (1973).

435. *See generally* Opinion of the Justices, 137 N.H. 270, 627 A.2d 92 (1993), *retreated from by Tyler Rd. Dev. Corp. v. Town of Londonderry*, 145 N.H. 615, 766 A.2d 267 (2000).

436. *Tyler Rd. Dev. Corp.*, 145 N.H. at 617, 766 A.2d at 270.

437. *See generally* *Trs. of Phillips Exeter Acad. v. Town of Exeter*, 90 N.H. 472, 27 A.2d 569 (1940).

438. *Lower Vill. Hydroelectric Assocs. v. City of Claremont*, 147 N.H. 73, 76, 782 A.2d 897, 900 (2001).

One decision has apparently permitted a degree of retrospectivity. In *Estate of Kennett v. State*,⁴³⁹ the legislature had adopted a business profits tax. The statute became effective April 22, 1970, but by express terms applied to gross business profits earned after January 1, 1970. The transactions in question were two sales of real estate pursuant to options.⁴⁴⁰ The options were “exercised” in 1969, deeds were delivered and recorded in February and March of 1970, and payment was received in February and October of 1970.⁴⁴¹ The tax was defined with respect to amounts shown on federal tax returns. Under applicable federal rules, the sales occurred on delivery and recordation of the deeds, not receipt of payment.⁴⁴² Although the court accepted this determination of the moment of recognition, it still upheld the levy.⁴⁴³ The business profits tax had been adopted at a special session called for that purpose.⁴⁴⁴ It had previously been the subject of months-long, very public study, and refinement by a legislatively created task force with participation of more than 300 citizens.⁴⁴⁵ Its reliance on federal tax calculations imposed a choice among retrospectivity: a year’s delay in efficacy, or presumably daunting complexities of proration.⁴⁴⁶ Faced with the legislature’s choice, the court apparently found the levy fundamentally fair and a practical necessity.⁴⁴⁷

A later proposal to similarly back-date the scope of a gross receipts tax on electric utilities was declared unconstitutional, although in part because the utility would have been prevented from recouping its payment through a rate increase.⁴⁴⁸ The court has since cast doubt on the “vitality” of the “reasoning and holding of *Kennett*,”⁴⁴⁹ and it is almost certainly confined to its peculiar context.

439. 115 N.H. 50, 333 A.2d 452 (1975).

440. *Id.* at 55, 333 A.2d at 455–56.

441. *Id.*

442. *Id.* at 51–52, 333 A.2d at 453.

443. *Id.* at 53–55, 333 A.2d at 454–56.

444. *Id.* at 53–54, 333 A.2d at 454.

445. *Id.*

446. *Id.*

447. The elaboration of the long, public gestation of the tax with its heavy investment of time and talent is superfluous except as tacit argument for fairness (no surprise) and against disrupting implementation with a judicially shortened tax year or worse. “Practical necessity” was the explanation offered ten years later by a skeptical court. *Cagan’s, Inc. v. N.H. Dep’t of Revenue Admin.*, 126 N.H. 239, 249–50, 490 A.2d 1345, 1362 (1985).

448. Opinion of the Justices, 123 N.H. 349, 354, 461 A.2d 132, 135 (1983).

449. *Cagan’s, Inc.*, 126 N.H. at 249, 490 A.2d at 1362.

5. *Summary of Changes in the Modern Era*

The modern era opened with approval of a product-specific sales tax shocking to judges steeped in the philosophy of earlier times. To justify this change, the court drew on sweeping language about the legislative power of classification based on the pre-1903 single-rate system. It tentatively undertook to define the “the legal requirements of classification”⁴⁵⁰ under the power given in 1903 and skeptically deflected proposals for differing taxes on the sale of sub-classes of ordinary goods or services. The suggestion that there might be some basic form of sales tax was last signaled in 1971.⁴⁵¹ The notion that there were a few broad classes of taxes within which rates and valuation methods must be uniform⁴⁵² disappeared after 1951.⁴⁵³ The income tax opinions validated numerous classifications with differing rates, merely requiring a “rational basis.”⁴⁵⁴ The old proposition that “[a]ll taxes that can be made proportional must be so assessed”⁴⁵⁵ has been stood on its head. It now seems no tax levied on a distinct class need be proportional to any other. Only when the court has considered two income classes to be essentially the same⁴⁵⁶ or found a class irrationally under-inclusive⁴⁵⁷ has it constrained legislative discretion in creating classes of taxable property. While sometimes treating exemptions in the old way, as indirect expenditures to be justified under the protective power,⁴⁵⁸ the court more often treated exemption as a variety of classification, justifiable on any rational ground,⁴⁵⁹ sometimes even presuming an unstated rational ground.⁴⁶⁰ This period also saw greater resort to “fees”

450. *Havens v. Att’y Gen.*, 91 N.H. 115, 117, 14 A.2d 636, 638 (1940).

451. *Opinion of the Justices*, 111 N.H. 131, 132, 276 A.2d 817, 818 (1971).

452. “[A]ll taxes of a given class must be laid at a common rate . . . annual taxes upon estates . . . inheritance taxes . . . [and] the taxation of incomes.” *Opinion of the Justices*, 82 N.H. 561, 570, 138 A.2d 284, 289 (1927); *accord* *Opinion of the Justices*, 84 N.H. 557, 571, 149 A. 321, 327 (1930).

453. “All income taxes must be laid at a common rate.” *Opinion of the Justices*, 97 N.H. 543, 545, 81 A.2d 851, 853 (1951).

454. *N. Country Envtl. Servs. v. State*, 157 N.H. 15, 19, 943 A.2d 786, 790 (2008); *see* *Opinion of the Justices*, 117 N.H. 512, 518, 374 A.2d 964, 968 (1977) (capital gains at differing rate); *Opinion of the Justices*, 110 N.H. 117, 124, 262 A.2d 290, 296 (1970) (approval of the BPT). The shift from New Hampshire’s traditional language (just distinction, just ground) to “rational basis” apparently occurred in *Cagan’s, Inc.* *See* 126 N.H. at 246, 490 A.2d at 1359.

455. *Thompson v. Kidder*, 74 N.H. 89, 96, 65 A. 392, 396 (1906).

456. *Opinion of the Justices*, 123 N.H. 344, 347, 461 A.2d 129, 130 (1983); *Opinion of the Justices*, 123 N.H. 296, 302, 460 A.2d 93, 98 (1983).

457. *Verizon New England, Inc. v. City of Rochester*, 156 N.H. 624, 639, 940 A.2d 237, 244 (2007); *Cagan’s, Inc.*, 126 N.H. at 246, 490 A.2d at 1359.

458. “[A] public benefit conferred by the exemption may be sufficient to render it constitutional.” *In re Town of Bethlehem*, 154 N.H. 314, 324, 911 A.2d 1, 9 (2006). *See also* *Opinion of the Justices*, 144 N.H. 374, 382, 746 A.2d 981, 987 (1999) (upholding exemption as a permissible public expenditure).

459. *See, e.g., N. Country Envtl. Servs.*, 157 N.H. at 20, 943 A.2d at 790; *Smith v. N.H. Dep’t of Revenue Admin.*, 141 N.H. 681, 687, 692 A.2d 486, 491 (1997).

460. *Opinion of the Justices*, 110 N.H. 117, 124, 262 A.2d 290, 296 (1970) (“might be thought”).

for recovering the costs of governmental activity, and judicial elaboration of the constitutional borderline between permitted fees and unconstitutionally structured taxes.⁴⁶¹

III. A MODERN APPROACH: SORTING OUT THE CONCEPTS

Limits on the legislature's powers, both overall and with respect to taxation, are rooted in particular constitutional passages and concepts. Given the founders' discursive style, the passages sometimes overlap and the concepts are expressed in differing terms. A problem can often be approached in several ways. For example, a highly selective tax may be attacked as violating equal protection, lacking reason, creating an improper classification, and being disproportional. An exemption may similarly be attacked on all those grounds, as well as for being an application of public resources to private purposes.

Arguments by litigants and questions from the other branches of government take any of these approaches, singly or in combination. Consequently, some of the court's opinions address a problem on narrow or uncommon grounds,⁴⁶² while others blend the arguments in conclusory language or cite constitutional provisions and lines of cases en masse. There are nearly two centuries of judicial gloss. In the nineteenth century, the court created a workable synthesis faithful to the founders' philosophic language. The constitutional amendment of 1903 was irreconcilable with part of that synthesis, but, as it labored for decades to resolve the resulting tension, the court cited the old cases and used the same language in an increasingly different context. Key words have been repeatedly used in multiple senses. What follows is an effort to distinguish and describe the current applications of the most important concepts and restate them more simply.

A. *Public Purpose, Equality, Reason*

The first question arising when a tax is imposed is "whether the purpose of such burden may properly be considered public."⁴⁶³ Further, "[a]ll

461. See, e.g., *D'Antoni v. Comm'r, N.H. Dep't of Health & Human Servs.*, 153 N.H. 655, 658, 917 A.2d 177, 180 (2006). The scope and limits of non-tax revenue powers will be addressed in a forthcoming article.

462. For example, see *In re Town of Bethlehem*, where the town rested its equality arguments on part I, article 10, neglecting articles 1 and 12. 154 N.H. at 318, 911 A.2d at 4.

463. *Eyers Woolen Co. v. Town of Gilsum*, 84 N.H. 1, 10, 146 A. 511, 516 (1929) (quoting *Berlin Mills Co. v. Wentworth's Location*, 60 N.H. 156, 157 (1880)).

taxation must be equal.”⁴⁶⁴ However, “[e]qual protection permits classifications that are reasonable and not arbitrary and have a rational relation to the public purpose sought to be achieved by the legislation involved.”⁴⁶⁵ In actual cases, these three concepts are inextricably related. A rational distinction made for a public purpose does not violate the principle of equality. Conversely, if a tax or exemption treats similarly situated persons differently, it either improperly favors one class for private benefit (violating several articles of the Bill of Rights),⁴⁶⁶ or is irrational (violating the limit on legislative power in part II, article 5),⁴⁶⁷ or both. If a particular tax is irrational, it either lacks a public purpose, or unequally burdens those subject to it, or both.⁴⁶⁸

Respect for the legislative branch and the presumption of validity mean that the reason and public purpose requirements are often phrased in the negative. A distinction or classification will be upheld “as long as ‘the proposed selection is not arbitrarily made or for the sole purpose of preferring some taxpayers to others.’”⁴⁶⁹ Coupling these requirements permits the court to avoid impugning legislative motives while preventing invidious discrimination. Thus, in *Claremont School District v. Governor*,⁴⁷⁰ the court conceded that the stated legislative motive for a transitional exemption from the statewide school tax to taxpayers of some towns (avoidance of foreclosures, bankruptcies, etc.) was a proper purpose.⁴⁷¹ However, to extend the exemption to everyone in the “property rich” communities rather than the minority who might face hardship from an immediate tax increase was “so arbitrary as to serve no useful purpose of a public nature” and “unreasonable.”⁴⁷²

Similarly, tax relief for low and moderate income homeowners was “directed toward a legitimate public purpose” in *Felder v. City of*

464. *State v. Pennoyer*, 65 N.H. 113, 114, 18 A. 878, 879 (1889) (citing seventeen prior cases).

465. *Opinion of the Justices*, 137 N.H. 270, 277, 627 A.2d 92, 96 (1993).

466. N.H. CONST. pt. I, art. 1 (1784) (“[G]overnment . . . instituted for the general good.”); *id.* pt. I, art. 10 (“Government being instituted for the common benefit . . . and not for the private interest . . . of any . . . class of men.”); *id.* pt. I, art. 12 (explaining that protection and taxation are reciprocal); *id.* pt. II, art. 6 (confining taxation to the “public charges of government”).

467. *Id.* pt. II, art. 5 (authority granted to general court “to make . . . reasonable laws . . . and levy proportional and reasonable assessments, rates, and taxes”).

468. At the hypothetical extreme these concepts logically could separate. A wholly irrational tax might be levied on all, or a rational one for an illegitimate purpose, but the general rule seems sufficient for the decided cases and any that could be reasonably anticipated.

469. *Opinion of the Justices*, 144 N.H. 374, 383, 746 A.2d 981, 988 (1999). This quotation is found in at least four other *Opinions of the Justices*. *Opinion of the Justices*, 142 N.H. 95, 99, 697 A.2d 120, 123 (1997); *Opinion of the Justices*, 137 N.H. at 275, 627 A.2d at 95; *Opinion of the Justices*, 97 N.H. 543, 544, 81 A.2d 851, 852 (1951); *Opinion of the Justices*, 97 N.H. 533, 536, 81 A.2d 845, 849 (1951).

470. 144 N.H. 210, 744 A.2d 1107 (1999).

471. *Id.* at 216–17, 744 A.2d at 1111.

472. *Id.*

Portsmouth,⁴⁷³ but the mechanism irrationally discriminated against those very groups.⁴⁷⁴ A dubious proposal to exempt wine and liquor dealers from the business profits tax could be deflected by indicating that no “just reason” had yet been articulated.⁴⁷⁵

While public purpose/reason analysis is routine in challenges to exemptions, it occasionally defeats a tax. Utilities seem to inspire particular legislative attention. They may, of course, be separately taxed on their franchises, their income,⁴⁷⁶ or their gross receipts.⁴⁷⁷ The tax, however, must be rational. In 1957, the franchise tax on electric utilities was declared unconstitutional on the sole ground that the statutory valuation formula (which guaranteed overvaluation) was “illogical and unjust.”⁴⁷⁸ A later proposal to levy a state property tax on electric plants capable of generating 500 megawatts or more would have reached only one facility, the Seabrook nuclear plant.⁴⁷⁹ While the court speculated that nuclear power generation might justify a special classification, capacity alone did not, and “in the absence of a just reason” for separate classification, the proposal was unconstitutional.⁴⁸⁰

In 1982, a lucrative administrative interpretation of the utility income tax had to be overturned because its application would mean the statutory formula would “not bear a rational relationship to economic reality.”⁴⁸¹ When the City of Rochester taxed Verizon New England’s use of public ways without taxing similar use by other utilities, it lost on equal protection despite the application of minimum scrutiny.⁴⁸² The city had offered, and the court could conceive of, “no rational reason for selectively imposing” the tax and no “legitimate governmental interest . . . furthered by [the] disparate treatment.”⁴⁸³

These requirements operate within taxing districts. So long as they are uniform in the taxing district,⁴⁸⁴ taxes and exemptions can be subject to

473. 114 N.H. 573, 324 A.2d 708 (1974).

474. *Id.* at 578–79, 324 A.2d at 711.

475. Opinion of the Justices, 115 N.H. 306, 309, 339 A.2d 450, 452 (1975).

476. *See generally* Opinion of the Justices, 101 N.H. 549, 137 A.2d 726 (1958).

477. *See generally* Opinion of the Justices, 123 N.H. 349, 461 A.2d 132 (1983).

478. *Pub. Serv. Co. of N.H. v. State*, 101 N.H. 154, 162–63, 136 A.2d 600, 606–07 (1957).

479. Opinion of the Justices, 118 N.H. at 345–46, 386 A.2d at 1275.

480. *Id.* at 346, 386 A.2d at 1275.

481. *In re Public Service Co. of N.H.*, 122 N.H. 919, 925, 451 A.2d 1321, 1325 (1982).

482. *Verizon New England, Inc. v. City of Rochester*, 156 N.H. 624, 631, 940 A.2d 237, 244 (2007).

483. *Id.*

484. Opinion of the Justices, 144 N.H. 374, 380, 746 A.2d 981, 986 (1999) (municipal exemptions for utility personal property); Opinion of the Justices, 142 N.H. 95, 97, 697 A.2d 120, 122 (1997) (municipal exemptions for industrial construction).

local option. The legislature frequently provides that cities and towns may adopt particular exemptions from local taxes.⁴⁸⁵

No unconstitutional delegation of authority results when the legislature establishes the terms of a general act, but leaves the determination of whether it shall have the force of law to the governing bodies of the localities to be affected or to the people themselves. Constitutionally mandated requirements for uniformity and equality of taxation would not be violated should less than all cities and towns adopt the optional exemptions provided by the bill, with a resulting uneven system of taxation.⁴⁸⁶

B. Proportionality

Proportionality is used in different ways in the cases, inviting confusion. Sometimes it refers to part I, article 12: “Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection.” In *Smith v. New Hampshire Department of Revenue Administration*, the court said this passage “literally imposes a requirement of proportionality of a taxpayer's portion of the public expense, according to the amount of his taxable estate, and requires that similarly situated taxpayers be treated the same.”⁴⁸⁷ Paradoxically, however, the same opinion continues that “[s]trictly speaking, the rule of equality and proportionality does not apply to the selection of the subjects of taxation, provided just reasons exist for the selection made.”⁴⁸⁸ Thus, one kind of proportionality is constitutionally required, but another is not. The state and current court have not been well served by loose use of the word in many older opinions.

“Proportionality” or “disproportionate” appear in the cases in at least four senses: (1) equal protection claims about selection and classification of the subjects of taxation or exemption; (2) the requirement of uniform rates and valuations in the design of a particular tax; (3) the possible requirement that different taxes of the same type have the same rate; and (4)

485. *E.g.*, N.H. REV. STAT. ANN. § 72:1-c (2008) (optional collection of Resident Tax); N.H. REV. STAT. ANN. § 72:28 (standard and optional Veterans' Tax Credit); N.H. REV. STAT. ANN. § 72:29-a (surviving spouse); N.H. REV. STAT. ANN. § 72:37-b (exemption for the disabled); N.H. REV. STAT. ANN. § 72:62 (exemption for solar energy systems); N.H. REV. STAT. ANN. § 72:66 (exemption for wind-powered energy systems); N.H. REV. STAT. ANN. § 72:76 (property tax exemption for new commercial or industrial uses).

486. *Opinion of the Justices*, 142 N.H. at 100–01, 697 A.2d at 124 (citations and quotation marks omitted); *accord Opinion of the Justices*, 144 N.H. at 379, 746 A.2d at 986.

487. 141 N.H. 681, 686, 692 A.2d 486, 491 (1997) (citation and internal quotation marks omitted).

488. *Id.* The Court quoted this language as recently as 2008 in *North Country Environmental Services*, 157 N.H. 15, 19, 943 A.2d 786, 790 (2008).

taxpayer challenges to their assessments under a tax that is constitutional but misapplied in their cases.

Since 1903, part I, article 12 should be primarily understood in the first of these senses, although it has some bearing on the fourth. While the provision that each “contribute his share” is obviously directed toward fairness in taxation, it does not contain the word proportionality. There is no formula by which a just “share” of the expense of protecting “life, liberty, and property” can be calculated. Relative benefits enjoyed, needs for protection, ability to pay, practicality of enforcement, costs of collection, etc., lurk in this general expression of the social contract. Balancing these factors “is not a judicial question.”⁴⁸⁹

Under the single-rate system, the court could force a sort of overall proportionality once the legislature selected the objects of taxation, but it is impossible in a system of layered classes. This provision is now simply an emphatic and specific expression of the general principle of equality found in other parts of the Bill of Rights.⁴⁹⁰ Translating it into proportionality adds nothing to public purpose, equal treatment, and reason. “The reasons which may justify the use of the selective power as to the subjects for taxation may be as various as the motives which induce any rational action,”⁴⁹¹ and “similarly situated taxpayers [must] be treated similarly.”⁴⁹²

The second sense is a textually-based and distinct limitation. Article 5 of part II actually uses the word proportional, empowering the legislature to “impose and levy proportional and reasonable assessments, rates, and taxes” This provision has always been applied to the *structure* of particular tax laws. Except for polls, all taxes are on property. Part II, article 5 proportionality requires taxes to be proportional to the value of the property—i.e., ad valorem. That requires a uniform rate and uniform valuation.⁴⁹³ The rate may not be varied on the basis of a personal characteristic of the taxpayer such as relative wealth.⁴⁹⁴ The word “reasonable” qualifies the mathematical requirement, authorizing exemptions for just cause.⁴⁹⁵ This is one source of confusion. An unjustified exemption vi-

489. *Morrison v. Manchester*, 58 N.H. 538, 555–56 (1879).

490. *See, e.g.*, N.H. CONST. pt. I, arts. 1, 2, 10 (1784).

491. *Opinion of the Justices*, 94 N.H. 506, 509, 52 A.2d 294, 296 (1947).

492. *Starr v. Governor*, 148 N.H. 72, 74, 802 A.2d 1227, 1229 (2002).

493. *In re Town of Rindge* (N.H. Dep’t of Envtl. Servs.), 158 N.H. 21, 26, 959 A.2d 188, 192 (2008); *N. Country Envtl. Servs.*, 157 N.H. at 19, 943 A.2d at 790; *Opinion of the Justices*, 144 N.H. 374, 378, 746 A.2d 981, 985 (1999); *Opinion of the Justices*, 142 N.H. 95, 101, 697 A.2d 120, 124 (1997); *Smith v. N.H. Dep’t of Revenue Admin.*, 141 N.H. 681, 685–86, 692 A.2d 486, 490 (1997); *Opinion of the Justices*, 131 N.H. 640, 643, 557 A.2d 273, 275 (1989).

494. *Opinion of the Justices*, 99 N.H. 525, 527, 113 A.2d 547, 548 (1955) (basing state income tax on a percentage of federal tax paid discriminates among taxpayers).

495. *See generally* *Opinion of the Court*, 4 N.H. 565 (1829), *criticized by* Trs. of Phillips Exeter Acad., 90 N.H. 472, 27 A.2d 569 (1940).

olates part II, article 5 proportionality, but exemption is often conflated with classification of property (part II, article 6) or approached as merely a matter of equal protection. If the same criteria and standards of review prevailed in all cases, this untidiness would be harmless. However, as explained below, some exemptions are based on the protective power, including some defined by personal characteristics that are forbidden as bases for a classification of property. It is also possible that different standards of review are or should be applied in these different contexts.

The third sense, that different taxes of the same type have the same rate, may be obsolete. At one time, the court held that there were classes of taxes, and that "all taxes of a given class must be laid at a common rate."⁴⁹⁶ "The object in requiring the use of a common rate [was] to insure the imposition of a proportionate burden."⁴⁹⁷ It was said as recently as 1951 that "[a]ll income taxes must be laid at a common rate,"⁴⁹⁸ but thereafter the types of income taxable at different rates multiplied as the court approved various classifications.⁴⁹⁹ In evaluating possible taxes on sales of goods or services, the court seems to have resolved the issue by merging the concept of *classes of taxes* with *classification of property* so that all property not properly distinguishable would necessarily be taxed proportionally because it would have to be in one class.⁵⁰⁰ As part II, article 6 speaks only of classes of property, not classes of taxes, this seems the correct approach.

The fourth use of proportionality in the tax cases involves disproportionate assessment of a taxpayer's property under a valid tax. To secure abatement, the taxpayer must show his appraisal is above the average of other property of the same class in the taxing district.⁵⁰¹ The process dates back to the nineteenth century when the court treated uniformity, equality, and proportionality as general principles without specifying particular constitutional provisions.⁵⁰² This usage could be grounded in part I or part II

496. Opinion of the Justices, 82 N.H. 561, 570, 138 A. 284, 289 (1927).

497. *Id.* at 567, 138 A. at 288.

498. Opinion of the Justices, 97 N.H. 543, 545, 81 A.2d 851, 853 (1951).

499. *See supra* Parts II.D.4 & 7.

500. Opinion of the Justices, 111 N.H. 206, 209, 278 A.2d 348, 350 (1971); *see also Opinion of the Justices*, 97 N.H. at 546, 81 A.2d at 853.

501. *In re Town of Sunapee* (N.H. Bd. of Tax & Land Appeals), 126 N.H. 214, 217, 489 A.2d 153, 155 (1985); *Berthiaume v. City of Nashua*, 118 N.H. 646, 648, 392 A.2d 143, 144 (1978); *Rollins v. City of Dover*, 93 N.H. 448, 450, 44 A.2d 113, 114 (1945). The modern cases involve real estate, but the principle would also apply if, for example, a particular railroad or utility franchise or income stream were overvalued in comparison to others. *See, e.g., Wyatt v. State Bd. of Equalization*, 74 N.H. 552, 554, 70 A. 387, 389 (1908).

502. *E.g., Amoskeag Mfg. Co. v. City of Manchester*, 70 N.H. 336, 345, 47 A. 74, 74 (1900) ("the constitutional rule of equality"); *Amoskeag Mfg. Co. v. City of Manchester*, 70 N.H. 200, 204, 46 A. 470, 472 (1900) ("the constitutional rule of equality requires a proportional and equal valuation").

of the constitution, but it deals only with the application of proportionality to the administration of a valid tax, not a limit on legislative authority. The distinction was recently made in *Verizon New England, Inc. v. City of Rochester*, where the tax failed on equal protection grounds as irrationally under-inclusive without any need to show that the taxpayer's total assessment was disproportionately high in comparison with the average rate for other taxpayers.⁵⁰³

The term *proportionality* seems best confined to the second and fourth senses in which it is used: the requirement of uniform rates and valuations in the design of a particular tax, and taxpayer challenges to their assessments under a tax that is constitutional but misapplied in their cases.

C. Selection and Classification

When all taxes but polls were on estates, at one rate and uniform valuation in each taxing district, the legislature had one choice—to tax or not. Excises were forbidden, but in selecting property subject to taxation, legislative discretion was supreme and limited only by a requirement that it be “reasonable.”⁵⁰⁴ As the constitution prohibits any taxation without legislative authority,⁵⁰⁵ the limit was largely theoretical in some cases because the state supreme court's only option for an under-inclusive tax was (and remains) to strike down the entire tax.⁵⁰⁶ It could strike an express exemption (leaving the general taxing provision in place), but not a tacit one.⁵⁰⁷ Consequently the old cases tend to treat the selective power as practically absolute.⁵⁰⁸

In the modern era the real property tax remains inclusive, subject only to express exemptions.⁵⁰⁹ Other levies occur under specific statutes defining the property to be taxed. Some of these treat personal property as realty for taxation purposes, which is permissible.⁵¹⁰ The modern cases still refer to the “selection of the subjects of taxation,” but in the context of

503. 156 N.H. 624, 629, 940 A.2d 237, 242–43 (2007).

504. See generally Opinion of the Court, 4 N.H. 565 (1829).

505. N.H. CONST. pt. I, art. 28 (1784).

506. See generally *Eyers Woolen Co. v. Town of Gilsum*, 84 N.H. 1, 28–29, 146 A. 511, 525 (1929).

507. *Id.*

508. See, e.g., *Brewster v. Hough*, 10 N.H. 138 (1839).

509. N.H. REV. STAT. ANN. § 72:6 (2008).

510. “[T]he Legislature, by proper classification, has the power to make any kind of property personalty for the purposes of taxation, though it is real estate by the common law and for all other purposes, and vice versa.” *Kolodny v. Laconia*, 96 N.H. 337, 338, 72 A.2d 507, 508 (1950); accord *In re Town of Pelham*, 143 N.H. 536, 538, 736 A.2d 1223, 1225 (1999).

classification under part II, article 6 as amended in 1903.⁵¹¹ The requirements in principle are the same—taxation only of property and reason in selection. The legislature has “broad power to declare property to be taxable or non-taxable based upon a classification of the property’s kind or use, but not based upon a classification of the property’s owner.”⁵¹²

The oft-repeated prohibition on classification of “owners,”⁵¹³ “taxpayers,”⁵¹⁴ or “persons”⁵¹⁵ is a loose and misleading way of describing what remains of the prohibition on excise taxes. To tax (or exempt) ownership, sale, severance, receipt, expenditure, etc., of a particular class of property necessarily classifies the taxpayers who do those things. The tobacco tax classified sellers or purchasers of tobacco. Denial to private landfill operators of an exemption for pollution control facilities classified the operators. Both were perfectly constitutional.⁵¹⁶ Yet a tax on apples put into commerce was an unconstitutional occupation tax,⁵¹⁷ as was one on milk distribution.⁵¹⁸ There is more to this than minimum-rationality equal protection—all of the distinctions are in some sense rational.

Taxation that meets the requirements of public purpose, equality, and reason can still fail. New Hampshire’s classification power in taxation is narrower than it is in ordinary economic regulation, because the legislature may only tax “polls, estates, and other classes of property.”⁵¹⁹ Pure excise taxes remain *ultra vires*. Since 1903, some of the appearance and effect of the forbidden excise can be achieved by classification of “property in motion,” but not all. The state may not directly tax the exercise of an occupation, nor some act. Charges on those things must be justified under some other power, such as cost recovery fees or police power penalties.⁵²⁰ However, the state may identify a class of property defined in part by some event and require a person associated with that property and event to pay the tax.

511. *N. Country Env'tl. Servs. v. State*, 157 N.H. 15, 19, 943 A.2d 786, 790 (2008); *Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. 681, 687, 692 A.2d 486, 491 (1997).

512. *N. Country Env'tl.*, 157 N.H. at 19, 943 A.2d at 790 (quoting *Smith*, 141 N.H. at 686, 692 A.2d at 491).

513. *Id.*; see also *Opinion of the Justices*, 123 N.H. 344, 348, 461 A.2d 129, 131 (1983) (quoting *Opinion of the Justices*, 84 N.H. 559, 569, 149 A. 321, 326 (1930)).

514. *Opinion of the Justices*, 106 N.H. 202, 206, 208 A.2d 458, 461–62 (1965) (quoting *Opinion of the Justices* 84 N.H. 559, 569, 149 A. 321, 326 (1930)).

515. *New York Life Ins. Co. v. Sullivan*, 89 N.H. 21, 28, 192 A. 297, 301 (1937).

516. See *N. Country Env'tl.*, 157 N.H. at 26, 943 A.2d at 795 (privately operated landfills); *Havens v. Att'y Gen.*, 91 N.H. 115, 116, 14 A.2d 636, 637 (1940) (tobacco).

517. *Opinion of the Justices*, 95 N.H. 555, 556, 65 A.2d 876, 877 (1949).

518. *Opinion of the Justices*, 98 N.H. 527, 529, 96, A.2d 733, 734–35 (1953).

519. N.H. CONST. pt II, art. 6 (1784).

520. The principal non-tax revenue powers will be the subject of a forthcoming article. They are subject to their own constitutional limits on structure, amount, purpose, etc. See, e.g., *D'Antoni v. Comm'r*, N.H. Dep't of Health and Human Servs. 153 N.H. 655, 917 A.2d 177 (2006).

There are two ways taxes may fail as classifications of property no matter how rational they are in the equal protection sense. The most obvious is to make taxability or tax rate depend on a characteristic of the taxpayer unrelated to the definition of the class of property. Thus, taxing the income of only corporations is forbidden.⁵²¹ Graduation is forbidden—it amounts to classification on the basis of wealth rather than qualities of the taxed property. “A tax levy cannot be sustained here upon any theory that the richer one is the higher his tax rate should be. All taxes on like property and for like purposes must be equal.”⁵²² Taxation of business profits that would vary with the labor intensity of taxpayers’ business or the taxpayer’s size or legal structure would unconstitutionally “result in two classes of taxpayers, paying differing rates of tax on essentially the same class of property.”⁵²³ This has nothing to do with the number of taxpayers linked to the property. Taxing unusual forms of property that may be uniquely valuable to only one or a few persons in a particular business is not necessarily an improper classification.⁵²⁴ Nor is taxing a type of property distinctively used by only two entities in the state.⁵²⁵ The state supreme court is “not concerned with the number of properties within a particular group, but with whether the distinction drawn between the taxable and nontaxable properties is a proper one, in that it is sufficiently inclusive to create distinctive classes.”⁵²⁶

The other form of forbidden excise involves under-inclusive classification—a tax on property used in or generated by a particular industry or group that is not sufficiently and meaningfully distinguishable from similar property of other industries or groups. This is why the apple and milk taxes were forbidden “occupation” taxes. While making the distinction is essential to preserving a fundamental constitutional limit, at least with regard to commodity taxes, it is not easy. Commercially produced apples were too narrow a class,⁵²⁷ but severed timber was not.⁵²⁸ Receipts on sale of bottled soft drinks were once approved as a class,⁵²⁹ but the income of milk distributors apparently was not.⁵³⁰ Tobacco sold for human consump-

521. Opinion of the Justices, 111 N.H. 206, 209, 278 A.2d 348, 350 (1971).

522. Opinion of the Justices, 99 N.H. 525, 527, 113 A.2d 547, 548 (1955) (internal quotation marks and citations omitted) (quoting Opinion of the Justices, 84 N.H. 559, 571, 149 A. 321, 328 (1930)).

523. Opinion of the Justices, 123 N.H. 296, 302, 460 A.2d 93, 97 (1983).

524. See *Tenn. Gas Pipeline Co. v. Town of Hudson*, 145 N.H. 598, 604, 766 A.2d 672, 677 (2000) (pipeline easement).

525. See *N. Country Envtl. Servs. v. State*, 157 N.H. 15, 28, 943 A.2d 786, 797 (2008) (privately operated landfills).

526. *Id.* at 20, 943 A.2d at 791.

527. Opinion of the Justices, 95 N.H. 555, 556, 65 A.2d 876, 877 (1949).

528. Opinion of the Justices, 84 N.H. 559, 575, 149 A. 321, 329 (1930).

529. Opinion of the Justices, 94 N.H. 506, 509, 52 A.2d 294, 296 (1947).

530. Opinion of the Justices, 98 N.H. 527, 529, 96 A.2d 733, 734–35 (1953).

tion and refined petroleum products are in classes by themselves.⁵³¹ The state supreme court has repeatedly warned of the “danger of creating, by narrow classification, a tax upon occupations or privileges,”⁵³² and proposals for narrow sales or service taxes seem to have waned. However, if they recur, the state supreme court may have to again take up the sketchy law on the “legal requirements of classification.”⁵³³ The language of the decisions along this difficult boundary has ranged from broadly deferential to legislative discretion to harshly peremptory.

Most classifications are justified at the equal protection level as rational distinctions with a public purpose. However, the limitation of taxing authority to classes of property is an additional restriction. Classification turning on personal characteristics unrelated to the property taxed is only permissible through police power exemptions, as described below. Narrow classification by specific products, services, or industries is inherently suspect, and the state supreme court has in fact required something more than minimum rationality to avoid it being treated as an impermissible occupation tax.

D. Exemptions

While some exemptions are a form of classification, some are not. It is better to keep the terms distinct. As described in the cases, exemptions can be tacit or expressed. Expressed exemptions may be justified as matters of administrative practicality, as a way of defining a class of taxable property, as a way of avoiding double taxation (which is a special case of the classification power), and as exercises of the police/protective power. All of these must meet the requirements of public purpose, equality, and reason, but only the last may legitimately discriminate on the basis of personal characteristics unrelated to the definition of the property taxed or exempted.

Tacit exemptions are those implicit in the legislature's choice not to levy a tax. Given the nineteenth-century practice of levying the tax on estates both inclusively (real property) and exclusively (personal property) it is understandable that from the earliest times the state supreme court has sometimes referred to this as a form of exemption, but it led to an unresolved tension in the cases because at least some express exemptions were treated very differently.

531. Opinion of the Justices, 114 N.H. 174, 178, 317 A.2d 568, 570 (1974) (petroleum).

532. Opinion of the Justices, 111 N.H. 131, 135, 276 A.2d 817, 820 (1971) (quoting Opinion of the Justices, 97 N.H. 546, 548, 81 A.2d 853, 855 (1951)).

533. *Havens v. Att'y Gen.*, 91 N.H. 115, 117, 14 A.2d 636, 638 (1940).

Tacit “exemption” by silently excluding property from a taxable class is an exercise of the power to select and classify. The line of cases saying selection of some property for taxation is not an exemption of other property is the better guide.⁵³⁴ Referring to silence in the tax statutes as an exemption was harmless before 1903, but now it adds confusion to the analysis of exemptions. Tacit exemption is simply a matter of selection and classification. The appropriate analysis has only two levels—the selection of the objects of taxation must meet the requirements of public purpose, equal treatment, and reason, and it must define a distinct class of property without resort to unrelated personal characteristics of the taxpayer. Defining a class of property with a stated exclusion, for example all income over \$2,000, is not a tacit exemption.⁵³⁵

Small express exemptions are sometimes permitted as matters of administration and practicality.⁵³⁶ Most other exemptions are now treated as exercises of the classification power, whether in the usual form of exemptions, or as “deductions, adjustments and credits.”⁵³⁷ Defining classes of property by carving out or adding back sub-classes is a natural and efficient method. However, add-backs or exceptions from exemptions can misdirect attention. This was recently illustrated in *North Country Environmental Services v. State*.⁵³⁸ The taxpayer operated a landfill—it had previously taken advantage of an exemption for pollution control facilities from the real property tax.⁵³⁹ In 2006 the legislature amended the relevant exemption statute prospectively to except privately owned landfills.⁵⁴⁰ The taxpayer, one of only two in the state then affected by the statute, argued discrimination and disproportion, but the state supreme court held that pollution-control facilities associated with landfills were a distinct class of property based on use, and that denial of exemption was rationally related to a declared legislative purpose to discourage that method of waste disposal.⁵⁴¹ As reasonable as this approach was, it seems more a response to

534. “The non-assessment of other classes of property would not be an exemption of any class of people.” *Morrison v. Manchester*, 58 N.H. 538, 556 (1879).

535. *Opinion of the Justices*, 82 N.H. 561, 570, 138 A. 284, 290 (1927).

536. *See Opinion of the Justices*, 88 N.H. 500, 510, 190 A. 801, 808 (1937) (implying that a nominal amount of an estate could be exempted, presumably because it would not be worth the costs of collection). A “discount” on tax stamps allowed to wholesale tobacco distributors was justified to reduce evasion and increase efficiency of supervision. *Havens*, 91 N.H. at 119–20, 14 A.2d at 639. An exemption to compensate retailers for collecting sales tax was permissible although not required. *Opinion of the Justices*, 97 N.H. 533, 539, 81 A.2d 845, 851 (1951).

537. *Opinion of the Justices*, 132 N.H. 777, 783, 584 A.2d 1342, 1346 (1990) (quoting *Opinion of the Justices*, 131 N.H. 640, 642, 557 A.2d 273, 275 (1989)).

538. 157 N.H. 15, 943 A.2d 786 (2008).

539. *In re Town of Bethlehem*, 154 N.H. 314, 324–25, 911 A.2d 1, 9–10 (2006).

540. *N. Country Envtl.*, 157 N.H. at 17, 943 A.2d at 789.

541. *Id.* at 24–25, 943 A.2d at 794.

the taxpayer's sense of grievance than a necessary holding. The exception simply restored the taxability of the property at the same rate as all other realty. The real question was whether the remaining exemption for other sorts of pollution control facilities was constitutional. If there were a proper purpose in encouraging them as a distinct class, a reason to discourage other activities was superfluous.

Perhaps most exemptions other than those to avoid double taxation are grounded in the protective/police power. Their effect is to encourage certain activity or aid particular persons. It may not matter if those exemptions designed to encourage certain uses of property are treated as classifications, but there are some express exemptions that should not be. Exemptions based on personal characteristics unrelated to the taxed property—age, wealth, disability, family relationship, form of business organization—are not exercises of the power to select objects of taxation. It is axiomatic that the power to classify and select objects of taxation is confined to property: “the legislature may not classify owners for differing taxation.”⁵⁴² Taxing or not on the basis of personal characteristics or activities unrelated to the taxed property is at the heart of the forbidden excise power. Taxing the wealthy as such may be progressive, but it is unconstitutional in New Hampshire. The state supreme court long ago observed that a quantitative exemption to an income tax could be forbidden graduation, and a tax “cannot be sustained here upon any theory that the richer one is the higher his tax rate should be.”⁵⁴³

Personal exemptions have historically required an explicit protective power justification, such as relief of actual poverty, and the state supreme court has usually made an independent judgment about the effect of the exemption.⁵⁴⁴ Yet the modern state supreme court has sometimes applied the minimal scrutiny that originated in generic classification cases to personal exemptions.⁵⁴⁵ The difference is shown in the treatment of age-based exemptions to the IDT in 1963. The state supreme court made do with a vague reference to “some common attributes” of age and poverty and then simply listed a series of statutes that drew lines for various purposes at age

542. *Id.* at 23, 943 A.2d at 793.

543. Opinion of the Justices, 84 N.H. 559, 571, 149 A. 321, 328 (1930). Quantitative exemptions always introduce graduation in effective rates. For example, under a 5% income tax with a \$1,000 exemption, a person earning \$1,100 pays \$5, an effective rate of 0.45%, while one earning \$2,000 pays \$50, an effective rate of 2.5%.

544. *See id.*

545. Most recently in sustaining inheritance tax exemptions based on family relationship. *Estate of Robitaille v. N.H. Dep't of Revenue Admin.*, 149 N.H. 595, 599, 827 A.2d 981, 985 (2003).

65 or 70.⁵⁴⁶ Age-related distinctions were rational in taxation because they existed for other purposes. Whether from laxity or naïveté, that decision has left us with working families having substantial savings subsidizing (to a modest degree) some much wealthier elders.⁵⁴⁷ The state supreme court of 1930 would have insisted on a means test or some alternate justification under the protective power. Opinions on age-based exemptions since 1963 have involved proposals with a means test, so it is unclear whether the state supreme court would return to its traditional position on quantitative exemptions.

As with the “occupation tax” problem in classification, the tests for protective power exemptions, particularly those based on personal characteristics, are unclear. General language lumping all forms of classification and exemption together is common, sometimes with language suggesting minimum scrutiny. In other cases there is different language and what appears to be a higher threshold. It is possible the state supreme court is once again prepared to require more than minimum rationality for all express exemptions. There is a discernible difference in the tone in some of the most recent cases. While the “rational basis test” has been invoked as recently as 2003,⁵⁴⁸ there is another line of cases coming down to 2008 speaking of “just reasons” that “reasonably promote some proper object of public welfare or interest.”⁵⁴⁹

E. *Justice*

The word “just” does not appear in any of the constitutional provisions bearing on taxation. The term entered the case law in 1829 when the court said that “reasonable” in part II, article 5 “seems to be used as having the same meaning with the word *just*.”⁵⁵⁰ This was in the context of explaining and justifying legislative discretion to deviate from strict mathematical proportionality—what became the selective power and the power to provide for exemptions.⁵⁵¹

A tax of a particular sum, upon every poll in the state, might be easily laid, and would be, in one sense of the term, a proportional tax. But no

546. Opinion of the Justices, 105 N.H. 22, 24, 192 A.2d 22, 23 (1963). The same rationale was quoted verbatim to support property tax exemptions in *Opinion of the Justices*, 110 N.H. 206, 208, 266 A.2d 111, 113 (1970), but that exemption was means-tested.

547. The current extra exemption at age 65 is \$1,200. N.H. REV. STAT. ANN. § 77:5 (2009). Age-related exemptions for residential property have justifications other than poverty.

548. *Robitaille*, 149 N.H. at 596, 827 A.2d at 983. The actual scrutiny in this case seems to have been a bit more robust.

549. *In re Town of Rindge*, 158 N.H. 21, 26 (2008) (quoting Opinion of the Justices, 144 N.H. 374, 378, 746 A.2d 981, 985 (1999)).

550. Opinion of the Court, 4 N.H. 565, 569 (1829).

551. *Id.* at 570.

person would suppose that such a tax would be just and reasonable. “No one would think, that the polls of children, in their earliest infancy, or of idiots and distracted persons, were proper subjects of taxation.”⁵⁵²

The classification and exemption powers are now fully developed. Yet the state supreme court has repeatedly included the term “just” in lists of requirements as if it were an independent limitation: “taxation [must] be just, uniform, equal, and proportional.”⁵⁵³ There are variations of this—some free-floating and some attributed to part II, article 5.⁵⁵⁴

An exercise of the taxing power that meets all the other constitutional requirements is necessarily “just” as far as judicial review is concerned. Such a protean term, now unnecessary in its original context, can only confuse litigants and the public. The state supreme court is frequently at pains to explain it has nothing to do with the wisdom of otherwise valid legislation, but this repeated inclusion of an extra-constitutional word in lists of constitutional requirements needlessly invites a contrary inference.

F. *Standards of Review*

Sometimes standards of review are not articulated in the modern taxation cases. When they are, they are not in entirely consistent language, in part because the same issue can be and often is characterized in a variety of ways. Even when the language and issues are parallel, it is difficult to reconcile the outcomes in all the cases. This situation was not improved when the three-tier federal approach to equal protection began to be applied in some tax cases⁵⁵⁵ during a period when the chief justice expressed concern over “the confusion in our standards of constitutional review.”⁵⁵⁶ While I believe some of the limitations on the taxing power should be and have been maintained with special scrutiny, an analysis and critique of standards of review in constitutional challenges to New Hampshire tax legislation will require a separate article.

552. *Id.*

553. *Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. 681, 686, 692 A.2d 486, 491 (1997).

554. “[E]qual in valuation and uniform in rate, and just.” *In re Town of Rindge*, 158 N.H. at 24, 959 A.2d at 192 (quoting *Opinion of the Justices*, 144 N.H. at 378, 746 A.2d at 985); *Starr v. Governor*, 148 N.H. 72, 74, 802 A.2d 1227, 1230 (2002); *Opinion of the Justices*, 131 N.H. 640, 642, 557 A.2d 273, 275 (1989).

555. *See Cagan's, Inc. v. N.H. Dep't of Revenue Admin.*, 126 N.H. 239 (1985).

556. *Gonya v. Comm'r, N.H. Ins. Dep't*, 153 N.H. 521, 538, 899 A.2d 278, 292 (2006) (Broderick, C.J., concurring); *see also Dover v. Imperial Cas. & Indem. Co.*, 133 N.H. 109, 121, 575 A.2d 1280, 1287 (1990) (Souter, J., dissenting).

G. *Modern Rules Summarized*

The modern law can be summarized in fairly simple and precise terms without the cascade of overlapping, multifarious, and redundant terms that have accumulated over two centuries. Each of the following propositions is supported by decisions in the modern era, and none has been repudiated.

While the legislature has great discretion in selecting the objects and methods of taxation, all tax legislation must meet the requirements of public purpose, equality, and reason. The term proportional in part II, article 5 means that every tax must be ad valorem, which requires a uniform rate applied to a uniform valuation for everyone paying the tax. Classification for taxation has two aspects—it must be applied to property, and it must be rational. So long as it is applied to property, classification under part II, article 6 need only meet the public purpose, equality, and reason standard. However, classification based on personal characteristics of the taxpayers unrelated to the defining characteristics of the property is not authorized. A narrow classification of property that fails to include similar property defined by the same characteristic event is possible but may fail as either insufficiently distinct or as an excise. Exemptions may be used to define classes of property, or to determine which of two overlapping classes will apply when double taxation threatens. These need only meet the public purpose, equality, and reason standards. Exemptions may also be exercises of the protective power to encourage particular acts or aid particular persons, and such exemptions are only permitted to promote some definite and proper object of public welfare or interests. Taxability of property defined by an act or event is determined by the law at the time of the act or event.

IV. CONCLUSION

In the 1880s the New Hampshire Supreme Court developed a logical, elegant, and comprehensive interpretation of the constitutional limits on the taxing power. One could imagine it being workable in a modern world, but the people soon found it too confining. However, rather than granting taxing powers more like those of other states, they authorized in 1903 two specific new property taxes and the taxation of “other classes of property.” A large part of the old learning was thereby rendered meaningless, as the state supreme court gradually discovered. Exercise of the power to define and tax other classes of property necessarily implied taxation of property based on some event, permitting something like an excise. It also necessarily involved the power to have more than one tax applied to some property and to have different tax rates for different classes of property. Still

lacking the excise power, however, the legislature must structure each new tax as an ad valorem property tax.

The 1903 amendment embedded a fundamental tension in the constitution. The nineteenth-century synthesis partially survives in the remaining broad language of proportionality and equality, the prohibition of excises, and the restriction of taxes to property and polls. But the new power to create multiple classes of property taxable in different ways at disparate rates opens the door to unequal, perhaps invidious, tax burdens and to classifications indistinguishable from occupation or other excise taxes. The fault line along which this tension is resolved in particular cases is the limit of the legislature's power to define classes of taxable property. These are also the cases with the widest variation in language and outcomes. Had the state supreme court adhered to its occasional position that there were only a few major classes of taxes, New Hampshire might have been obliged to adopt a general sales or income tax. Yet that view was neither grounded in the constitutional language nor consistent with the state supreme court's previous declarations about the legislature's power to select and classify the objects of taxation.

One could criticize the outcome or language of a given decision or urge a stricter standard of review, but each critical step in the development of the modern law has been logical, faithful to the language of the constitution, and supportable by reference to earlier decisions. A regime where everyone who was taxed was taxed the same way and at the same rate has, by the probably unforeseen implications of a vague phrase, been utterly transformed.