The Three Faces of Equality: Constitutional Requirements in Taxation

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I. INTRODUCTION

The government’s power to tax has been described by the United States Supreme Court as an inherent power of sovereignty: “The power . . . of taxation, operates on all persons and property belonging to the body politic” and “has its foundations in society itself.” An important truth that can be learned from modern history is that the power to tax may well be the most important of all governmental powers; not only does tax revenue make all other powers practically possible, but tax in itself has enormous capacity to mold human activity. In the development of the modern state, one of the most important movements has been the struggle to remove the power to tax from monarchs and to place that power exclusively in the hands of legislators. Indeed, the principle “no taxation without representation” is not simply a principle of representative democracy, but was also a proscription in some early constitutions that conditioned the right to vote on the fact of being a taxpayer. It is a maxim of constitutional democracy that government power can only be exercised pursuant to certain conditions and limitations. Thus, the power to tax, like other government powers, is naturally circumscribed by constitutional norms that define the relationship between government and citizen. One such constitutional norm that is
considered essential to a just system is equality. This precept was included in various forms in some constitutions as early as the eighteenth century. Equality is arguably one of the most comprehensive rights. However, though a fundamental right to equality in treatment is contained in many constitutions, there are serious questions as to what the right of equality adds to the constitutional dialogue today.

The idea of equality may be particularly problematic as a restraint on governments’ power to tax. In the modern context, it has been noted: “Of course, there are no cases of gross human rights violations in fiscal case law. In this respect, tax law usually focuses on relatively trivial matters.” The concept of equality, however, did not always lack importance. When the principles of constitutional democracy developed in Europe and the United States, a strong influence on the ideology of the time was a fear of the unbridled exercise of state powers, in particular, the power to tax. The goal was not simply to replace the arbitrary power of the sovereign with popularly elected legislatures, but to check the arbitrary exercise of sovereign powers in general via constitutionally mandated limitations.

Early America was deeply influenced by John Locke’s tenets on taxation: that there should be “no taxation without representation” and that the burden of taxation should be equally allotted among the citizens of a society. The first tenet, “no taxation without representation,” is accomplished through the formation of a democratic and republican government. Based on Locke’s conclusion, the second tenet, equality, might be perceived as a logical outcome of a democratic order. Indeed, Alexander Hamilton in The Federalist Papers made the strongest arguments against the importance of a Bill of Rights in a society governed by a constitution established by the people. He explained that the Preamble to the American Constitution, which proclaimed the establishment of the Constitution, was “a better recognition of popular rights, than volumes of those aphorisms which make the principle figure in several of our state bills of rights, and

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4 The historical importance of tax during times of intense social unrest also cannot be understated. For example, Charles I began his road to the executioner’s block when he was forced by financial crisis to recall Parliament in an effort to raise new taxes, and the American Revolution was precipitated by the British Parliament’s imposition of new taxes on the American Colonies. CHARLES ADAMS, FIGHT, FLIGHT, FRAUD: THE STORY OF TAXATION 191, 211-17 (1982).

5 John Locke, who deeply influenced thinking in America, concluded, “[i]t is fit everyone who enjoys his share of the [government’s] protection should pay out of his estate for the maintenance of it. But still it must be with his consent, i.e., the consent of the majority, given it either by themselves or their representatives chosen by them.” JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT 193 (Haffner Publ’g. 1947).
which would sound much better in a treatise of ethics than in a constitution of government." In other words, Hamilton thought a Bill of Rights to be unnecessary because the very structure of democracy guaranteed equality.

Yet Locke and later thinkers like David Hume recognized the human drive toward acquiring property or, as Hume put it, man's "avidity" for "acquiring goods and possessions." The acquisitive nature of man even permeates the struggle over the fair allocation of the burden of taxation on the citizens of a country. This human tendency is also recognized in democratic society, as noted in a United States Supreme Court opinion in 1895.

But there is another cause tending to introduce inequality in the burdens of taxation of far greater effect than all the instances of departure from the rule of equality which I have just mentioned; and this is a cause which does not arise from any consideration of the public good whatever, but from the inherent selfishness of men. In every community those who feel the burdens of taxation are naturally prone to relieve themselves from them if they can; and the extent of the effort which they make to relieve themselves is, in general, proportionate to the extent of the burden which they suppose has been laid upon them. One class struggles to throw the burden off its own shoulders. If they succeed, of course it must fall upon others. They also, in their turn, labor to get rid of it, and finally the load falls upon those who will not, or cannot, make a successful effort for relief. This is, in general, a one-sided struggle, in which the rich only engage, and it is a struggle in which the poor always go to the wall.

As a result of this struggle between economic classes, some states adopted constitutional provisions that require legitimate taxation to be carried out in accordance with the principle of equality. As a societal supernorm, equality in taxation is about the rights and obligations of citizens and states in constitutional democracies.

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8 Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 516 (1894), aff'd on reh'g, 158 U.S. 601 (1895). Pollock involved the constitutionality of the federal income tax. For further discussion, see infra notes 111-20 and accompanying text.
9 Pollock, 157 U.S. 429 at 516.
This paper explores the nature and force of equality as a constitutional tax norm and studies equality’s evolution, that is, its changing face over time. Part II of this paper provides background information on the fundamental premise of equality. Part III discusses the approaches to equality in taxation found in several early constitutions.

Part IV of this paper considers the role of judicial review in determining what constitutes equal taxation. Though constitutions represent the fundamental law of a nation, their legal effect is ambiguous and depends largely on the permissibility of judicial review. How and by whom are constitutions enforceable? Are their precepts meant only to be inspirational or to limit sovereign power? In societies without judicial review, legislators interpret their constitutions’ limitations subject only to check by popular will. In societies that have embraced the right of courts to review legislation for constitutional infirmity, constitutional norms may contain both negative proscriptions that defend individuals from government overreaching and positive directives that require governments to achieve certain societal goals. Since this paper involves a look at equality as normative proscription, its focus is on the history of judicial intervention in tax law, that is, equality’s force and meaning as a consequence of the constitutional testing of tax statutes by the judiciary.

Even though judicial review has been accepted more and more as an appropriate exercise of judicial power in democratic societies, its widespread acceptance is a fairly recent development. Because of this, this paper is primarily focused on the concept of equality in America, for it was in America that judicial review of legislative acts was established as appropriate well over 150 years before the concept was accepted in Europe.

Part V of this paper looks to the traditions of three court systems, the U.S. state courts, the U.S. Supreme Court, and the German Federal Constitutional Court, to provide an informative contrast to help explicate the constitutional concept of equality. Each represents a different moment in the historical development of the precept of equality. The first tradition, the law of state courts, originated in the eighteenth century and is used to examine the notion of equality in the constitutions of the states of the United States and its subsequent development. This represents the earliest attempts by the judiciary to establish a tradition of limitations on the governmental power to tax. The second tradition is the jurisprudence of the Supreme Court of the United States. The history of the Supreme Court’s jurisprudence shows a move from an individual, rights-based concept of equality to a regime that appears to have no real concept of equality in tax at all.
The lesson here may be that a different theory of fairness, namely that taxes should be assessed on the basis of ability to pay, has destroyed the constitutional requirement of equality but has not replaced it with an alternative approach, leading to almost complete deference to the legislature in tax matters. The third tradition, the law of the German Federal Constitutional Court, owes its development to the more recent shifts to judicial review of tax in Europe. There, the Constitutional Court has adopted a proactive concept of equality. In part, the Constitutional Court draws on the thinking of the United States and reflects both of the first two traditions. Yet, the traditional notion of equality based on individual rights has also been transformed in Germany into a substantive concept that adopts a social rights ethic requiring both individual rights and governmental duties, both of which are founded on the premise that equality in taxation means that tax must be applied on the basis of ability to pay.

Part VI of this paper concludes by suggesting that equality has developed into such an elusive concept that our systems of taxation do not promote its goals. Yet, these goals are not beyond us and our experience with the concept of equality has taught us certain lessons that may need to be relearned.

II. THE FUNDAMENTAL PREMISE OF EQUALITY IN TAXATION

To Aristotle, equality was the measure of justice; the unjust is unequal, the just is equal.\textsuperscript{10} Justice is about determining and giving individuals their due. Aristotle perceived equality as a mean, that is, a point between two extremes of what was unjust, finding what was just to be "a species of the proportionate."\textsuperscript{11} Yet a person's just share of money or honor could be equal or unequal to that of others\textsuperscript{12} since "what is just in distribution must be according to merit in some sense."\textsuperscript{13} Thus, a famous maxim developed from these principles is that "things that are alike should be treated alike, and things that are unalike should be treated unalike in proportion to their unalikeness."\textsuperscript{14}

Modern democratic society adopted a more egalitarian principle of equality by proclaiming that all men are created equal. This foundational principle begins with a universal notion of equality depending only on one's formal affiliation with the human race. It is this notion

\textsuperscript{10} Aristotle, Nicomachen Ethics 1131a (W.D. Ross trans., Oxford Univ. Press 1925).
\textsuperscript{11} Id.
\textsuperscript{12} Id. at 1130b.
\textsuperscript{13} Id. at 1131a.
\textsuperscript{14} Id. at 1131a–b; see also Erwin Chemerinsky, In Defense of Equality: A Reply to Professor Westin, 81 Mich. L. Rev. 575, 578 n.17 (1983) (discussing Aristotle's idea of equality).
of human status that is behind the law’s ideal that all men are equal before the law.

Thus, we see two quite different notions of equality. Aristotle considers man as a member of civil society where wealth and honors are unevenly divided. This also corresponds with Locke’s natural state. There, equality is a notion of justice by which each is treated according to his just desserts. The proclamations of equality that arose from the eighteenth century revolutions, however, deal with man and his relation to the state. As a member of the body politic, each member of the social order must be treated the same, without differentiation. Yet, taxation in an eighteenth century sense allows the state to share in the fruits of civil society. As such, tax must recognize the inequality of man in civil society and confront the question of rights and just desserts.

What is considered fair or just, that is, what individuals merit, depends greatly on the specific values of societies, and there can be a large divergence in views on this subject even among democratic societies. Aristotle recognized long ago that people disagree as to the standard for determining merit; thus, “democrats identify it with the status of freemen, supporters of oligarchy with wealth, and supporters of aristocracy with excellence.” What one deserves can be based on needs, aspirations, opportunities, and so forth. Modern society’s overarching goals often include a more proportionate or equitable distribution of wealth.

The abyss between political man and civil man is profound. It would be simple to achieve important social goals by passing a law allowing those who are economically disadvantaged or the victims of prejudice to cast more votes than others. For every year that a woman or a person of color was denied the vote or other human dignities, she would be entitled to an extra vote. This device might quickly establish more significant proportionality in our societies. Certain political rights, like the right to vote, are matters of formal equality. History teaches, however, that the question of who are men for purposes of determining equal treatment does change. In Athens at the time of

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15 Locke’s state of nature was a state of perfect liberty and equality governed by natural laws that require man to preserve the life and goods of others. See Locke, supra note 5, at 122–24.

16 ARISTOTLE, supra note 10, at 1131a.

17 See, e.g., MASS. CONST. of 1780, pt. I, art. IX, reprinted in CONSTITUTIONS THAT MADE HISTORY 46 (Albert P. Blaustein & Jay A. Sigler eds., Paragon House 1988). Note, however, that in the United States the residents of each state, no matter how large its population, are entitled to elect two U.S. Senators. U.S. CONST. art. 1, § 3. The weight of the vote of a resident of a small state is disproportionately large as compared with the vote of a resident of a large state.
Aristotle, it was free men; in America at the time of the Declaration of Independence, it was free men with property;\textsuperscript{18} in France at the time of the Declaration of the Rights of Man and the Citizen, it was free men who paid taxes;\textsuperscript{19} and today in the United States, it is men and women aged eighteen and over.\textsuperscript{20} Once the right holder is defined, political equality is clear and unambiguous—one person, one vote. The French expressed this in the Declaration of the Rights of Man and the Citizen as follows: "[L]aw is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes."\textsuperscript{21}

Can this kind of formal equality be achieved in taxation? The answer, of course, is yes. A poll tax or a head tax follows the principle that every human being is as deserving as every other and should share in the costs of government by paying the same as everyone else. Considering the political person, there is something quite appealing in the notion that since it is just that we all have the same political rights, it is just that we all have the same "duty" to support the state. But whereas political equality demands that the only relevant criterion is our humanity, taxation necessarily takes us beyond political man to social and economic man.

The difference is obvious. Political rights are all about the abstract relation between citizens and their government. Taxation is instead about government's need and its capacity to enter into civil society to claim a portion of the economic wealth of a society. Taxation is concrete rather than abstract; it is a real claim on economic activity that takes place. By nature and practicality, tax is imposed on people based on an attribute that is not shared equally by all. Just as one cannot get blood out of a turnip, one cannot get tax revenue from people who lack the economic capacity to pay taxes. Taxation, as a practical endeavor, must treat people differently because it is levied on economic activity that is distributed unevenly. From this broader per-

\textsuperscript{18} See, e.g., MASS. CONST. of 1780, pt. II, ch. 1, § II, art. 1; pt. II ch. 1, § III, art. IV, \textit{reprinted in CONSTITUTIONS THAT MADE HISTORY, supra} note 17, at 51, 54.

\textsuperscript{19} In France, the relationship between the mutual interdependence of full rights of citizenship and the obligation to pay taxes was made a formal requirement in the French Constitution of 1791. Only "active" citizens were entitled to sit and vote in the primary assemblies charged with electing representatives to the national assembly. CONSt. of 1791, tit. III, ch. I, § II, cl. 1 (Fr.), \textit{reprinted in CONSTITUTIONS THAT MADE HISTORY, supra} note 17, at 89. In order to be an active citizen, it was necessary "[t]o pay in some place within the kingdom a direct tax at least equal to the value of three days labor." \textit{Id.} at tit. III, ch. I, § II, cl. 2.

\textsuperscript{20} U.S. CONST. amends. XIX, XXVI.

spective, the truth is that a formally equal tax can be in some cases the most unequal of all taxes.

This does not mean, however, that equality has no force in tax. Aristotle's concept of justice would sensibly require some kind of proportionality in taxation. Adam Smith first applied this notion of justice to taxation. Adam Smith's first canon of taxation was that taxes should be equal or equitable. The burden of taxation should be apportioned to a person on the basis of the benefits he received from government goods and services. The benefit theory treats tax as a market phenomena; it is an exchange theory of tax. Thus, in Adam Smith's first canon of taxation he stated that "the subjects of every state ought to contribute to the support of the government, as nearly as possible in proportion to their respective abilities; that is the revenue which they respectively enjoy under the protection of the state." Most likely, Smith was using ability to pay as the proper measure of the benefit a person derived from the protection of the state.

As we can see, Aristotle, John Locke, and Adam Smith provided the philosophical foundation for a requirement of equality in taxation. Their concerns over the potential for abuse in taxation led many societies to adopt provisions on equality in their constitutions.

III. THE EARLY CONSTITUTIONS: EQUALITY AND TAXATION

America's struggle for independence was founded upon the cornerstone of equality when it was declared, "[w]e hold [this] truth[] to be self-evident, that all men are created equal." Surprisingly, neither the original Constitution of the United States nor the Bill of Rights contained any mention of equality. Though the Constitution did contain an explicit limitation on the taxing power of Congress to the effect that "all Duties, Imposts and Excises shall be uniform throughout the United States," this clause has been consistently interpreted

24 Id.
25 SMITH, supra note 22.
26 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
27 James Madison may have provided the explanation for the absence of a requirement of equality when he remarked, after reviewing the constitutions of state governments that had equality clauses, "in some instances they do no more than state the perfect equality of mankind; this to be sure is an absolute truth, yet it is not absolutely necessary to be inserted at the head of a constitution." WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 188 (Univ. of N.C. Press 1973).
to mean only geographical uniformity, that is, the same tax must be applied in the same way throughout the United States.\textsuperscript{29} It was not until the Civil War Amendments were passed, which provided that no state could deny any person the equal protection of the law, that the notion of equality became part of the Constitution.\textsuperscript{30}

Though the Federal Constitution did not have an equality clause, many state constitutions passed at the time of the revolution and prior to the enactment of the Federal Constitution did. Many provisions were patterned after the Virginia Constitution of 1776, which declared "[t]hat all men are by nature equally free and independent."\textsuperscript{31}

Several of these early constitutions contained specific provisions on the underlying justification for taxation.\textsuperscript{32} Pennsylvania in 1776 declared "[t]hat every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection."\textsuperscript{33} Rhode Island, years later, expressed this condition in its constitution as follows: "[T]he burdens of the State ought to be fairly distributed among its citizens."\textsuperscript{34} Other states made equality in taxation more definite by requiring that legislatures may levy only "proportional and reasonable . . . taxes."\textsuperscript{35}

\textsuperscript{29} Knowlton v. Moore, 178 U.S. 41, 92 (1900).
\textsuperscript{30} U.S. CONST. amend. XIV.
\textsuperscript{31} VA. CONST. OF 1776, BILL OF RIGHTS, § 1, reprinted in CONSTITUTIONS THAT MADE HISTORY, supra note 17, at 11. See also the PA. CONST. of 1776, art. I, reprinted in CONSTITUTIONS THAT MADE HISTORY, supra note 17, at 25, which declared, "[t]hat all men are born equally free and independent."
\textsuperscript{32} From 1776 to 1784, Delaware, Massachusetts, New Hampshire, Pennsylvania, and Vermont adopted similar provisions. WADE J. NEWHOUSE, 2 CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 1727 (2d ed. 1984).
\textsuperscript{33} PA. CONST. of 1776, art. VIII, reprinted in CONSTITUTIONS THAT MADE HISTORY, supra note 17, at 26. Vermont adopted the same language in 1793. VT. CONST. of 1793, reprinted in THE FEDERAL AND STATE CONSTITUTIONS COLONIAL ChARTERS AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND Colonies NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3762 (Francis Newton Thorp ed., 1909). The provision in the Massachusetts Constitution of 1780 gave each individual the "right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of his protection." MASS. CONST. of 1780, pt. I, art. 10, reprinted in CONSTITUTIONS THAT MADE HISTORY, supra note 17, at 46. Indeed, in Pennsylvania, the constitution went so far as to admonish the legislature and provide guidelines for carrying out its great responsibility:

Section 41. No public tax, custom or contribution shall be imposed upon, or paid by the people of this state, except by a law for that purpose: And before any law be made for raising it, the purpose for which any tax is to be raised ought to appear clearly to the legislature to be of more service to the community than the money would be, if not collected; which being well observed, taxes can never be burdens.

PA. CONST. of 1776, § 41, reprinted in CONSTITUTIONS THAT MADE HISTORY, supra note 17, at 35.
\textsuperscript{34} R.I. CONST. of 1842, art. 1, § 2, reprinted in 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 386 (William F. Swindler ed., Oceana 1979).
\textsuperscript{35} MASS. CONST. of 1780, pt. II, ch. 1, § 1, art. IV, reprinted in CONSTITUTIONS THAT
Other countries' early constitutions also made specific reference to the principle of equality in taxation. The French Constitution of 1791 contained guarantees of natural and civil rights, including the following specific references to the apportionment of the tax burden among its citizens: "For the maintenance of the public force and for the expenses of administration a general tax is indispensable; it ought to be equally apportioned among all the citizens according to their means."\(^{36}\)

Spain's provision emphasized only the obligation to pay taxes and not the relationship between benefit and taxes. The Spanish Constitution of 1812, nevertheless, made the most forceful statement of equality in taxation when it declared that, "[e]very Spaniard is likewise bound, without any distinction, to contribute in proportion to his means, to the expenses of the state."\(^{37}\) In Bolivia, the Constitution of 1826 emphasized the theme that all taxes should be equally imposed on taxpayers by declaring, "[t]he Taxes shall be fairly imposed, without either exception or privilege."\(^{38}\) Thus, earlier constitutions emphasized various aspects of the concept of equality in taxation. Their force as a binding rule, however, depended upon the role courts played in the enforcement of constitutional provisions.

**IV. EQUALITY AND TAXATION: THE ROLE OF JUDICIAL REVIEW**

Though many systems may be described as constitutional systems, they can vary dramatically depending on the legal role constitutions play. Constitutions begin by establishing or legalizing the political order. Constitutions also set forth the parameters for the exercise of sovereignty. But do constitutions establish rights of citizens that are enforceable against the government? The traditional answer was no. Even though the constitutions of many countries were based on the inalienable rights of individuals, judicial review of legislative acts to determine their validity in the face of constitutional rights was not a

\(^{36}\) **CONST. of 1791 DECLARATION OF THE RIGHTS OF MAN AND CITIZEN**, art. 13 (Fr.), reprinted in **CONSTITUTIONS THAT MADE HISTORY**, supra note 17, at 84–85.

\(^{37}\) **CONSTITUCIÓN [C.E.]** tit. I, ch. II, art. 8 (Spain), reprinted in **CONSTITUTIONS THAT MADE HISTORY**, supra note 17, at 118.

valid exercise of the judicial power. This left the interpretation of constitutional rights to the self-imposed limits of the legislature.\textsuperscript{39}

In this context, is a constitutional limitation truly a norm? It must be said that its utility lies in its inspirational value as a reminder to legislators and the people. Ultimately, a constitutional limitation commands legislators to judge themselves and commands the people to judge their legislatures. This tradition can be seen quite clearly in the French tradition, which gave the judiciary no power to dispense with a statute and, thus, confined the role of the judge to the faithful application of the statute.\textsuperscript{40} Indeed, this strong democratic disposition was initially supported in some American articles and was addressed specifically in the Pennsylvania Constitution of 1776, which stated that "no power of suspending laws shall be exercised, unless by the legislature, or its authority."\textsuperscript{41}

In general, however, most Americans did not have the same fear of judicial power that the French had. Long before the United States Supreme Court established its power to determine the constitutionality of legislation in \textit{Marbury v. Madison}\textsuperscript{42} in 1803, courts in New Jersey in 1780,\textsuperscript{43} Rhode Island in 1787,\textsuperscript{44} and North Carolina in 1787\textsuperscript{45} all declared laws of their legislatures incompatible with rights established by their state constitutions and, thus, void. This began the American tradition of judicial review that is generally described as a decentralized approach, which gives the power to review statutes for their compatibility with constitutional prescriptions to all courts in the judicial system.\textsuperscript{46} Cases, whether they involve common law or equity, statutes or constitutions, are resolved by the same courts under the same procedures.

\textsuperscript{39} \textit{See infra} notes 40–48 and accompanying text.
\textsuperscript{41} \textit{PA. CONST.} of 1776, art. 9, § 12, \textit{reprinted in Constitutions That Made History}, \textit{supra} note 17, at 26.
\textsuperscript{42} 5 U.S. 137 (1803).
\textsuperscript{43} ROBERT VON MOSCHIZIKER, \textit{JUDICIAL REVIEW OF LEGISLATION} 30–33 (Da Capo Press 1971) (discussing Holmes v. Walton, 9 N.J.L. 444 (N.J. Sup. Ct. 1780)).
\textsuperscript{44} THAYER, CASES ON CONSTITUTIONAL LAW 73 (discussing Trevett v. Weeden (R.I. Sup. Ct. 1786)).
\textsuperscript{45} Bayard v. Singleton, 1 N.C. (Mart.) 48 (1787).
\textsuperscript{46} \textit{See MAURO CAPPNELLETI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW} 14 (Bobbs-Merrill 1979).
On the contrary, in Europe, with the exception of Austria, there was little judicial review of the constitutionality of legislation until after World War II. In the aftermath of World War II, many European countries established new constitutional systems and adopted a model of judicial review quite different from that of the United States. Under this model, constitutional review is relegated to a single court that has sole jurisdiction over constitutional matters. Constitutional review is its only jurisdiction. This is best described as the centralized model of judicial review. Until quite recently, the constitutional review of tax legislation pursuant to the requirement of equality did not occur in Europe. Consequently, the European experience must be viewed in the context that judicial consideration of the nature of equality in taxation commenced in a world that had experienced much since the eighteenth century.

V. THE CHANGING FACE OF EQUALITY AS A CONSTITUTIONAL TAX NORM

Since the changing face of equality as a constitutional tax norm developed over time, this section starts with the early American experience, particularly relating to the American states' constitutional review. The changing attitude toward equality and judicial intervention, which is best captured by the United States Supreme Court's decisions on equal protection, will be addressed second. Finally, a striking new face of equality that has emerged in apparent coexistence with prior conceptions will be considered by examining the jurisprudence of the German Federal Constitutional Court.

A. The Concept of Equality Before the State Courts in the United States

An important cause of the American Revolution was the perceived unfairness of British taxation. The cry of "no taxation without representation" was inspired by John Locke's maxim of just taxation, which stated that "[legislators] must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies." But Locke also recognized a citizen's duty to pay

48 Id. at 40-42.
49 CAPPETI & COHEN, supra note 46.
50 LOCKE, supra note 5. The Massachusetts Constitution incorporated this precept. MASS. CONST. OF 1789, pt. I, art. XXIII, reprinted in CONSTITUTIONS THAT MADE HISTORY, supra
taxes. These sentiments were reflected in several American states' constitutions. For example, in 1776, Pennsylvania's Constitution declared "[t]hat every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion to the expense of that protection . . . ."52

What implications do these principles have when they have been made constitutional norms? The precept requiring taxation only when there is representation guarantees a governmental form that should lead to fair taxation. In 1830, Chief Justice Marshall, writing for the United States Supreme Court, addressed this hope of representative government as follows: "[T]he interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise taxation."53 In addition to the adoption of representative government, many state governments adopted provisions specifically on taxation, with the simplest relating burden to benefit. Some states found that from these simple constitutional precepts one necessarily derived a requirement of equality in taxation.54

How did the notion of equality affect the legislative power to tax? The original purpose of equality in taxation was to prevent both privilege and oppression. In ancient regimes, some were able to receive exemptions from taxation while others without influence paid the bulk of the taxes. Shifting from a monarch to a legislature was not sufficient to guarantee fair taxation. The equality clause was meant to prevent "spoliation by a dominant faction."55

Many state constitutions adopted provisions on equality, uniformity, or proportionality in tax over the course of the nineteenth century.56 Interestingly, even where there was no specific reference to taxation in the Pennsylvania Constitution at the time,57 the Supreme Court of Pennsylvania found such a limitation against arbitrary or discriminatory tax was implied by the very notion of the power to tax.

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51 LOCKE, supra note 5.
52 PA. CONST. of 1776, art. VIII, reprinted in CONSTITUTIONS THAT MADE HISTORY, supra note 17, at 26. This provision was left out of the Pennsylvania Constitution of 1790. See PA. CONST. OF 1790, reprinted in SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, supra note 34. For other state constitutions that included similar language see supra note 33.
54 See Cumberland & Pa. R.R., 40 Md. 22, 52 (1873).
55 City of Lexington v. McQuillan's Heirs, 31 Ky. (9 Dana) 513 (1839).
56 For a comprehensive treatment of equality in state taxation, see NEWHOUSE, supra note 32.
57 Pennsylvania's provision on taxes in its 1776 Constitution was left out of the Pennsylvania Constitution of 1790. See id. at 1199.
Accordingly, the court stated, "[i]t is the theory of a republican government that taxes shall be laid equally, in proportion to the nature of the property; and when collected, shall be applied only to purposes in which taxpayers shall have equal interest."\textsuperscript{58} Indeed, a later Pennsylvania case developed a notion of equality from the constitutional provision guaranteeing the "inherent and indefeasible right of men," which protects against "all unjust, unreasonable and palpably unequal exactions . . . .\textsuperscript{59}

The specific constitutional limitations on taxation adopted by the states took various forms.\textsuperscript{60} These included requirements of equality, uniformity, proportionality, and reasonableness of taxation on the basis of value. Though the language varied, state courts uniformly viewed these provisions as founded upon the requirement of equality in taxation.

Though equality was the touchstone, there was a wide difference of opinion on the precise meaning of equality and its constitutional effect. The courts had to confront critical issues of interpretation. Did the concepts apply to all taxes or only to property taxes? If all taxes, did it apply to all taxes in the same way? Did equality require rigid formalism such that the base had to be determined or measured in the same way, or was there some flexibility such that only effective taxation had to be approximately equal? Did equality require a concept of universality so that any exemptions from taxation were impermissible?

1. Unique Problems of Equality Posed by State Property Taxes

Some early thoughts on equality clearly reflected Adam Smith's tax canons, which required taxes to be proportional or equal and related the burden of taxation to the benefit the taxpayer derived from society.\textsuperscript{61} In 1862, a Wisconsin court concluded that "socially and politically all are equal" and that "the burden of supporting the government should be borne equally by all the individuals composing it, in proportion to the benefits conferred."\textsuperscript{62} This treatment was based on a simple assumption that one benefited in proportion to what one owned.

This approach led to extreme limits on some states' power to tax property. In those states, taxes had to be the same on all property, that

\textsuperscript{58} Sharpless v. Major of Philadelphia, 21 Pa. 147, 168 (1853).
\textsuperscript{59} In re Washington Avenue, 69 Pa. 352, 363 (1871).
\textsuperscript{60} See NEWHOUSE, supra note 32, at 17-18.
\textsuperscript{61} SMITH, supra note 22.
\textsuperscript{62} Knowlton v. Bd. of Supervisors, 9 Wis. 410, 416-17 (1859), aff'd, 15 Wis. 600 (1862).
is, the government could only tax on the basis of reasonably determined market value, the rates had to be the same on all classes of property, and no exemptions were permitted.\textsuperscript{63} The philosophy behind these provisions was simple and straightforward. Since property could be held in various forms, government should not burden one form any more than any other, and exemptions of any kind were impermissible because everyone had an obligation to pay a proportional tax on whatever property they had. As put by the California Supreme Court, the purpose of the constitution was "to secure that equality of taxation which results from subjecting all property to the same burden."\textsuperscript{64} That court found that the legislature lacked power to provide exemptions because "in all just systems of government, the burdens of taxation should be distributed as equally as practicable."\textsuperscript{65}

Such a theory of equality in taxation faced difficult times when considering the vast economic changes confronting society from the nineteenth to twentieth centuries. Where land was the principle asset, proportionate tax on value was practical. But as economies changed and wealth was transformed from tangibles to intangibles and incomes from rents to profits, old notions of property were strained. Even though some states still follow these basic precepts of equality today, most have responded to the force of circumstances.

A very early case, \textit{Rhinehart v. Schuler},\textsuperscript{66} confronted this predicament in a very unusual way. Faced with the impossibility of valuing land in a frontier setting, the court decided that half a loaf was better than none, so it approved an alternate valuation system. Though some courts at this time viewed the notion of equality and uniformity in taxation as requiring universality, that is, proportional taxation on all property without exception, other courts, including the dissent in \textit{Rhinehart}, accepted the legislative power to discriminate among the subjects of taxation by choosing to tax or not to tax or by applying different rates to different kinds of property. But once a category of property, such as real estate, was selected by the legislature, it was generally assumed, even by the majority in \textit{Rhinehart}, that the dictates of equality and uniformity required universality within the class; that is, the class of property would be taxed under the valuation method, the same rate, and without exception. Without such uniformity of taxation, it was concluded that some would be asked unfairly to bear a disproportionate burden.\textsuperscript{67}

\textsuperscript{63} Exchange Bank v. Hines, 3 Ohio St. 1, 15 (1853).
\textsuperscript{64} People v. McCreary, 34 Cal. 432, 457 (1868).
\textsuperscript{65} \textit{Id.} at 460.
\textsuperscript{66} 7 Ill. (2 Gilm.) 473 (1845).
\textsuperscript{67} \textit{Id.} at 531–32 (Scates, J., dissenting).
Clearly, such an approach grants some additional latitude to the legislature since it affords that body the power to classify property for purposes of differential taxation. One must consider the question of how great a breach this is in the traditional notion of equality. Classification implies selecting previously undifferentiated subjects for unequal treatment. Does this constitutionally transform the requirement of equality into mere formal equality before the law by which all who fall within a legislative classification must be treated the same, or does the constitution still necessitate substantive equality requiring that there be appropriate reasons for the classification? According to the dissent in *Rhinehart*, and to many courts in the nineteenth century, it was the latter. To many, real property was an obvious, discrete classification such that the legislators lacked the power to differentiate among its types. Indeed, this was a fairly prevalent attitude at the time and its force was recognized and generally accepted even by the majority in *Rhinehart* when it upheld the statute.

In this context, the majority felt constricted by the practical dilemma of having to value property located on the frontier where appraisals simply could not be made. The majority upheld a different system of valuation for such property based on the assumption that actually trying to find a market value for such property would produce vastly inconsistent results; even more intense than the problem inherent in systems of property taxation that must rely on subjective judgment of value. Thus, in the majority's opinion, adhering to a strict standard of equality would result in disaster: "Taxes would thus become unequal, the burdens of government would not be equitably distributed among our citizens, all uniformity would be destroyed, and the object of the constitution would not be accomplished." This may well be one of the earliest judicial expressions of a view of the inherent contradiction within the concept of equality that adherence to a formal concept of equality can beget real inequality. According to this view, the legislature should not be restricted by such a formal notion of equality in the *appropriate situation*.

The *Rhinehart* decision did not reflect the majority of the states at that time. Indeed, it did not even represent the law in Illinois for long. Nevertheless, it did form part of a common history of the American state courts' struggles to define the parameters of legislative power in terms of the principle of equality. Moreover, even though the principle of equality has lost some of its force over the

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68 *Id.* at 515-16.

69 Several years later, Illinois reasserted a doctrine of strict equality in taxation, requiring strict uniformity. See *Newhouse*, *supra* note 32, at 269-73.
years, state courts continue to take the constitutional mandates seriously and to subject state legislation to significant examination for constitutional compliance.

An example is a 1949 Massachusetts case\(^\text{70}\) that dealt with the question of whether certain legislative exemptions from the general property tax were permitted. The Massachusetts Supreme Court recognized that not all general principles could "be applied with absolute literal exactness"\(^\text{71}\) and that "[s]ome exemptions founded upon compelling reasons are permissible."\(^\text{72}\) The Court asserted, however, that a compelling reason justifying discrimination was just that, a compelling reason. The Court concluded:

> It is manifest from the language of the Constitution, and from the legislation under it, that all property within the Commonwealth, which is owned and held in such a way that it ought to be available by its owner to increase his ability and enlarge his duty to assist in defraying the expenses of the government, must be included in the property upon which assessments are made.\(^\text{73}\)

This standard left little room for exemptions; only the property of charitable or religious organizations or cases involving hardship could be legitimately excluded from the general property tax by the legislature.

The change in economic activity during the nineteenth century created great challenges to the formal, or classical, equality theory. The simple forms of property ownership of the eighteenth century had been augmented dramatically by the growth of new economic activity, especially in manufacturing, and by the creation of vast new forms of wealth in intangibles. Legislators were attracted for many reasons, both laudable and not, to the benefits that tax advantages provided to both old and new businesses that remained or located in a state. This led directly to cries of unfairness by taxpayers and to constitutional amendments that attempted to revitalize classical notions of equality.

The growth of intangible wealth presented particular problems in taxation due to the difficulty of using actual value as the tax base. Corporate shares, for example, presented particular problems for assessment based on market value. In many cases, the adoption of in-

\(^{70}\) Opinion of the Justices, 85 N.E.2d 222 (Mass. 1949).

\(^{71}\) Id. at 226.

\(^{72}\) Id.

\(^{73}\) Id. (quoting Opinion of the Justices, 84 N.E. 449, 502 (Mass. 1907)).
come tax systems was spurred on by the acknowledgment that income tax was the only effective way to deal with such intangibles.\textsuperscript{74} In addition, taxing representative property involved potential double taxation to the extent that the property represented had already been taxed in another's hands. For example, a debtor taxpayer could be taxed on the full value of financed property while at the same time the creditor was taxed on the value of the debt. Courts differed on whether exemptions based on double taxation were permissible especially because such exemptions typically were overinclusive.\textsuperscript{75}

Once some courts recognized the practical difficulties of treating all property alike, some accepted that the principles of equality must operate tax by tax. Some courts took the next step by approving classifications within a tax. Three categories of property were recognized as having obvious differences: real property, tangible personal property, and intangible personal property. Courts varied considerably.\textsuperscript{76} Argument focused on the economic or administrative justifications that reflected the nature and practicalities of the particular tax. At the same time courts struggled with the niceties of the requirements of equality in property taxation, they began to accept the use of tax discrimination to advance appropriate public purposes unrelated to the general purposes of taxation to collect revenue on a fair and reasonable basis. There is still resistance to these latter kinds of justification today.\textsuperscript{77}

2. Unique Problems of Equality Posed by State Income Taxes

Subjecting tax legislation to a proactive requirement of equality was commonly understood as an appropriate exercise of judicial review. The commonly adopted approach in the states emphasized a formal, classical notion of equality that was initially tied to property taxation.

Income taxation provided the most difficult challenge to the classical notion of equality and, in many cases, led to the substantial contraction of its force. But this was not the result in every state. The confrontation of classical views of equality with changing perception

\textsuperscript{74} Tennessee, for example, constitutionally authorized the income taxation of stocks and bonds to the extent they were not taxed under property tax laws. See Shields v. Williams, 19 S.W.2d 261 (Tenn. 1929). See generally DICK NETZER, ECONOMICS OF THE PROPERTY TAX 138-141 (1961).

\textsuperscript{75} See NEWHOUSE, supra note 32, at 1833–34.

\textsuperscript{76} See Gottlieb v. City of Milwaukee, 147 N.W.2d 633 (Wis. 1967) (exemptions, but not partial exemptions, allowed); Wright v. Steers, 179 N.E.2d 721 (Ind. 1962) (classifications, but not exemptions, allowed).

\textsuperscript{77} For a comprehensive examination of those trends, see NEWHOUSE, supra note 32, at 1769–1922.
of social needs expressed in income taxation demonstrates the differing and changing value choices facing modern society.

The challenge of taxing representative or intangible property under notions of proportionality and market value first led state legislatures to use "property" taxes based on annualized value, that is, value based on capitalization of the income stream. As a property tax, such an approach was often problematic in terms of the requirements of uniformity. A changed strategy based on income taxation that taxed intangible income streams directly had greater success.

Income taxation, more than any other system of taxation, presents the fundamental problem of defining equality in taxation. Initially, in some states, the principles of equality were considered to apply uniformly to all taxes without exception; thus, they were subject to the same rules, that is, the same base (value) and the same effective rates, without exceptions. But in many cases, strict notions of equality were only deemed applicable to property taxes either due to the precise wording of the constitutional provision or because judicial construction dictated that these standards of equality were not applicable to the characteristics and attributes of non-property tax bases. Courts first explored the essential nature of the income tax to determine whether it was simply a tax on property.

The State of Massachusetts is one example of a state that only applied strict uniformity to property taxation. Yet, the Supreme Court of Massachusetts concluded that "[i]n its essence a tax upon income from property is a tax upon the property." Thus, the court declared the income tax statute unconstitutional because it used a different standard of value, resulting in a lack of uniformity in effective rates.

In 1918 a Missouri court upheld an income tax while admitting that income tax was in one sense a tax on property and labor. Other states, however, concluded that income taxes were simply not taxes on property. Often, income taxes were simply classified as non-property excise taxes. The oft-repeated view was that an income tax was a tax on a privilege or on the right to produce, create, receive, or enjoy and not on any specific property. The basic justification for

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78 See Opinion of the Justices, 108 N.E. 570, 573 (Mass. 1915) (holding that taxes that are not proportional are unconstitutional).
79 Id. at 574.
80 Ludlow-Saylor Wire Co. v. Wollbrink, 205 S.W. 196, 201 (Mo. 1918) (holding that the income tax does not contravene "any of the limitations imposed on their [the legislature's] action by the constitution.").
81 See, e.g., Featherstone v. Norman, 153 S.E. 58, 64 (Ga. 1930) (holding that the taxation of income is not taxation of property).
82 Id.; see also State ex rel. Knox v. Gulf, M & N, R.R. Co., 104 S.O. 689 (Miss. 1924).
83 See Diefendorf v. Gallett, 10 P.2d 307, 315 (Id. 1932) (holding that "a tax upon net in-
tax was now perceived differently. Tax was no longer justified as a cost imposed for the government's protection of one's property. Instead, income tax was a cost conferred on the taxpayer by the government for the privilege of using one's labor and property.

Some courts went further and regarded income tax as sui generis. Often, these courts rejected the market-oriented benefit or license approach to taxation. These courts found that members of society had an affirmative duty to pay taxes in accordance with the equitable basis of ability to pay regardless of the actual benefit they derived from government. This led to a different notion of the ideal of equality that justified both graduated rates and exemptions as reasonable classifications on the basis of ability to pay. This new notion of equality abandoned strict uniformity adopting its opposite—progressive taxation. According to one court,

[the basic principle underlying... such classifications is the ability of the taxpayer to pay. Many economists and students of government regard a progressive tax as more just and equal in point of sacrifice than a proportional one, since persons with large incomes can more readily spare a fixed portion of their income than those who have difficulty in sustaining themselves upon what they receive each year.]

In order to free legislators to adopt this more egalitarian view of equality in tax, courts moved toward a more liberal view of the standard of review for testing tax legislation against the precepts of equality. In some cases this standard requires only minimum rationality, which is similar to modern federal equal protection analysis.

Though the retreat from classical notions of equality represents the overwhelming trend, an important judicial debate over the nature of equality as a constitutional norm in taxation took place in the latter half of the twentieth century in Pennsylvania in Amidon v. Kane.

84 See Reed v. Bjornson, 253 N.W. 102, 105 (Minn. 1934) (holding that people enjoy the protections offered by stable society and have an obligation to pay for it).

85 "A proportionate tax is one in which the average tax (total tax/tax base) is the same as the tax base of the taxpayer increases. A progressive tax is one in which the average tax increases as the tax base of the taxpayer increases. A regressive tax is one in which the average tax decreases as the tax base of the taxpayer increases." Barker, supra note 23 (manuscript at 10 n.24, on file with author).

86 Bacon v. Ranson, 56 S.W.2d 786, 789 (Mo. 1932).

87 See Standard Lumber Co. v. Pierce, 228 P. 812, 818 (Or. 1924) (holding that a graduated income rate does not violate the Fourteenth Amendment). For consideration of federal developments, see infra Part V.C.

88 279 A.2d 53 (Pa. 1971) (holding that the tax structure did not meet requirements of the...
This case demonstrates the continued rigor of the application of the concept of equality to the income tax.

Prior to *Amidon*, the particular significance of the notion of equality in Pennsylvania can be attributed in part to the state’s specific experience. The language of the modern uniformity clause in Pennsylvania requires that taxes be uniform on the same class of subjects. This rather permissive requirement recognizes the right of the legislature to classify the subject matter of tax and to apply different rates to different classes. Thus, the courts recognized income as a separate class. The notion of equality in Pennsylvania that was applied to income taxation was a strict one. The subject had to be taxed uniformly, the base had to be determined in the same way, the rates had to be proportional, and exemptions not authorized by the constitution were not allowed. Two unique features were also relevant to the particular situation in Pennsylvania. First, both in 1913 and 1928, the people of Pennsylvania rejected a constitutional amendment providing for progressive taxation. Second, in 1968, the constitution was amended to allow legislation to establish classes based on age, disability, infirmity, or poverty for those who are in need of special exemptions or tax provisions.

Thereafter, Pennsylvania adopted an income tax with a flat rate. The state used a technique utilized by many states in America; it piggy-backed on the federal system by adopting the federal tax base for state purposes. The tax was soon challenged on the basis that it violated the requirements of equality and uniformity. The Pennsylvania Supreme Court asserted that the principle of uniformity applied to the income tax and that all taxes must satisfy the requirement of "substantial equality of the tax burden." That meant that people in similar situations had to be taxed the same. As a general principle, once a tax is imposed upon a particular class, "[p]art of the class may

uniformity clause of the state constitution).

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89 *Pa. Const.* art. IX, §1.
90 Though Pennsylvania courts initially classified income as property and concluded that it constituted one class for purposes of determining equality in taxation, that view was abandoned. *See Turco Paint & Varnish Co. v. Kalodner*, 181 A. 37 (1936) (upholding corporate income tax as a privilege tax).
92 *Id.*
94 *Id.* at 67 (Pomeroy, J., concurring).
95 *Id.* at 58.
96 *Id.* at 66.
not be excused, regardless of the motive behind the action." Thus, people who were in similar circumstances were those with comparable amounts of the tax base. The tax base for comparing taxpayers was each person's portion of total net income.

Certainly, the justices of the Pennsylvania Supreme Court did not expect perfect equality and recognized a necessary tolerance for the practicalities of raising revenue and of achieving a fair and equitable allocation of the burdens of government. The court found, however, that many aspects of the federal income tax base created severe inequalities rendering the state tax unconstitutional. For example, the tax was replete with preferences and special exemptions that were based not on the natural exigencies of taxation but on furthering certain non-tax political and social policies.

The court reviewed the situations of "typical taxpayers [with the same income] claiming representative exemptions and deductions." In examining hypothetical taxpayers who differed as to items like the exclusion for certain interest income and the deductions for home mortgage interest, retirement plans, and charitable contributions, to name a few, the court found a range of disparate treatments. It was the court's view that these hypothetical taxpayers were similarly situated because they had enjoyed the same privilege of "'receiving, earning or otherwise acquiring' the same dollar amount of annual income . . . ." Yet, the taxpayers did not have to pay the same dollar amount of taxes; indeed, their burden varied by as much as 50%. In the words of the court, "These inequalities result, of course, from the manifold tax preferences afforded taxpayers depending among other things upon whether a particular taxpayer is a wage earner or self-employed, renter or home owner, etc." Implicit in the court's discussion is the fact that these provisions create different obligations to pay taxes that have nothing to do with either the benefit received by the taxpayers or the taxpayers' abilities to pay. Moreover, these provisions generally result in a greater proportion of tax on those people who have a lesser ability to pay.

In this context, it is interesting to note that the Pennsylvania income tax law considered by the court had eliminated many of the tax preferences that have inundated federal tax law. The Pennsylvania scheme had started with the concept of "taxable income" (net income)

97 Id. at 68 (quoting Saulsbury v. Bethlehem Steel Co., 196 A.2d 664, 666 (Pa. 1964)).
98 Id. at 63.
99 Id. at 61.
100 Id. at 62.
101 Id. at 63.
102 Id. at 62.
under the federal system that generally taxes profits stated in terms of gross income minus any deductions associated with the cost of producing that income. The Pennsylvania statute had, however, added back into the income tax base many of the business and investment tax preferences allowed by federal law, including the difference between accelerated depreciation and economic depreciation, excess investment interest, excess depletion, and the capital gains differential. From the court's perspective, however, the legislature had not gone far enough to eliminate the inequality. Tax preferences violated the concept of equality regardless of their non-tax, social rationale. The court concluded:

Whether or not these or any or all of the myriad other tax preferences implicit in Article III of the Tax Reform Code of 1971 might be thought to serve some useful social policy, the fact remains that unequal burdens are being imposed . . . . These pervasive and impermissible discriminations between similarly situated taxpayers render Article III invalid.

Pennsylvania does have a valid income tax law today, but it bears the clear imprint of this view of equality. The present law is the product of a rigorous attempt to exclude all sources of preference in business and individual income deductions, including deductions for personal consumption. Pennsylvania may well represent the closest attempt at comprehensive income taxation found in the world today.

B. The General Concept of Equality Before the Federal Courts in the United States

It was not until the aftermath of the Civil War that the United States Constitution contained a provision on equality. Neither the original Constitution nor the original Bill of Rights mentioned equality. The Fourteenth Amendment, adopted after the Civil War, provides, "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." Though equal protection of the laws only applied to state governments by its terms, it was thought to be inherent in the concept of due process, which was

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104 Amidon, 279 A.2d at 55 n.2 (citing 72 PA. STAT. ANN. § 7302(q) (West. 1971)).
105 Id. at 63.
107 U.S. CONST. amend. XIV, § 1 (passed by Congress June 13, 1866, ratified July 9, 1868).
a limitation on federal power under the Fifth Amendment.108 This principle was not clearly established, however, until 1954 in the case of Bolling v. Sharpe.109

In the late nineteenth century, an important debate took place before the United States Supreme Court concerning the nature of equality and the federal income tax in Pollock v. Farmers' Loan & Trust Co.110 In Pollock, the federal income tax law was challenged on the basis of its incompatibility with the following provision: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."111 The Court determined that the income tax was unconstitutional because it was a direct tax laid in violation of the proportionality requirement. The question of equality and the income tax was also a central issue. In a concurring opinion, Justice Field concluded that "another consideration against the law" was the principle of equality.112

Justice Harlan, in his dissenting opinion, recognized that the notion of equality, derived from the essential idea of tax, did impose certain fundamental limitations on tax legislation.113 He also found that several features of the particular income tax before the Court were defective, but that the act could be sustained without them.114 Justice Harlan argued that modern notions of justice did not require precise equality. He noted that taxes on consumable goods were alleged to frequently ignore principles of equality, but that under the practical conditions of life, no one is the same. Thus, he concluded that classical or formal equality in taxation requiring proportionality was not truly equal because it ignored taxpayers' abilities to pay.115

Harlan's concept of equality perceives a different objective underlying the need for fairness in taxation. One of the basic tenets of classical equality was that there should be no privileges in taxation because "the greatest source of inequality" is the practice of those who try to shift tax to someone else. The new concept of equality

108 The Fifth Amendment, which was part of the original Bill of Rights, provides, in part, "No person shall... be deprived of life, liberty or property, without due process of law... ." U.S. CONST. amend. V.
111 U.S. CONST. art. I, § 9, cl. 4.
112 Pollock I, 157 U.S. at 592–93 (1895) (Field, J., concurring).
113 Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 676 (1896) (Harlan, J., dissenting) [hereinafter Pollock II]. Note that it was not until later that the Court acknowledged that the equal protection of the law required by the Fourteenth Amendment applied to the federal government as well as the states. See infra note 160.
114 Pollock II, 158 U.S. at 676.
115 Id. at 675–76.
TRANSFORMS THE FORMAL EQUALITY OF PROPORTIONALITY IN TAX INTO A
SUBSTANTIVE EQUALITY OF PERMISSIVE, OR EVEN REQUIRED,
DISPROPORTIONALITY IN ORDER TO COMBAT THE ADVANTAGES OR DISADVANTAGES
AFFORDED PARTICULAR CLASSES BY SOCIETY. SIGNIFICANT DIFFERENTIATION
AMONG TAXPAYERS IS NECESSARY IN ORDER TO REDRESS ECONOMIC
INEQUALITY. \textsuperscript{116} THESE APPROACHES DIFFER ON HOW TAXPAYERS ARE JUDGED TO
BE SIMILAR OR DISSIMILAR, AND HOW SUCH DIFFERENCES ARE WEIGHED.
CLASSICAL EQUALITY THEORY ADDRESSES THE EQUAL APPLICATION OF TAX BASED
ON MATHEMATICAL MEANS WHEREAS ABILITY TO PAY SEeks TO ADDRESS
INEQUALITY OF CIRCUMSTANCES.

JUSTICE HARLAN, HOWEVER, ADMITTED THAT THE INCOME TAX LAW CON-
TAINED CERTAIN OBJECTIONABLE EXEMPTIONS THAT WERE NOT BASED ON CON-
SIDERATIONS OF ABILITY TO PAY. \textsuperscript{117} IN HIS VIEW, THESE COULD BE INVALIDED
WITHOUT INVALIDATING THE ENTIRE LAW. \textsuperscript{118} Thus, equality as measured by
ABILITY TO PAY STILL SHOULD LIMIT LEGISLATIVE TAX AUTHORITY APPROPRIATELY
WHEN EXEMPTIONS ARE NOT BASED ON ABILITY TO PAY.

IT DID NOT TAKE LONG FOR EVEN THIS MORE LIMITED SCOPE FOR CONSTITU-
TIONAL EQUALITY TO FADE FROM MODERN THOUGHT. THOUGH DURING THE LATTER
PART OF THE NINETEENTH CENTURY STATE COURTS WERE STRUGGLING WITH THE
PROBLEMS OF TAXATION AND CLASSICAL CONCEPTS OF EQUALITY, FEDERAL COURTS
VIEWED THE EQUAL PROTECTION CLAUSE QUITE DIFFERENTLY. IN \textit{BELLS GAP
R.R. CO. v. PENNSYLVANIA}, \textsuperscript{119} THE SUPREME COURT WAS ASKED TO REVIEW A
STATE TAX ON CORPORATE SECURITIES FOR WHICH THE TAX BASE WAS MEASURED
BY THE SECURITIES' NOMINAL OR FACE VALUE, RATHER THAN THEIR FAIR MARKET
VALUE. UNDER A VIEW OF EQUALITY REQUIRING UNIVERSALITY, MEANING THAT
ALL PROPERTY MUST BE TREATED IN THE SAME WAY, \textsuperscript{120} THE DIFFERENT METHODS
OF VALUATION WOULD HAVE BEEN A VIOLATION OF THE PRINCIPLE OF EQUALITY.
IN FINDING NO DEFECT IN THE LEGISLATION, THE COURT REJECTED THE ARGUMENT
THAT EQUALITY REQUIRED STRICT UNIFORMITY. INSTEAD, THE COURT FOUND THAT
IN TAXATION "THE LAW DOES NOT MAKE ANY DISCRIMINATION IN THIS REGARD
WHICH THE STATE IS NOT COMPETENT TO MAKE." \textsuperscript{121} THE COURT CONCLUDED:

\begin{quote}
[T]he Fourteenth Amendment was not intended to compel the
State to adopt an iron rule of equal taxation. If that were its
proper construction, . . . it would render nugatory those dis-
criminations which the best interests of society require, which
\end{quote}

\textsuperscript{116} See Pollock I, 157 U.S. at 505-06, 514-16.
\textsuperscript{117} Pollock II, 158 U.S. at 674 (Harlan, J., dissenting). For example, the exemptions for
large amounts of accumulated capital such as those available to savings banks, mutual insurance
companies, and loan associations. Id. at 675.
\textsuperscript{118} Id.
\textsuperscript{119} 134 U.S. 232 (1890).
\textsuperscript{120} See supra text accompanying notes 64-67 for a description of this approach.
\textsuperscript{121} Bells Gap, 134 U.S. at 237.
are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt.\textsuperscript{122}

The Court hinted at a much more limited role for equal protection in the defense of individual rights, suggesting that "clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."\textsuperscript{123}

\textit{Pacific Express Co. v. Seibert},\textsuperscript{124} a case decided just two years later, illustrates the beginnings of the transformation of the notion of equality. The Court saw a necessary relationship between discrimination and equality in taxation:

This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a \textit{perfect uniformity and equality of taxation} in the proper sense of those terms; and that a system imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens.\textsuperscript{125}

Here the Court is neither speaking of taxation according to ability to pay, nor speaking precisely of taxation according to the benefit derived by the taxpayer from the government. Instead, this is disproportionate taxation according to the burden or societal cost of different kinds of property. Such exceptions to the requirement of universality are clearly warranted. The Court did not explain, however, how or by whom these determinations were to be made.

Shortly after the Supreme Court declared the federal income tax unconstitutional in \textit{Pollock},\textsuperscript{126} the Supreme Court was confronted with the question whether progressive taxation violated the Equal Protection Clause. In \textit{Magoun v. Illinois Trust and Savings Bank},\textsuperscript{127} an 1897 case, the Supreme Court upheld Illinois' graduated rates of

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} 142 U.S. 339 (1892).

\textsuperscript{125} \textit{Id.} at 351 (emphasis added).

\textsuperscript{126} \textit{See supra} notes 85–86 and accompanying text.

\textsuperscript{127} 170 U.S. 283 (1898).
tax on inheritances. The Supreme Court reasoned that the Equal Protection Clause "only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances."\textsuperscript{128} Legislatures, however, do not have unlimited powers to classify. A permissible classification "is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and [which] is not a mere arbitrary selection,"\textsuperscript{129} or put differently, one based upon "some difference which bears a just and proper relation to the attempted classification."\textsuperscript{130} Though the Court set forth this test, it never analyzed the reasonableness of the classifications.\textsuperscript{131} Instead, the Court, recognizing that there were six classifications based on amount, determined that the classifications were permissible because the tax operated uniformly within each class.\textsuperscript{132} The dissenting opinion by Justice Brewer, who had authored the controlling authority cited by the majority,\textsuperscript{133} found the tax unequal because it was based on a purely arbitrary classification, wealth, which made the tax directly and intentionally unequal. The majority avoided responding to this assertion.

One particular feature of the Illinois tax bears closer scrutiny. The graduated rates in the Illinois tax operated on the entire amount transferred. For example, the tax was 3% on up to $10,000, but 4% on the entire amount if the total was over $10,000, and so forth. Thus, one who received $10,000 paid $300 netting $9,700, whereas one who received $10,001 paid $400.04 netting $9,600.96 therefore netting $99.04 less than the person who had been bequeathed less.\textsuperscript{134} There was no indication in the case that the classification scheme had any purpose other than to raise revenue. Thus, a tax does not violate the principle of equality even when it could change the relative position of persons vis-à-vis their means as measured by the tax base, in this case inheritance. Even though the tax may have literally treated all those in similar circumstances "uniformly and equally," which we

\textsuperscript{128} Id. at 293 (quoting Kentucky R.R. Tax Cases, 115 U.S. 321, 337 (1885)).

\textsuperscript{129} Id. at 294 (quoting Gulf, Colo. & S.F. Ry. Co. v. Ellis, 165 U.S. 150, 165 (1897) (Brewer, J.). Note that Justice Brewer filed a dissenting opinion in \textit{Magoun}. See id. at 301 (arguing that tax law that grades rate of tax on legacies to strangers by amount of legacy is unequal and violates the Constitution).

\textsuperscript{130} Id. at 294.

\textsuperscript{131} See id. at 300, where the Court reached its conclusion.

\textsuperscript{132} Note that in similar circumstances several state courts had found that although one could treat different items as separate classes, one could not treat different amounts of the same item as a separate class under general notions of equality. See discussion supra Part V.A.

\textsuperscript{133} \textit{See supra} note 125.

\textsuperscript{134} \textit{Magoun}, 170 U.S. at 300.
may call horizontal tax equity, its very different application to those in only slightly different circumstances might be considered quite disproportionate to the difference. Vertical equity does not just require that those with different resources be treated differently, but that they be treated differently in proportion to their difference. The Court's decision to focus on horizontal equity, while ignoring vertical equity, promotes only a cursory examination of the rationale behind the classification and its operation, leading to a limited role for courts.

Indeed, the Court indicated in a later case that it has no role at all to play in taxation. In its decision upholding the constitutionality of the federal income tax law, the Court easily dismissed a challenge under the Fifth Amendment:

[The Due Process Clause] is not a limitation upon the taxing power . . . . And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, . . . [or] was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.

Though in general the decade beginning in 1930 is marked as the end of the Supreme Court's interference with any congressional regulation of economic affairs, Brushaber v. Union Pacific indicates that the Court's role in testing the constitutionality of tax legislation had lost its significance many years earlier. It might be more accurate to say that by this time there was no federal doctrine of substantive equality unless some other important constitutional value was implicated. Justice Frankfurter contrasted the federal position with some states' views of equality in taxation in the following way: "This Court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of

135 See supra note 9 and accompanying text.
137 Id. at 24–25.
equality which alone the Equal Protection Clause was designed to assure."139

Exactly what is this "meritorious conception of equality" contained in the Fourteenth Amendment? It was by then to be understood in terms of the appropriate standard of judicial review. In the 1938 case of United States v. Carolene Product Co.,140 the Court in a non-tax case outlined the role of the courts:

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.141

The present state of federal equal protection law has led to assertions that equality is an empty concept.142 This judgment is well-merited when applied to the testing of economic regulation. A benchmark case in the Supreme Court's consideration of equal protection was United States Railroad Retirement Board v. Fritz.143 Fritz involved changes to the Railroad Retirement Act, which was a federal benefit system for railroad workers that paralleled the general Social Security system. Initially, workers who paid mandatory contributions or taxes to both systems could qualify for benefits under both systems. The new Act was meant to eliminate the double benefit but not the double taxes.

Many employees' benefits had already vested under the old law due to their contributions and length of service. Through the legislation, Congress had eliminated vested benefits for those persons who had not begun to receive benefits but who were no longer employed by the railroads in the year the amendments took effect. Those who were still employed were left with full benefits. The Court, however, found that this disparate treatment did not violate equal protection.

The Court's opinion began with the question of "the appropriate standard of judicial review to be applied when social and economic

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139 Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362, 368 (1940).
140 304 U.S. 144 (1938).
141 Id. at 152.
legislation enacted by Congress is challenged as being violative of the Fifth Amendment" where the legislation is not challenged on the basis of a suspect classification like race. The test was that when "the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time that the law was enacted must be assumed." This involves an issue of Congressional "power," not "wisdom," and it was power, not rationale or purpose, that carried the day. The Court concluded:

Applying those principles to this case, the plain language of § 231b (h) marks the beginning and end of our inquiry. There Congress determined that some of those who in the past received full windfall benefits would not continue to do so. Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purposes of phasing out those benefits.

The Court's view was that once Congress distinguished between classes, the Court was required to search out a plausible reason for such classification. The Court decided that Congress could have concluded that one class "had a greater equitable claim [than the other]," that is, that those still employed had a more just claim than those who were not still employed. According to the majority, once the Court finds a plausible reason, it is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision."

In his dissenting opinion, Justice Brennan concluded that the requirement of equality necessitated more. The tougher standard of the dissent highlights the discretion the Court extends to the legislature. The dissent would have required a finding first of "what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes." Justice Brennan was troubled by deriving the justification from the classification of the statute itself, especially when the justification conflicted with the

144 Id. at 174 (Rehnquist, C.J.).
145 Id. (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911)).
146 Id. at 176.
147 Id. at 176-77 (footnotes omitted).
148 Id. at 178.
149 Id. at 179 (quoting Fleming v. Nestor, 363 U.S. 603, 612 (1960)).
150 Id. at 184 (Brennan, J., dissenting).
151 Id. at 186-87.
legislative history's stated purpose to protect vested interests\textsuperscript{152} and, therefore, was not related to Congress's "actual purpose."\textsuperscript{153} Justice Brennan suggested "that the mode of analysis employed by the Court in this case virtually immunizes social and economic legislative classifications from judicial review."\textsuperscript{154} Thus, the majority's standard confers virtually total discretion for legislative action. Equality in the federal system becomes form without content.

Justice Brennan's admonition has particular force in taxation. This is demonstrated by the case of \textit{Madden v. Kentucky},\textsuperscript{155} where the Court found that the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes. The Court affirmed that in taxation, even more than in other fields, legislatures possess the greatest freedom of classification.\textsuperscript{156}

The treatment of federal doctrines on equality has so far focused on the latitude legislators have when their object is essentially to raise revenues. Taxation, of course, can serve social purposes other than simply raising revenue. For example,

\begin{quote}
Tax also performs an expenditure function today . . . . Income tax law is utilized to encourage or reward activities considered to be beneficial from society's perspective, including, for example, home ownership, health insurance, pensions, life insurance, and so forth in the noncommercial context, and tax holidays, accelerated depreciation, deductions for capital expenditures, credits, and so forth in the business context. Reducing the tax burden of certain individuals based on the special character of income or expense that is not shared by all is the equivalent of a direct tax expenditure. Thus, the tax structure serves as an apparatus, indeed a complex, infinitely patterned mosaic, which reconfigures the burdens of taxpayers on the basis of political decisions and social values. The aims and purposes of taxation include the purposeful use of the forms of taxation to promote economic and social results that are deemed to be politically desirable. Within the appearance of progressive tax form based on egalitarian principles of ability to pay through
\end{quote}

\textsuperscript{152} \textit{Id.} at 185. The explanation of this Bill stressed that persons with vested rights were to be protected.
\textsuperscript{153} \textit{Id.} at 193.
\textsuperscript{154} \textit{Id.} at 183.
\textsuperscript{155} 309 U.S. 83, 88 (1940).
\textsuperscript{156} \textit{Id.} at 87–88.
the manipulation of the concepts of income, capital, deductions, depreciation and credits, the obligations of taxpayers are metamorphosed according to new politically established principles of social merit. Tax incentives, tax preferences, and tax loopholes proliferate for those who have the wherewithal to take advantage. Thus, tax transfer payments are made through the taxing process that reallocates the burdens of society among its citizens.\(^\text{157}\)

The full implications of this important role tax plays undermines the very essence of classical equality.

In *Great Atlantic & Pacific Tea Co. v. Grosjean*,\(^\text{158}\) the Supreme Court provided unequivocal support for the use of the enormous potential of tax law to change society through unequal treatment. The Court concluded:

> Our decision need not, however, rest on the conceptions of subject, measure and rate of tax. Much broader considerations touching the state’s internal policy of police sustain the exaction . . . . Whatever a state may forbid or regulate it may permit upon condition that a fee be paid in return for the privilege, and such a fee may be exacted to discourage the prosecution of a business or to adjust competitive or economic inequalities. Taxation may be made the implement of the exercise of the state’s police power; and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful.\(^\text{159}\)

Legislatures are well aware of the enormous capacity of tax provisions to reward or punish. This discretion lodged in the legislature has, in the case of the United States, led to many special exemptions, incentives, and preferences aimed at special groups or special individuals. Legislatures have learned quickly how useful and politically opaque taxation can be.

The purposes behind such provisions can differ, from giving relief from a hardship that might reflect the taxpayer’s diminished ability to pay to outright subsidies. Indeed, oftentimes the particular justification depends solely on the particular values espoused by the

\(^{157}\) See Barker, *supra* note 23 (manuscript at 13–14).

\(^{158}\) 301 U.S. 412 (1937).

\(^{159}\) Id. at 425–26 (footnotes omitted).
commentator. Without question there are many hardships that may be created by taxation, so that even in the case of provisions aimed at relieving some, others are not helped, and distinctions are created that seriously test the important goals of fairness to taxpayers and equality of burden.

But many incentives clearly have nothing to do with the objective of fairness in taxation since their purpose is to treat taxpayers differently not on the basis of their particular circumstances, including their benefits received or their ability to pay, but instead on the basis of public purposes that intentionally distort equality. Only by targeting a minority for unfair treatment can one demonstrate a violation of equality under the Supreme Court’s test. Granting special provisions to a few, no matter who they are, at the expense of a larger group, is acceptable under the equal protection doctrine. These uses are inherently unequal. Nevertheless, state governments do not violate the equal protection doctrine by giving special tax incentives to particular industries or specific taxpayers, and tax holidays that subsidize specific activity do not violate the principle of equality.

One reason for this result is the recognition of the problematic relationship between taxation and expenditure. “Reducing the tax burden of certain individuals based on the special character of income or expense that is not shared by all is the equivalent of a direct tax expenditure.” This was recognized in Regan v. Taxation with Representation in Washington, a case involving a special exception provided for a veterans’ organization from the lobbying restrictions placed upon all other charitable and religious institutions. The result of this legislation was that the veterans’ organization could receive tax-deductible contributions from people for its lobbying efforts while other charities could not. The Court concluded that tax exemptions and deductions are a form of subsidy paid indirectly through the tax system. These have the same effect as a cash payment to the organization in the amount of tax it would have had to pay. Thus

161 See Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959) (holding that tax exemption for merchandise owned by a non-resident held in a warehouse solely for storage does not violate the Fourteenth Amendment).
162 Barker, supra note 23 (manuscript at 13); see also Edward A. Zelinsky, Are Tax “Beneﬁts” Constitutionally Equivalent to Direct Expenditures?, 112 HARV. L. REV. 379, 382 (1998) (arguing for the replacement of general categories of tax beneﬁts and direct expenditures with a case-by-case determination of a speciﬁc tax and direct spending program’s equivalence).
viewed by the Court, the tax statute was a legislative choice to subsidize one activity, but not another.\textsuperscript{164}

Once one views exemptions and such as subsidies, then has one not separated these discriminations from the tax function? Are we simply dealing with two acts instead of one, the first being a tax imposed equally on all and the second, an expenditure made to one or a few? If so, what is left of the original notion of equality that no special privileges in taxation should be granted? Nothing!

The legislature's ability to grant special privileges to a few is well illustrated in the case of \textit{Apache Bend Apartments, Ltd. v. United States}.\textsuperscript{165} This case involved a claim by a taxpayer that the special relief provisions included in the Tax Reform Act of 1986 violated equal protection. These transition rules "provided specified exemptions from designated provisions of the new tax laws to very, very few specified favored taxpayers."\textsuperscript{166} The plaintiffs were taxpayers who had not received special treatment but claimed that they were in a similar situation to those favored taxpayers. The Court viewed the relief sought by the plaintiffs as, essentially, preventing the Internal Revenue Service from enforcing "laws passed by Congress for the purpose of benefiting only those taxpayers who have political influence."\textsuperscript{167} Ultimately, the Fifth Circuit dismissed the case on the basis that the plaintiffs lacked the requisite standing to sue because they were asserting the rights of a "disfavored class" that included practically everyone.\textsuperscript{168}

The problem of standing in the United States presents serious impediments to the assertion of constitutional claims.\textsuperscript{169} But even if the parties had proceeded to the merits, it is quite unlikely that they would have prevailed. That is because the modern standard for evaluating equal protection claims leaves little room for meaningful review by the courts. Of course, equal protection is all about treating similarly situated people similarly. Unless the classification infringes a fundamental constitutional right (other than the right to equality),\textsuperscript{170} Congress is given the widest latitude in taxation to make distinctions between taxpayers. A legislative enactment represents a legislative determination that the classified persons or objects of taxation are, in fact, dissimilar. Such a determination cannot be overturned unless the

\textsuperscript{164} \textit{Id.} at 549.

\textsuperscript{165} 987 F.2d 1174 (5th Cir. 1993).

\textsuperscript{166} \textit{Id.} at 1175.

\textsuperscript{167} \textit{Id.} at 1179.

\textsuperscript{168} \textit{Id.} at 1177–78 (noting plaintiffs suffered no direct injury).

\textsuperscript{169} See \textit{infra} notes 188–90 and accompanying text.

classification does not bear a rational relationship to a legitimate governmental purpose.\(^{171}\) There is no requirement that the legislature supply this purpose, and the legislation will be sustained as long as the courts find any justification.\(^ {172}\) Indeed, the taxpayer must “negative every conceivable basis which might support”\(^ {173}\) the legislative classification. Though there is a requirement that there be a relation between justification and classification, the courts only require a plausible connection, not a provable one. In the case of individualized relief provisions for special taxpayers, it may be sufficient that Congress concluded that these few individuals faced hardship. Whether they did or did not is not judicially relevant. Speculation as to whether the classification was overinclusive is irrelevant; simply unwise legislation is not unconstitutional legislation. Underinclusive classifications, as alleged by the plaintiff in Apache Bend, can hardly be “a hostile and oppressive discrimination against particular persons and classes,”\(^ {174}\) unless motivated by a constitutionally impermissible purpose. Though modern taxation often creates extreme differences in the taxation of quite economically similar taxpayers, these disparities have not been viewed as involving the wholesale shifting of the tax burden from one class to another.

But what if that were the case? Even in the face of large-scale discrimination, in Nordlinger v. Hahn,\(^ {175}\) the Supreme Court sustained a statute on the basis of minimum rationality. In Nordlinger, certain taxpayers brought an equal protection challenge to Proposition 13, which was an amendment to the California Constitution that mandated a new system for real property taxation.\(^ {176}\) Under that amendment, California abandoned the typical market value or current value basis for assessing real property and mandated, instead, what can be called an acquisition value base. The amendment provided that the annual tax could not exceed one percent of “cash value.” Cash value was “defined as the assessed valuation as of the 1975-1976 tax year or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment.”\(^ {177}\) The assessed base could increase by no more than the lesser of two percent or the annual rate of inflation.\(^ {178}\)

\(^ {171}\) See Wheeler v. United States, 768 F.2d 1333, 1337 (Fed. Cir. 1985).
\(^ {172}\) Id.
\(^ {173}\) Madden, 309 U.S. at 88 (citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1912)).
\(^ {174}\) Regan, 461 U.S. at 547 (quoting Madden, 309 U.S. at 87–88).
\(^ {175}\) 505 U.S. 1 (1992).
\(^ {176}\) CAL. CONST. amend. XIII A.
\(^ {177}\) Nordlinger, 505 U.S. at 5 (citing CAL. CONST. amend. XIII A, § 2(a)).
\(^ {178}\) Id. (citing CAL. CONST. amend. XIII A, § 2(b)).
What happened could hardly have been unanticipated. Property values continued to surge in California so that by 1992, when the Supreme Court reviewed the situation, "dramatic disparities in the taxes paid by [taxpayers] owning similar pieces of property" had occurred.\(^{179}\) It was alleged that when the plaintiff in *Nordlinger* had purchased her house in 1988, she was paying about five times more in taxes than some of her neighbors who owned comparable homes.\(^ {180}\) Nonetheless, the Supreme Court held that the statute was constitutional.

One can hardly imagine a more striking example of a violation of the classical concept of equality. Classical equality required taxation of property according to what one has and that had to be determined on the basis of market value. While there might have to be exceptions made for certain types of property like intangibles that might be difficult to value, such was not the case for real property, which had been a standard tax base since the eighteenth century. Though there may be nothing sacrosanct in market value, it is generally considered the fairest base for generally assessing both benefit and ability. Where market value is ascertainable, it is considered to be the proper measurement of the tax base unless there are particular countervailing factors.

As outlined in the above section on state law, the concept of equality has recognized legitimate deviation from the requirements of uniform rates and value in order to realize social and economic equality through taxation. In *Nordlinger*, the Court was able to satisfy itself that there were certain social goals that provided the justification for the legislation.

Equality is all about determining who equals are. At first blush, one might think that when considering a tax on real property, those who have the same house, as defined by size, condition, neighborhood, etc., that is, value, are similarly situated. According to the state government's classification, they were not. In fact, only those that have the same house acquired at the same time are similarly situated.

In *Nordlinger*, two state interests were deemed sufficient to justify the seemingly odd distinction between newer and older owners. The first was the state's interest in "local neighborhood preservation, continuity, and stability."\(^ {181}\) The second was its interest in protecting older owners' reliance interests in the continued level of tax.\(^ {182}\) The Court developed both of these purposes without any real guidance.

\(^{179}\) Id. at 6.
\(^{180}\) Id. at 7.
\(^{181}\) Id. at 12.
\(^{182}\) Id. at 12–13.
from those who enacted the law, in this case the people of the State of California who ratified the constitutional amendment. It does not take a crystal ball to understand that the real purpose of those who voted for the law (the existing homeowners) was to cap their property taxes at the expense of newcomers. The law was generally known as the "Welcome Stranger" law.\textsuperscript{183}

The first justification found by the Court was that the tax law was used to accomplish some non-tax public purpose. When this is done, by definition, inequality is consciously created in order to accomplish some end. Under the Court's test, the protection afforded to taxpayers by equal protection ends as soon as any plausible rationale is ascertained. The Court does not require that the discrimination is likely to achieve the particular result. This is due to the fact that rarely is more than minimal rationality needed to establish a classification's tendency to accomplish the government's purpose.

Even the Court recognized that "California's grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society . . . ."\textsuperscript{184} This does not sound like the same group that was thought to justify the classification, that is, the "lower income families" that could have been displaced by rising taxes on their properties.\textsuperscript{185} One might legitimately speculate that low-income property owners were a small minority among the well-off majority who more substantially benefited from this legislation. Classifications based on taxpayers' abilities to pay are natural and legitimate purposes of tax legislation.\textsuperscript{186} The gross overinclusiveness of Proposition 13 seriously challenges its alleged justification and completely robs the means of any legitimate proportionality to their ends.

Equality not only requires that similarly-situated people be treated the same, but also permits, or even requires, that dissimilarly situated people be treated dissimilarly. What is similar or dissimilar depends on the features that are relevant to the comparison. What Justice Stevens pointed out in his dissenting opinion in \textit{Nordlinger} is that mere classification by the legislature should not be accepted as proof of rationally based dissimilarity.\textsuperscript{187} Thus, the legislative choice of relevance must be justified by a purpose outside the classification itself. There should be more than just conjecture that the classification has a

\textsuperscript{183} CAL. CONST. amend. XIII (1978).
\textsuperscript{184} Id. at 18.
\textsuperscript{185} Id. at 12.
\textsuperscript{186} See Fox v. Standard Oil Co., 294 U.S. 87 (1935) (discussing the validity of a graduated tax scheme imposing higher tax rates upon chain service stations than on independent service stations).
\textsuperscript{187} Nordlinger, 505 U.S. at 34 (Stevens, J., dissenting).
rational likelihood of accomplishing the ends. As noted in the dissent, "Proposition 13 is too blunt a tool to accomplish such a specialized goal."\(^{188}\)

One could posit a different way an enlightened electorate in California could have proceeded. To curb the abuse of fiercely escalating taxes, California voters could have capped property tax increases for all instead of only for existing homeowners. Such a law would have fully accomplished all the legitimate purposes of the Tax Act. Instead, the majority intentionally placed a disproportionate burden of increased taxes on a minority.

Even in a democratic society, it is the obvious consequence of power that one group will try to shift its burden to others. The notion of equality finds that outcome repugnant. Under the modern federal view of equality in taxation, public purposes irrelevant to the raising of revenue can be furthered through the tax system by placing inordinately unequal burdens on some for the benefit of others without any requirement that the system of reward and punishment have a significant relationship to the goal.

Reflecting on the federal experience, it is apparent that equality has little force. Its current status is the result of a clear decision by the courts in the 1930s to reduce their supervision of tax legislation in order to free legislatures from constraints on the use of economic and tax law and regulation to accomplish important social goals. It has been said of this era that the Court freed up the government to allow it the possibility of becoming a social state,\(^{189}\) thus, allowing legislatures to address economic inequality without being hamstrung by the liberal rights tradition of equality.\(^ {190}\) The result was to create what has been called the empty idea of equality. Equality here is not form to be made determinate by a court that supplies its content, but it is instead form without any content.

By freeing government from a liberal rights view of equality, American society is not only free to become socialistic, but is also free to become its opposite. Dominant classes are free to shift the burden of government to others. In Nordlinger, even the California state government recognized that the "inequity is clear."\(^ {191}\) A young couple buying a home could be taxed at five times the amount of a

\(^{188}\) Id. at 37–38 (Stevens, J., dissenting).
\(^{189}\) See Neuman, supra note 138, at 298–99.
\(^{191}\) Nordlinger, 505 U.S. at 29–30 (Stevens, J., dissenting) (citing SENATE COMM’N ON PROP. TAX EQUITY AND REVENUE, REPORT OF THE SENATE COMM’N ON PROP. TAX EQUITY AND REVENUE TO THE CAL. STATE SENATE, S. 1991-581, at 9–10 (1991)).
young couple that inherited a similar home.\textsuperscript{192} A person who buys a home in 1988 for $170,000 in a middle class neighborhood would pay substantially the same tax as the long-time owner of a Malibu beach property worth $2,000,000.\textsuperscript{193} Thus, we have come about face from the original notion of equality. In the words of the dissent in Nordlinger, "Such a law establishes a privilege of a medieval character: Two families with equal needs and equal resources are treated differently solely because of their different heritage."\textsuperscript{194} In the abstract, vast differentials in taxation between taxpayers can be freely created without any comprehension of their actual respective abilities to pay. In the concrete, it is more likely than not that the more prosperous homeowner or business owner pays substantially less than the less affluent person who came to property ownership at a later date.

\textbf{C. The Concept of Equality in Germany}

The review of acts of the legislature in terms of constitutional norms in a manner analogous to judicial review in the United States developed quite recently in Germany. While its roots could be clearly perceived in the Weimar Republic, it did not emerge as a real force until after World War II.\textsuperscript{195} The types of judicial control, however, are quite different. The United States follows what has been called the "decentralized" model, whereby "the power of control [is given] to \textit{all the judicial organs} of a given legal system."\textsuperscript{196} Germany follows the "centralized" model, which "confines the power of review to \textit{one single judicial organ}."\textsuperscript{197} In Germany, this power is assigned to the Federal Constitutional Court.\textsuperscript{198} In America, constitutional testing can only take place in the context of an actual case or controversy in which the litigant has a concrete interest in the outcome; this is the requirement of standing. A regime of centralized review, like Germany's, permits the abstract testing of legislation.\textsuperscript{199} For example, the Federal Constitutional Court has jurisdiction to review the compatibility of legislation with the Basic Law when requested by "the Fed-

\textsuperscript{192} Id.
\textsuperscript{193} Id. at 7.
\textsuperscript{194} Id. at 25 (Stevens, J., dissenting).
\textsuperscript{196} CAPPELLETTI \& COHEN, supra note 46, at 73.
\textsuperscript{197} Id.
\textsuperscript{198} See KOMMERS, supra note 195, at 10.
\textsuperscript{199} Id. at 13.
eral Government, a Land government, or of one third of the Members of the Bundestag.200

Several countries in Europe have specific constitutional provisions that govern legislative power over taxation.201 The German Constitution, like the United States Constitution, has only a general provision on equality. The Basic Law provides, "All persons are equal before the law."202 This provision might suggest that equality means no more than that the relationship between citizen and state is governed by the rule of law. To the contrary, the Federal Constitutional Court has been quite active in reviewing tax legislation with respect to a value-oriented concept of equality, and in several important cases has found that certain tax measures violate the principles of equality.

Initially, the methodology and standard of review that was utilized in testing tax legislation by the concept of equality appears quite similar to that established by the United States Supreme Court, which applies a stricter scrutiny when legislation involves a suspect classification, like race, and only a rational basis test in all other cases. In Germany, when legislation implicates specific constitutional protections other than the general requirement of equality or affects a particularly identified group, the standard of review is heightened and can be summarized as follows: first, one asks whether the purpose of the discrimination is a legitimate public goal; second, one asks whether the means selected are appropriate and necessary to achieve that goal; and third, one asks whether the disadvantages imposed on a class are adequately related and proportionate to the desired goal.203

In cases where overt discrimination against particular taxpayers does not involve critical social interests, the Federal Constitutional Court then follows what can be called a minimum rationality or rational basis test that only asks whether government action is clearly arbi-


201 See, for example, Constitución [C.E.] art. 31, cl. 1 (Spain), translated in 17 Constitutions of the Countries of the World, supra note 21, which provides: "All shall contribute to the sustenance of public expenditures according to their economic capacity through a just tax system based on the principle of equality and progressiveness, which in no case shall be of a confiscatory scope." And, see Costituzione [COST.] art. 53 (Italy), translated in 9 Constitutions of the Countries of the World, supra note 21, at 11, which provides: "All shall contribute to public expenditure in accordance with their means. The system of taxation shall be based on criteria of progression."

202 GG art. 3, cl. 1, translated in 7 Constitutions of the Countries of the World, supra note 21 (providing equality before the law).

203 See Susanne Baer, Equality: The Jurisprudence of the German Constitutional Court, 5 Colum. J. Eur. L. 249, 263 (1999) (exploring equality as the most important yet elusive concept in German jurisprudence).
One finds much that is alike; however, there is a substantial difference in degree.

Unlike the United States Supreme Court, the Federal Constitutional Court has reached some significant decisions on the limitations of the power to tax based on the requirement of equality. In some cases, the Constitutional Court has developed a different notion of equality than what is found in the United States. The Constitutional Court’s notion is derived from the concept of a social state that is based on the conception of the Constitutional Court’s role as “trustee of a certain legal, moral, and political model, rather than a guardian of human rights.” This has led the Constitutional Court to limit legislative power in some cases by a method that adopts equality in substance. Even where tax legislation does not implicate some other important constitutional value, the Constitutional Court has adopted a much tougher standard for testing legislation by carefully examining the relation between classification and results to determine if the tax legislation justifies the purpose for which it was enacted. This approach is particularly reminiscent of that taken in dissents to the United States Supreme Court’s decisions on equal protection. These cases can be usefully described as having adopted concepts of equality in form and equality in practice.

1. Substantive Notions of Equality in Germany

Germany’s completely unique contribution on equality was developed from the concept of the social state. The German cases tested tax statutes against the requirement of equality with a heightened level of scrutiny due to the presence of certain fundamental requirements in the Basic Law that are not present in the United States Constitution. These constitutional values include the basic right of human dignity and the basic right to special protection by the state for institutions of marriage and family. These cases also reflect a jurisprudence of constitutional adjudication that is quite different from that found in the United States. The Federal Constitutional Court views the Basic Law as a foundational normative structure that commands the develop-

204 Id. at 256–62.
205 Id. at 31.
206 See KOMMERS, supra note 195, at 290.
207 See supra notes 147–50, 181–82, and accompanying text.
208 GG art. 1, cl. 1, translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, supra note 21 (“Human dignity is inviolable. To respect and protect it is the duty of all state authority.”).
209 Id. at art. 6, cl. 1 (“Marriage and the family are under the special protection of the State.”).
opment of the social state. This places an affirmative duty on the Constitutional Court. Equality is not only a prescription against certain legislative acts, but also contains a positive command to legislatures to advance certain critical social goals through legislation. The Constitutional Court was established to promote this outcome.

These constitutional provisions have led the Constitutional Court to give new meaning and importance to the requirement of equality. Though the Basic Law adopted after World War II did not have a specific provision on the requirements of appropriate taxation, the Court developed out of the principle of equality the requirement that the legislature levy taxes in accordance with the principle of ability to pay. Though it did not appear in the Basic Law, the Weimar Constitution previously articulated the requirement of taxation in accordance with ability to pay, stating that “[a]ll citizens, without exception, contribute in proportion to their means to all public taxes, in accordance with the provisions of the laws.”

The Constitutional Court first applied these principles to a statute that required the joint assessment of husband and wife. The statute was void because it violated the principle of individual taxation by trying to accomplish an impermissible purpose—trying to bring the employed wife back to the home. Though the Constitutional Court recognized that “it is constitutionally permissible to impose a tax for other purposes besides collecting revenue,” those purposes had to reflect appropriate values.

In a later case, the Constitutional Court was asked to determine whether widowed or unmarried persons with a dependent child were being treated equally with married parents where the income tax law did not provide any tax relief for the additional costs of child care.

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210 Hans Gribnau, General Introduction to The Principle of Equality in European Taxation, supra note 3, at 19.
212 GG of 1919, art. 134, translated in Constitutions That Made History, supra note 17, at 378-79.
214 “[T]he Constitutional Court may hold laws or regulations that it considers unconstitutional either null and void (nichtig) or incompatible (unvereinbar) with the Basic Law. When held to be nichtig, the statute immediately ceases to operate; when declared unvereinbar, the statute or legal norm is held to be unconstitutional but not void, and it remains in force during a transition period pending its correction by the legislature . . . .” KOMMERS, supra note 195, at 52-53.
215 Id. at 497.
216 Id.
217 BVerfG Mar. 11, 1982, 61 BVerfGE 319 (345); see also the discussion in Klaus Vogel
The Constitutional Court determined that this was an unjustified burden on these individuals. Hence, the principle of equality in taxation led to the conclusion that equality unambiguously mandated that taxes be assessed in accordance with a taxpayer's ability to pay.

In this case, the Constitutional Court was clearly concerned with features of the income tax law that were outside the normal theoretical description of the tax base, that is, net income. Income measurement, as a general theoretical matter, requires the deduction of costs associated with income production, but excludes personal or family expenses, which are considered personal consumption. Indeed, the principal understanding of classical equality theory is that economic capacity is measured solely by actual resources in a given tax base.

The concept of equality in Germany views resources as only the starting point. To be taxed, resources must be truly available. Thus, the Constitutional Court considers expenditures that are "necessities," those that are unavoidable, to be relevant to appropriate and equal taxation. Expenses for child care presented just such an inescapable additional burden for single individuals and could not be ignored by the Bundestag without violating the principle of equality. In the United States, in contrast, taking these personal consumption items into consideration in order to achieve social goals outside the tax system would be viewed as a matter of discretionary legislative policy. The United States Constitution is seen as a declaration of political forms and rights, not economic or social ones.

Later, the principle that income tax should tax only true economic capacity led the Constitutional Court to conclude that an amount representing the necessities of life, that is, a minimum subsistence amount, should be excluded from the tax base. The right of human dignity required the legislature to treat taxpayers according to their ability to pay, which meant that the legislature must leave the taxpayer with income free from tax in an amount necessary to meet the minimum requirements for a dignified existence. Thus, a minimum level, set by the Constitutional Court, must be deducted from the tax base.218

Two later cases also involved married persons and taxation in accordance with ability to pay. In the first, the Constitutional Court held that a person who paid alimony to a former spouse should be entitled

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218 BVerfG Sept. 25, 1992, 87 BVerfGE 153. See also Vogel & Waldhoff, supra note 217, at 97-98 (discussing that a minimum level of income must remain tax free to assure equality according to ability to pay).
to a deduction as long as the recipient spouse consented.\textsuperscript{219} Sharing the benefit of the tax deduction between the parties was required under the law.

The second arose under legislation that allowed a taxpayer to deduct the cost of a second home for up to two years when he had been transferred temporarily for employment purposes.\textsuperscript{220} A married couple contested the limitation arguing that they were required to continue to maintain a second home because the spouse who had not been transferred remained gainfully employed in the area of the first home. The Constitutional Court found that the limitation violated the requirement of equality since it put an unreasonable burden on married couples that could not move their homes to the new location for valid reasons of employment or business. Once again, failure to take this into consideration violated the notion of taxation according to ability to pay.

2. Formal Notions of Equality in Germany

The wealth tax case\textsuperscript{221} and the inheritance and gift tax case\textsuperscript{222} are two important cases from the point of view of their cost to the German Treasury. In these cases, the Constitutional Court applied a classical concept of equality reminiscent of the approach previously taken by many state courts in America.\textsuperscript{223} In both cases, the issue centered on the methods used to value property subject to the tax. Multiple methods had been used. For example, securities were valued at market value, and business property and some real estate were valued at capitalized earnings. Nonproductive real estate was valued on a fixed formula that was totally out of sync with the "market values" derived in the other cases. Thus, taxing all properties at the same rates resulted in certain properties being taxed disproportionately to others. The Constitutional Court concluded that these provisions violated the principle of equality.\textsuperscript{224}

As was seen when considering the American state experience, taxing property on an equal and uniform basis can be extremely problematic due to the difficulties of valuing consistently. In many cases, such difficulties have led governments to give up and to categorize property separately and tax it differently according to category.

\textsuperscript{219} 108 BVerfGE, supra note 211.
\textsuperscript{220} BVerfG Dec. 4, 2002, 107 BVerfGE 27, discussed in Ordower, supra note 211, at 303.
\textsuperscript{221} BVerfG June 22, 1995, 93 BVerfGE 165. See also Vogel & Waldhoff, supra note 217, at 98.
\textsuperscript{222} BVerfG June 22, 1995 93 BVerfGE 165. See also Ordower, supra note 211, at 301.
\textsuperscript{223} See supra Part V.A.
\textsuperscript{224} See Ordower, supra note 211, at 301.
Equality typically requires that once a classification is made, taxes must be equal and uniform within that classification. This can be a difficult standard to meet when governments use broad-based taxes like wealth or inheritance and gift taxes. In many cases, courts permit substantial deviation on the basis of efficiency and administrative convenience. Exceptions are usually permitted with minimum scrutiny. Yet, the Constitutional Court rejected two fairly broad-based taxes, the wealth tax and the inheritance and gift tax, which are consistent with a taxpayer's ability to pay and can be easily adapted to progressive forms of taxation.

3. Equality in the Application of the Tax Law in Germany

Two of the most dramatic cases decided by the Federal Constitutional Court involved inequalities resulting from the application of the tax law, not from the letter of the law. The first involved the income taxation of interest. The statute was tarnished by the significant failure of the revenue authorities to enforce provisions of the law. Due to the lack of withholding at source and the absence of any real effort at enforcement, there was widespread evasion by taxpayers who failed to include interest income in their tax returns. The Constitutional Court determined that since only honest taxpayers paid any tax on their interest, this provision violated the principle of equality. Ability to pay in this case became a mandate for identical tax burdens when it came to one item of income. Similarly, in a later case, a provision for the taxation of speculative gains in securities, that is, gains from the sale of securities occurring within six months of purchase, was held to violate the principle of equality. The situation was quite similar to that of the case of taxation of interest in that the administration had made almost no effort at enforcement. The statute had neither provided a withholding mechanism for the tax, nor included any requirement that financial intermediaries report the transactions to the tax authorities. Indeed, the government had not

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225 The German Bundstag subsequently changed the valuation rules for real property for inheritance and gift tax purposes. It has not changed the wealth tax rules and that tax regime has not been in effect since 1997. Id. at 325 n.479.
226 Law in action is the law as applied and lived by the laws' interpreters including not only the professional classes, but also the private parties to whom the law applies. See William B. Barker, Expanding the Study of Comparative Tax Law To Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa, 109 PENN ST. L. REV. 703, 723 (2005). It is the perception of the people, in the first instance, that often determines what the law really means.
227 BVerfG Jun. 27, 1991, 84 BVerfGE 239. See also Neuman, supra note 138, at 309.
228 Id.
229 BVerfG Mar. 9, 2004, 110 BVerfGE 94. See also Ordower, supra note 211, at 264.
even tried to enforce the tax through audit. The Constitutional Court found that the tax was easily avoided, which rendered the tax unequal for honest taxpayers.230

The Constitutional Court's holding a statute unconstitutional because of the ineptitude of its administration is quite unique. It is also unusual in terms of the jurisprudence of the Constitutional Court, since the case did not implicate any important constitutional value other than the general provision on equality. This was not a situation where the classification failed the rational basis test; there was nothing improper with taxing all who fell within the class. Indeed, although the Constitutional Court rested its decision on the notion of ability to pay, this is not the same concept that requires governments to assess the populace in terms of their real economic capacity taking into consideration their needs. Instead, this was formal equality applied to the real tax base. The Constitutional Court singled out one element of income—interest, or speculative gains—as the relevant factor in determining whether two taxpayers are equal. Honest taxpayers whose means include interest income are to be treated the same as dishonest taxpayers whose means include interest income. Only the status of specific taxpayers matters for comparison, not the underlying economic capability of taxpayers in general.

One might ask what has happened to taxation according to true ability to pay. Those whose income consists predominantly of wages might seek to know why the burden of supporting the government is shifted to them. If ability to pay is the underlying requirement, should not those with equal incomes, derived from capital, interest, labor, or any other source, be considered similar?

The Constitutional Court's decision to send a clear message to the legislature that equality matters results in some confusion as to the value system reflected in the concept of equality. These decisions confer a privilege on those with financial gains; this is not taxation in accordance with the Constitutional Court's value-rich notion of ability to pay or social equality, but taxation based on formal equality and uniformity.

Thus, in some cases, two taxpayers are compared on the basis that a single item in the tax base must be treated the same. In other cases, the Constitutional Court removes an item from the tax base for separate treatment. In a way, the Constitutional Court's decision was a resurrection of classical notions of equality. The traditional classical notion of equality, however, would have found the income tax law in its entirety lacking because it had allowed a substantial exemption

230 See id.
from its natural coverage. The obvious conclusion would have been that the entire law was invalid. Instead, the Constitutional Court applied classical equality in a way that treated the administrative inaction as something that it was not, a purposeful legislative subclassification. Under formal equality, classifying interest as a separate tax base would result in uniformity of treatment of all in the subclassifications.

Thus, Germany accepts several different normative roles for the concept of equality in the same system. For the most part, Germany adopts the American federal view that legislatures should be free to use the tax law to advance whatever social interests are deemed desirable in the legislature’s eyes. Thus, legislatures in exercising their power to tax have the primary responsibility for directing public policy. Legislation does not violate equality if it gives special treatment to some taxpayers but not to others as long as such treatment does not result in a significant detriment to the others. While tax preferences and incentives that benefit the few at the expense of the many fly in the face of taxation in accordance with ability to pay, they could hardly run afoul of the principle of equality unless they were so lacking in justification as to be arbitrary.

In other areas, that is, areas asserting other important constitutional values, the Constitutional Court insists that the legislature apply a distributive notion of ability to pay. The Constitutional Court makes marriage or children a relevant factor for determining who is equal with whom, thus, restricting the legislature from adversely affecting those institutions through tax. The Constitutional Court also finds that helping to alleviate poverty is an affirmative duty of income taxation by requiring that income tax exempt a minimum subsistence amount. Lastly, the Constitutional Court embraces formal notions of equality and uniformity. By finding fault with wealth and inheritance taxes because their reach is uneven among the more affluent members of society, the Constitutional Court removes a tax directed at promoting a progressive sharing of the tax burden. By finding a violation of equality in terms of taxing interest and speculative gains, the Constitutional Court removes items from the tax base that are earned in larger proportion by high income taxpayers, again reducing the progressivity of the system. This is done on the basis of a more individual rights focused principle of equality.

\[\text{Vogel & Waldhoff, supra note 217, at 113–14.}\]
VI. Conclusion

The three faces of equality have been described as classical, social, and popular. Classical equality is an individual, rights-based principle that limits government action that aims oppressive measures at certain taxpayers while giving unwarranted privileges to others. It is a negative force that controls government action through the principle of formal equality. Social equality is a communal, group-based principle that relies on a constitutional vision of a more equal society premised on a fairer distribution of resources. It can hold both negative and positive force by permitting judicial intervention in tax law to ensure that the state takes action to move toward a more just system. Popular equality is popularly constituted equality. Its content is a matter of current political choice. Since the legislature is representative of current mores, the legislature should have the discretion as to equality's content. Consequently, popular equality deprives equality of positive force, relegating it to a matter of inspirational value. All three faces of equality reflect value systems that determine the judicial role.

Equality, as an explicit command of the legal system, shared its conception with the early birth pangs of constitutional democracy. As this form of political and social organization developed, so too did the principle of equality. In theory, equality is about the just treatment of the people by the government of the people. In practice, changing values supply equality's content.

The classical approach developed in a time when government was perceived as resulting from individual transfers of power, and government was required to respect its own limitations. The formal notions of equality had their greatest force in an era of more simple economics and social relations. They reflected the importance of the courts' role in a more limited government and heightened emphasis on individual property and economic rights.

As democracy changed over the course of the nineteenth century, the social structure and the economic scene also changed dramatically. Many began to see government as a powerful instrument for economic and social change. Demand for a more economically equitable division of resources increased. In this light, classical equality was seen to prevent taxation from reaching its enormous potential to cure economic inequality. Thus, Locke's contract theory of tax equality gave way to an egalitarian theory of equality that treated people equally by requiring equal sacrifice and permitting progressive forms of taxation. The judicial role as the guardian of individual rights also diminished. Mostly by choice, but in some American states by the
constitutional amendment of equality clauses, the courts relinquished this power to the legislature and to the executive branch.

There is a large difference among the three court systems examined in this paper. In America, the states have struggled with the principles of classical equality in terms of the requirements of modern society and have tried to accommodate both classical and popular views. The federal regime has freed the legislature from all vestiges of equality determination, so that the legislature can focus on carrying out the popular social agenda. In the United States, the personal circumstances and needs of the taxpayer are not relevant factors in the quest for equality because there is no constitutional requirement to help those who are less fortunate.

Germany also experiences the tension between classical and popular principles of equality. In stark contrast to the American experience, the Federal Constitutional Court has found in the Basic Law a mandated conception of a particular social state that requires an egalitarian notion of equality. The Constitutional Court asserts its power to insist that the legislature promote certain social values that lead to greater economic equality. Whereas the United States Supreme Court has found that judicial supervision is particularly inappropriate in the area of tax, the Constitutional Court has adopted the principle that equality has even greater force in matters of taxation. The Constitutional Court’s aggressive review of tax legislation reflects taxation’s importance as a most efficient engine for social change.

Justice in taxation based on the modern value-rich notion of ability to pay has abandoned its roots in John Stuart Mill’s utilitarian philosophies. In finding just taxation on the basis of ability to pay, Mill recognized different views on what would be the result of equal sacrifices by each taxpayer. As has been persuasively argued, the proof is lacking as to whether equal sacrifice leads to progressive, proportional, or even regressive taxation.\(^{232}\) Mill concluded that “from these confusions there is no other mode of extraction than the utilitarian.”\(^{233}\)

Utilitarianism strives for the maximization of societal wealth without regard to who benefits. Utility does not recognize individual rights as an \textit{a priori} restraint on government powers. Justice requires only those measures that maximize utility. A social welfare state that

\(^{232}\) Richard A. Musgrave & Peggy B. Musgrave, \textit{Public Finance in Theory and Practice} 211–12 (McGraw Hill 1976). Steven Utz has described the origin of the justification of tax according to ability to pay in early utilitarian thought. See Steven Utz, \textit{TAX POLICY: AN INTRODUCTION AND SURVEY OF THE PRINCIPLE DEBATES} 41 (West 1993). Once it is recognized that the theory of equal sacrifice does not justify progressive taxation, ability to pay as distributive justice may produce results clearly at variance with utilitarianism.

values significant redistribution of wealth may not promote utilitarian justice.\textsuperscript{234}

The Federal Constitutional Court's conclusion that ability to pay should be the guiding supernorm of the tax system must be recognized as a rejection of utilitarian economic principles. In contrast, the American federal experience is the ultimate utilitarian approach to tax. Utilitarian goals give little role for individual rights since the value perspective of utilitarianism requires the maximization of total social utility. Rights like equality should not be a restraint on this just social outcome because it is irrelevant to utilitarian goals how wealth is distributed.\textsuperscript{235} To Rawls, what would be considered just by individuals enshrouded in a veil of ignorance would necessitate the assumption that each individual would vote to test all laws by the standard of whether they would make the least well off member of society better off.\textsuperscript{236} To a utilitarian, the veil of ignorance would instead result in a vote to test all laws in terms of whether they would increase society's welfare, thus making society better off.\textsuperscript{237}

The American standard of review of equal protection promotes a purely utilitarian approach. There is no intrinsic merit in a value system; one adopts a method for its effect. For example, a doctrine of taxation that ignores means could be accepted, like the doctrine of supply-side or trickle-down economics, which argues that reducing taxes, especially for businesses and the well-to-do, stimulates savings and investment and in turn benefits all members of a society. On the other hand, the doctrine "from each according to his ability, to each according to his needs"\textsuperscript{238} would be just as proper if it were effective to maximize society's utility.

In the United States, consequently, whether taxation shall be imposed in accordance with ability to pay or rather according to privilege is a matter of social and political struggle. In 1913, this struggle led to a constitutional amendment permitting Congress to enact the most comprehensive income tax of its time. The system was enacted because it reflected most clearly the principle of ability to pay.\textsuperscript{239}

\textsuperscript{234} From a utilitarian perspective, legal policy should exclusively promote general welfare and no independent weight should be given to fairness. Louis Kaplow & Steven Shevell, Fairness v. Welfare, 114 HARV. L. REV. 961, 1030 (2001).


\textsuperscript{236} JOHN RAWLS, A THEORY OF JUSTICE 3-53 (Harvard Press 1971).

\textsuperscript{237} Kaplow, supra note 235, at 502-03.


\textsuperscript{239} See Barker, supra note 40, at 860-61 (discussing the origins of the ability to pay taxation in the United States).
Over time, Congress has diluted these egalitarian principles. In contrast, in Germany, the constitutional requirement that tax burdens reflect equality and ability to pay represent values of justice the courts hold more sacred than utility. The question remains as to equality’s strength in the face of utility.

Treating people equally according to their ability to pay requires three elements. There must be a proper assessment of their means, that is, the resources available to them. There must also be an assessment of their needs according to societal standards reflecting society’s values. Finally, the system must reflect a value judgment as to the proper rate structure: progressive, proportional, or regressive. The first element primarily requires practical economic judgment coupled with social choices as to which system of taxation best reflects societal values. The second requires economic judgment in the context of debatable decisions concerning need. The third determines how government’s need for revenue will be distributed among people on the basis of social choice or philosophy as to what constitutes equal sacrifice.

The first also confronts the timeless debate as to what is the most just tax base: income, wealth, gratuitous transfers, or consumption. Adam Smith believed the most equitable tax was one on income because income reflected the benefit a taxpayer derived from the state. Hobbes, in The Leviathan, viewed the most equitable tax as one on consumption. The income base reflects economic capacity in terms of what is actually available to pay taxes, whereas the consumption base, which excludes savings, reflects economic capacity in terms of what should be considered available to pay taxes since foregone consumption is believed to benefit society.

Most countries use both consumption and income taxes. Even though both bases can reflect the personal circumstances and needs of taxpayers, the consumption taxes used today are transactional taxes that reflect neither. Thus, a tax base that truly reflects ability to pay must be a personal one, like income or a personal expenditure (or consumption) tax. The general adoption of personal income taxes, rather than personal consumption taxes reflects current societal be-

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240 *Id.* In commenting on the 1913 Federal Income Tax Law, the legislative history provided: “The tax upon incomes is levied according to ability to pay, and it would be difficult to devise a tax fairer or cheaper [system] of collection.” H.R. Rep. No. 63-5, at XXXVII (1913). For a complete discussion of the context of this legislation, see Barker, *supra* note 40, at 860-61.

241 *Smith, supra* note 22.


243 It is interesting to note that John Rawls accepted these anti-distributive notions of justice as appropriate in taxation without much analysis. See RAWLS, *supra* note 236, at 278.
lies that economic capacity to pay taxes is best reflected by including "saved" income in the tax base. In other words, excluding accumulations in wealth is taxation according to the principle from those who are mean to those who have means. Clearly, personal taxation also has the largest potential to affect social and economic behavior and, thus, has the largest potential within itself to realize the opposite of equality.

Adoption of a personal expenditure tax, even though it does not adhere well to the principle of ability to pay, would most likely survive a minimum rationality test in America. In Germany, however, according to the Federal Constitutional Court, the Basic Law's principle of equality "forbids any regulation imposing a tax for which the ability to pay is not a principle consideration."\(^{244}\) The special value encapsulated in the German principle of equality and ability to pay requires, according to the Federal Constitutional Court, progressive taxation: "Here justice demands that relative equality for a more powerful economic performer means that taxes must be paid according to a higher percentage rate than an economically weaker person."\(^{245}\)

Though the principle of equality might prevent the Bundestag from a wholesale abandonment of income taxation for expenditure taxation, equality does not appear to prevent German legislators from accomplishing much the same thing by importing consumption tax notions and other tax preference inequalities into the income tax system.

Personal taxes have the greatest innate potential to realize equality's objectives. The use of progressive principles to achieve a fairer distribution of resources, however, is also equality's Achilles' heel, for progressivity dominates every aspect of the income tax system, including an income tax's ability to influence behavior by granting preferences, incentives, and tax holidays without regard to ability to pay. One example to the contrary is the American State of Pennsylvania where one can find a consistent effort to ensure that the income tax base reflects true economic capacity undiminished by the legislature's planned use of inequality to accomplish social objectives through the tax law.

Other nonpersonal forms of taxation cannot truly conform to the more modern social construct of ability to pay. Many taxes select bases without an attempt to measure comprehensively a person's available resources. This is particularly true of property and sales taxes. But even where there is an attempt to tax consumption broadly,

\(^{244}\) Vogel & Waldhoff, supra note 217, at 98.

\(^{245}\) Id. at 92 (citing BVerfG Jun. 24, 1958, 8 BVerfGE 51 (68)).
as is the case of the value-added tax (VAT), the base is regressive, even without its exemptions, with those with less means paying proportionally more. Whereas income is an excellent indicator of actual ability to pay, consumption taxes rely on the understanding that voluntary participation in market transactions indicates ability, even though tax payments will often be substituted for necessities.

Since consumption patterns poorly reflect ability to pay, governments sometimes try to bring progressive principles to consumption taxes, especially in the case of the VAT. Multiple rates represent legislative determinations as to which products are more likely to be consumed by those who are better off. Where the judgment is good, these taxes tend to create appropriate distinctions between those in the middle class, but still tend to be regressive as wealth accumulates because higher income taxpayers have more choices as to how they use their resources.

Thus, in Germany, the Federal Constitutional Court accepts a fiction that those taxes extant at the promulgation of the Basic Law embody the principle of ability to pay. A more honest response is that taxes are different and that different principles of equality operate in different systems of taxation. Social equality works well where one directly takes the individual circumstances of taxpayers into account. Where the application of social equality to nonpersonal taxes relies on insecure generalizations, there is a strong case for following the more formal precepts of classical equality by treating all resources the same except to the extent clear differences are demonstrable. This is an approach that could be compatible with the present jurisprudence of the Federal Constitutional Court.

The three faces of equality conjure very different images. Classical equality, which was designed to protect eighteenth century bourgeois from both king and proletariat, values an individual’s rights against privilege and spoliation. Social equality values a tax system that leads to economic equality. Popular equality values the relativity of democratic will. All three faces of equality bear upon the conception of a just tax system. One learns, however, that neither an uncontrolled legislature nor an active court has yet to create a just allocation of tax burdens in accordance with the principle of equality.

246 See generally VALUE-ADDED TAX (Henry J. Aaron, ed., 1982).
247 Vogel & Waldhoff, supra note 217, at 90.