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In the current drama of property tax reform, no one seems quite sure which role to cast for state constitutions. California's Proposition 13[1] will no doubt serve to sharpen the debate over the proper scope of constitutional limitations on the power of taxation.[2] Yet other, less dramatic developments in this area of the law also merit close attention. In the last twenty-five years, for example, almost half of the states have amended their fundamental law to allow for differential taxation of farm, timber, and open space land.[3] These provisions are designed to free the legislatures from the restrictive uniformity clauses once thought necessary to ensure an equitable distribution of the tax burden.[4] The legislatures responded in kind: more than forty states have adopted some form of

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1. CAL. CONST. art. 13 A. The constitutionality of the amendment was upheld in Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

2. *See, e.g.*, Gelfand, *Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt, and Beyond*, 63 MINN. L. REV. 545 (1979). *See also* Keesling & Ajalat, *Proposition 13: The Revolution's Aftermath*, 14 ASSESSOR'S J. 117 (1979).

3. The recent open space amendments, with the year of adoption in parentheses, include: ALA. CONST. art. XI, § 217 (1978); CAL. CONST. art. 13, § 8 (1976); DEL. CONST. art. 8, § 1 (1977); FLA. CONST. art. 7, § 4(a) (1968); KAN. CONST. art. 11, § 12 (1976); KY. CONST. § 172A (1969); LA. CONST. art. 7, § 18(C) (1974); ME. CONST. art. 9, § 8 (1973); MD. CONST. Declaration of Rights, art. 43 (1960); MASS. CONST. Articles of Amendment, arts. 41 (forest lands and recreational areas) (1978), 112 (1978); MO. CONST. art. 10, § 7 (1976) (forest lands); NEB. CONST. art. 8, § 1 (1978); NEV. CONST. art. 10, § 1 (1974); N.H. CONST. art. 5b (1968); N.J. CONST. art. 8, § 1, ¶ 1b (1963); OHIO CONST. art. 2, § 36 (1974) (forest lands); OKLA. CONST. art. 10, § 8 (1972); PA. CONST. art. 8, § 2 (1973); TENN. CONST. art. 2, § 28 (1973); TEX. CONST. art. 8, §§ 1-d (1966), 1-d-1 (1978); UTAH CONST. art. 13, § 3 (1969); VA. CONST. art. 10, § 2 (1971); WASH. CONST. art. 7, § 11 (1968); WIS. CONST. art. 8, § 1 (1974).

4. *See* Kelsey v. Colwell, 30 Cal. App. 3d 590, 595, 106 Cal. Rptr. 420, 423 (1973); City of E. Orange v. Township of Livingston, 102 N.J. Super. 512, 531-34, 246 A.2d 178, 188-90 (1968).

differential taxation for such areas.[5]

The paradox in this development is intriguing. The rigid uniformity provisions were originally designed to prevent legislative abuses of the taxing power by demanding that all property be taxed equally and at its true or full value.[6] The open space amendments carve out certain exceptions to these rules.[7] At the same time, however, the amendments confirm the continuing viability of the concept of uniformity by allowing specific deviations from operation of the rules.[8] Thus, the open space amendments tend both to countermand and to reinforce the ideal that absolute equality in state taxation can be attained.

In order to assess the impact of this development on state constitutional law, this Article will first examine the theoretical func-

5. Current citations to 43 of these programs can be found in the appendix to Malone & Ayesb, *Comprehensive Land Use Control Through Differential Assessment and Supplemental Regulation*, 18 WASHBURN L.J. 432, 458-73 (1979). *See generally* Currier, *An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Uses*, 30 U. FLA. L. REV. 821 (1978); Keene, *Differential Assessment and The Preservation of Open Space*, 14 URB. L. ANN. 11 (1977). *See also* Myers, *The Legal Aspects of Agricultural Districting*, 55 IND. L.J. 1 (1979).

6. *See generally* W. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 609-42 (1959) [hereinafter cited as NEWHOUSE]; Matthews, *The Function of Constitutional Provisions Requiring Uniformity in Taxation*, 38 KY. L.J. 31, 39-46 (1949).

7. *See e.g.*, NEV. CONST. art. 10, § 1.

> Notwithstanding the provisions of this section, the legislature may constitute agricultural and open-space real property having a greater value for another use than that for which it is being used, as a separate class for taxation purposes and may provide a separate uniform plan for appraisal and valuation of such property for assessment purposes.

Id. See also WASH. CONST. art. 7, § 11.

8. *See* Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 426, 147 N.W.2d 633, 642-43 (1967).

> The viability of the uniformity clause is attested to by the series of constitutional amendments that have been necessary to avoid its proscriptions. In 1908, sec. 1, art. VIII, was amended to permit income, privilege, and occupational taxes without regard to the uniformity clause. In 1927, it was amended to make possible the separate taxation of forests and minerals. In 1941, came an amendment that permitted municipalities to collect and return taxes on real estate by optional methods, and, in 1961, the inequality of taxing merchants' stock in trade and certain other personal property uniformly with general property was recognized, and the requirements of the section were lifted in respect to the types of property specified. Without question these amendments resulted from the recognition by the legislature and the people of the onerous strictures of the constitutional requirement of uniformity.
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> The rigors of the uniformity clause have on occasion prevented the passage of socially desirable legislation; and to accomplish the ends sought, constitutional amendments permitting limited and defined exceptions to the rule have been enacted and ratified. Its purpose, however, is as worthy as it is necessary. It is "to protect the citizen against unequal, and consequently unjust taxation." Weeks v. Milwaukee (1860), 10 Wis. 186, 201 (*242, *257).

Id. See also Note, *The Uniformity Clause, Assessment Freeze Laws, and Urban Renewal: A Critical View*, 1965 WIS. L. REV. 885, 891 n.34.

tion and form of state constitutions. This analysis can in turn be used to develop criteria for evaluating the content of these open space amendments. These criteria can then be used to suggest alternative methods of constitutional change that will allow state governments to respond most effectively to contemporary problems in the taxation of real property.

I. Defining the Function of State Constitutions

Conventional wisdom dictates that state constitutions should be brief, confined to a general framework of government, and limited to a consideration of fundamental principles.[9] These fundamental matters generally include the protection of basic rights, an enumeration of the powers of government, some provisions on elections and suffrage, and procedures for amendment of the document.[10] Some authorities have concluded that the fundamental law of a state should also contain provisions on local finance, home rule, intergovernmental relations, and public education.[11] Beyond these core areas, the commentators agree only that state constitutions should not get bogged down in excessively detailed provisions dealing with emerging social or economic problems that are better handled by the legislature.[12]

This ideal form of a state constitution is directly related to the function that it must perform. A constitution is a "contract by the people with each other, to form a government and accept its authority, to define its purposes and powers, to blueprint its structure and procedures."[13] A state constitution must establish the organization of its government and delineate the broad parameters of public goveruance.[14] This organic document is the highest law in the hierarchy of legal authority and therefore beyond the purview

9. Munro, *An Ideal State Constitution*, 181 Annals 1, 5 (1935). *See generally* Grad, *The State Constitution: Its Function and Form for Our Time*, 54 Va. L. Rev. 928 (1968).

10. Grad, *supra* note 9, at 948-49.

11. *Id.* These provisions are included in the National Municipal League's Model State Constitution. *See* National Municipal League, Model State Constitution arts. 7-9, 11 (6th ed. 1963).

12. *See* Fellman, *What Should A State Constitution Contain?* in Major Problems in State Constitutional Revision 137, 146 (W. Graves ed. 1960); Wheeler, *Introduction*, in National Municipal League, Salient Issues of Constitutional Revision, ix, xi (J. Wheeler ed. 1961). *See generally* Bebout, *Recent Constitution Writing*, 35 Tex. L. Rev. 1071 (1957); Grad, *The State's Capacity to Respond to Urban Problems: The State Constitution*, in The States and the Urban Crises 27 (A. Canipbell ed. 1970); McMurray, *Some Tendencies in Constitution Making*, 2 Calif. L. Rev. 203 (1914); Swindler, *State Constitutions for the 20th Century*, 50 Neb. L. Rev. 577 (1971).

13. Henkin, *Constitutional Fathers—Constitutional Sons*, 60 Minn. L. Rev. 1113, 1120 (1976).

14. Munro, *supra* note 9, at 4.

of normal law-making processes.[15] The fact that it is difficult to change cautions against its use as a code of laws.[16]

Most modern state constitutions fall short of this ideal.[17] With a few exceptions,[18] the fundamental law in most jurisdictions is too long, too specific, and too detailed.[19] As a consequence, most state constitutions are quite inflexible.[20] The primary reason for this infestation of legislative matter is a basic distrust of the legislative process.[21] By placing a subject in the state constitution, special interest groups can be assured that desired policies will not be changed by the legislature.[22] Increasingly, the constitution is transformed into an intimidating check on legislative prerogative. As one early commentator noted, we seem to be saying:

> We have found our servants dishonest; we won't discharge them and try to get honest and competent ones. No, we will continue to employ those who have been proved to be bad, but we will take good care to tie their hands securely so that they can neither steal nor work.[23]

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15. Grad, *supra* note 9, at 946. *See also* Note, *The Theory of State Constitutions*, 1966 UTAH L. REV. 542, 546.

16. Grad, *supra* note 12, at 29-30. *See also* McMurray, *supra* note 12, at 213-14.

> There is on the face of it, no particular objection to such [legislative] matters being placed in the constitution. The people are only trying to get out of the bog of legislative inefficiency created by the constitutions and constitutional amendments adopted in the preceding period. But they are using a cumbersome process. The machinery is quite disproportionate, in many cases, to the result to be accomplished. It is like using a trip-hammer to crack a nut. And we must not forget that while the constitutional provisions of these days are, as Mr. Justice Temple said, in effect statutes, they are statutes of a higher and controlling quality. While the people are legislating through the form of constitutional amendments concerning taxation, they may be affecting action in some remote sphere of legislation. The legislature, it is conceivable, may be forbidden by some provision in the general taxation amendment from authorizing a municipality of the sixteenth class to buy a fire engine. Greater freedom of legislative action would be secured if such purely statutory matters could be expressed in the form of what they are in substance, namely, statutes.

17. Fellman, *supra* note 12, at 139-40.

18. *See* Bebout, *supra* note 12, at 1088 (praising the newer constitutions of Puerto Rico, Alaska and Hawaii).

19. Fellman, *supra* note 12, at 145. *See also* Swindler, *supra* note 12, at 578-79.

20. Munro, *supra* note 9, at 4.

> When details are crowded into a constitution, they shackle the hands of the public authorities. The more voluminous the constitution, the more quickly it loses touch with the social and economic needs of a rapidly growing community. The more precise and elaborate its provisions, the greater are the obstacles to the reform of abuses.

Id. See also Fellman, *supra* note 12, at 145; Grad, *supra* note 9, at 958-59.

21. *See* McMurray, *supra* note 12, at 210-14; Comment, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279, 282-83 (1949).

22. Grad, *supra* note 9, at 946. *See also* McMurray, *supra* note 12, at 216 ("Lawyers and students of governmental forms may lament the fact that our modern constitutions are huge and undigested codes of statutory law, but practical men will not trust their legislative efforts to the dangerous sea of constitutional law.").

23. McMurray, *supra* note 12, at 213.

This attitude is reflected in state constitutional limitations on the power of taxation. The taxing powers of most state legislatures are severely restricted by limitations on rates, debts, and expenditures of public monies.[24] Many state constitutions also place important restrictions on the fiscal powers of local governments.[25] The lamentable result in many cases is a constitutional strait jacket on the revenue raising powers of state and local governments.[26] Most commentators conclude that such limitations hamper efforts by state legislators to adopt effective and equitable fiscal policies that are responsive to current revenue needs.[27]

One of the most important limitations on the taxing power of state and local governments is the requirement that property be taxed uniformly.[28] These uniformity provisions were adopted in the latter half of the nineteenth century to prohibit preferential treatment of the railroads, land development corporations, and other institutions often aided by the legislatures in the course of industrial development.[29] The clauses were, like many of the constitutional limitations adopted at that time, "designed to make men honest by statute"[30] and generally demanded that the burden of taxation be equitably apportioned.[31] The drafters of these provisions could not agree on how this ideal might be accomplished, however, and the

24. *See* Bebout, *supra* note 12, at 1084. *See also* Gelfand, *supra* note 2. *See generally* Kresky, *Taxation and Finance,* in NATIONAL MUNICIPAL LEAGUE, SALIENT ISSUES OF CONSTITUTIONAL REVISION 136 (J. Wheeler ed. 1961); Landers, *Taxation and Finance,* in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 225 (W. Graves ed. 1960). For discussions of revenue articles in specific state constitutions, see Anderson, *Constitutional Aspects of Revenue and Taxation in Texas,* 35 TEX. L. REV. 1011 (1957); Parker, *Tax Problems Presented by the Tennessee Constitution,* 4 VAND. L. REV. 116 (1950); Young, *The Revenue Article of the Illinois Constitution of 1970—An Analysis and Appraisal,* 1972 U. ILL. L.F. 312.

25. *See* Grad, *supra* note 12, at 50-53.

26. Grad, *supra* note 9, at 65-66. For example, one commentator notes that approximately 10% of the California Constitution deals with revenue and taxation. Fellman, *supra* note 12, at 143.

27. *See* Grad, *supra* note 12, at 36; Kresky, *supra* note 24, at 137; Landers, *supra* note 24, at 225. These commentators also note, however, that limitations on fiscal powers in state constitutions have not diminished state governmental activity. *See* Kresky, *supra* note 24, at 137; Landers, *supra* note 24, at 238.

28. Kresky, *supra* note 24, at 138-39. For a comprehensive discussion of state constitutional uniformity provisions, see NEWHOUSE, *supra* note 6. These restrictions are important because of the degree to which local governments depend on the property tax for revenue. Grad, *supra* note 12, at 51. For a perspective on that dependence, see Gloudemans, Almy, Miller & Denne, *Property Tax Limit Legislation: An Evaluation,* 14 ASSESSOR'S J. 129, 130-37 (1979).

29. Matthews, *supra* note 6, at 44. Additionally, as intangible forms of wealth became more important, many states attempted to classify property taxes in an attempt to reach this new wealth. This development prompted fears of discrimination. *See* Landers, *supra* note 24, at 228-29.

30. McMurray, *supra* note 12, at 207.

31. Matthews, *supra* note 6, at 51-54.

resulting clauses vary considerably in both substance and form.[32]

The inflexibility of these strict uniformity provisions is revealed in *Knowlton v. Supervisors of Rock County*,[33] an early Wisconsin decision. The state constitution provided that the rule of taxation "shall be uniform, and taxes shall be levied upon such property as the Legislature shall prescribe."[34] The court was confronted with a local tax scheme limiting the tax rate on agricultural land within city limits to one-half the tax rate on other property in the city. The court began its analysis by noting that states have plenary powers, including the power of taxation, which may be exercised at the will of the legislature in the absence of specific constitutional limitations.[35] In this instance, however, the hands of the legislators were tied:

> The theory of our government is, that socially and politically all are equal, and that special or exclusive, social or political privileges . . . cannot be granted, and ought not to be enjoyed. . . . This principle of justice and equality which requires that each person should contribute towards the public expenses his proportionate share, according to the advantages which he receives, lies at the foundation of our political system; and, in our opinion, it was to give to it a greater permanency and force, and to secure its more rigid observance, that the section above quoted was introduced into the constitution.[36]

The court was, indeed, very "rigid" in its "observance" of the uniformity requirement; it held that the provision mandates both equal valuation and equal rates, and prohibits classification of property for taxation purposes.[37] The court dismissed the argument

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32. *See* NEWHOUSE, *supra* note 6, at 643-88.

33. 9 Wis. 378 (1859).

34. WIS. CONST. art. 8, § 1 (1848).

35. The court displayed an unusual sensitivity to the nonconstitutional limits on legislative discretion:

> The power of taxation is one of the essential attributes of sovereignty, and is inherent in and necessary to the existence of every government. In republics it is vested in the legislature, and in the absence of any constitutional restrictions, may be exercised by them, both as to objects and modes, to any extent which they may deem proper. It is then a matter of legislative discretion with which the courts can seldom or never interfere. In such cases the only guaranties against an abuse of this discretion, by harsh or unjust taxation, consists in the integrity and sense of justice of the legislature, their "responsibility to the people," and the power of the people, through the frequent recurrence of elections for the choice of new members to correct any evils which may have crept in.

Knowlton v. Supervisors of Rock County, 9 Wis. 378, 387 (1859).

36. *Id.* at 387-88.

37. *Id.* at 389. The court concluded that a constitutional amendment would be required to authorize differential tax treatment for farmland:

> It may be as well claimed by counsel that the legislature acted unwisely or perhaps unjustly in including within the territorial limits of the city so much farming or agricultural land, but that is not a matter for judicial correction. Neither is it a matter for them to correct by discrimination in taxation, when the constitution has declared that

that the command for uniformity is satisfied when there is uniformity within a proper class: "The answer to this argument is, that it creates different *rules* of taxation to the number of which there is no limit, except that fixed by the legislative discretion, whilst the constitution establishes but one fixed, unbending, uniform rule upon the subject."[38]

In a sole dissenting opinion, Mr. Justice Cole argued that property is different in kind, and must be taxed accordingly.[39] He concluded that as long as all property similarly situated is taxed similarly throughout the entire taxing district, the demands of uniformity have been met.[40] His position was based not on political philosophy but on judicial realism: "The idea of a revenue law which is equal in its operation, however beautiful in theory or desirable in practice, never has, and probably never will be realized."[41]

This somewhat cynical observation has been borne out in subsequent Wisconsin case law. Fifty years after the *Knowlton* decision, in *Chicago & Northwest Railway v. State*,[42] the court lamented over the inability of public officials and lawyers to define and implement the constitutional mandate:

> It seems quite unaccountable, after the lapse of nearly sixty years since the constitution was framed, and half a century since that feature of the article in question was first considered by this court, notwithstanding the seemingly clear decision then made on the point at that time primarily involved, followed soon thereafter by a second decision covering the precise matter now in hand, that we should find ourselves at this late day face to face with a controversy as to the precise meaning of the words of our organic law: "The rule of taxation shall be uniform, and taxes shall be levied on such property as the legislature shall prescribe." That language seems plain, this court, as we shall see, early said it was very plain, and yet it has been treated time and again as ambiguous, and still seems to be so regarded, notwithstanding all that this court has in fifty years said on the subject. And so it must be regarded, especially since men of the highest attainments, lawyers, jurists, and learned laymen, have read different meanings out of it, having regard, as it has been thought, to the object of state constitutions and the broad powers possessed by the people, unrestrained by a charter on the subject. No better object-lesson, perhaps, could well be presented to illus-

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there shall be no discrimination. The remedy lies in a repeal or an amendment of the charter.

Id.

38. *Id.* at 390. For more recent decisions relying heavily on the rationale of the *Knowlton* decision, see State Tax Comm'n v. Gales, 222 Md. 543, 161 A.2d 676 (1960); Boyne v. State *ex rel.* Dickerson, 80 Nev. 160, 390 P.2d 225 (1964).

39. 9 Wis. at 394 (Cole, J., dissenting).

40. *Id.*

41. *Id.* at 398.

42. 128 Wis. 553, 108 N.W. 557 (1906).

> trate the rule that ambiguity requiring judicial construction may as well arise through the apparent consequences of applying words in their literal sense to the subject with which they deal as from uncertainty of sense in the words themselves, than by the matter in hand. By such application, especially in the light of the varying views entertained of what this court has decided, the words of the constitution speak one way, seemingly, to some and another way to others. It is to be hoped that by the treatment of the subject in the three cases now before us all obscurities may be cleared up.[43]

The obscurities remained, however, and the court found itself with another half-century of litigation on the matter.[44] Recently, in *Gottlieb v. City of Milwaukee*,[45] the court reaffirmed the strict commands of the uniformity clause and struck down a redevelopment law which allowed for differential assessment of land acquired by private corporations for urban renewal projects.[46] The court concluded that there can be only one constitutional class for direct taxation of property.[47]

This attitude poses a difficult problem for state legislatures, because they must develop an effective and equitable property taxation system without differentiating between classes of property. To be sure, this safeguard inhibits preferential treatment of certain groups of taxpayers. But it also precludes legislation of a special character desigued to promote the general good. For example, the state legislature could not pass a differential assessment law designed to encourage participation of private corporations in the process of urban renewal.[48] Nor could it pass a law providing for differential assessment of farmland to discourage conversion of agricultural resources to more intensive uses.[49] In Professor McMurray's words,[50] the legislature could neither "steal nor work."

By way of contrast, the federal constitution contains no requirement of uniformity relating to property taxation. Here, the

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43. *Id.* at 587-88, 108 N.W. at 561 (opinion per Marshall, J.).

44. *See* Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 418, 147 N.W.2d 633, 638 (1967) ("In view of the approximately 20 cases on the same subject that have come before the court since Mr. Justice Marshall wrote, it is apparent that his hopes have not been realized.").

45. 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

46. *Id.* at 433, 147 N.W.2d at 646. For a discussion of the Wisconsin law, see Note, *supra* note 8, at 885.

47. 33 Wis. 2d at 424, 147 N.W.2d at 641. The Wisconsin court later held that agricultural land could not be assessed at a lower percentage of fair market value than residential property. State *ex rel.* Boostrom v. Board of Review, 42 Wis. 2d 149, 166 N.W.2d 184 (1969).

48. *See* Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

49. *See* Arkansas Pub. Serv. Comm'n v. Pulaski County Bd. of Equalization, 226 Ark. 64, 582 S.W.2d 942 (1979); State Tax Comm'n v. Gales, 222 Md. 543, 161 A.2d 676 (1960); Boyne v. State *ex rel.* Dickerson, 80 Nev. 160, 390 P.2d 225 (1964); Knowlton v. Board of Supervisors, 9 Wis. 378 (1859).

50. *See* text accompanying note 23 *supra*.

only limitation on state and local taxation resides within the equal protection clause of the fourteenth amendment.[51] The United States Supreme Court has never interpreted this mandate to forbid reasonable classification of property for the purpose of taxation.[52] In fact, the Court seems quite sensitive to the fact that legislatures must impose special burdens or grant special benefits for the general welfare of the state.[53] The Court has worked a compromise between the legislative right to classify and the demand for equality: it requires merely that those similarly situated be treated in a similar manner.[54] Under this approach, only patently arbitrary classifi-

51. *See* NEWHOUSE, *supra* note 6, at 601-08. *See also* Sholley, *Equal Protection in Tax Legislation*, 24 VA. L. REV. 229, 388 (1938).

52. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973).

> The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.

Id. (citations and footnotes omitted). *See also* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959); Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940); Alward v. Johnson, 282 U.S. 509 (1931); Puget Sound Power and Light Co. v. County of King, 264 U.S. 22 (1923); Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350 (1918).

53. *See, e.g.*, Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526-27 (1959).

> The states have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.

Id. See also Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 388 (1940).

> 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 the meritorious conception of equality which alone the Equal Protection Clause was designed to assure.
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> That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate—these are among the commonplaces of taxation and of constitutional law.

Id.

54. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

cations will be held invalid.[55]

The temptation to interject this analysis into interpretations of state constitutional uniformity provisions is great. After all, both the demand for equality and the requirement of uniformity present paradoxes of a similar nature. Both seem to suggest that the law itself must be equal; yet neither can require that "things different in fact be treated in law as though they were the same."[56] Under a doctrine of reasonable classification state courts could allow legislatures enough latitude to draw distinctions between those things that are dissimilarly situated.[57] If such practical notions of equality could be read into existing uniformity provisions, then classification of property for purposes of taxation, where reasonable, probably would be upheld.[58]

Although the idea is tempting, the ability of state courts to fashion the mandate of uniformity into a broad, general objective is limited by two considerations. First, every state must bear the burden of its past constitutional history.[59] In some jurisdictions, previous judicial interpretations of the state's uniformity clause may inhibit a modern state court from adopting a more flexible attitude toward the constitutional validity of innovative tax legislation.[60] The Wisconsin experience again is illustrative. In a recent decision, the state supreme court reaffirmed the vitality of the *Knowlton* and *Gottlieb* opinions and emphasized that the requirements of uniformity in that jurisdiction are much more rigid than the limitations imposed by the equal protection clause.[61] Thus, stare decisis would curtail a Wisconsin court's latitude to adopt the fourteenth amendment's doctrine of reasonable classification.

A second consideration inheres in the very nature of state constitutions. As mentioned above, states have plenary powers by virtue of their sovereignty which can be limited only by express state or federal constitutional provisions.[62] Unlike the federal govern-

55. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527-28 (1959). For an excellent summary of these principles and their application, *see* J. NOWAK, R. ROTUNDA & J.N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 361-65 (1978).

56. Tussman & tenBroek, *supra* note 54, at 344.

57. Of course, any property tax classification scheme would have to be reasonable, and the measure of its reasonableness would be "the degree of its success in treating similarly those similarly situated." *Id.*

58. This approach was suggested by Professor Matthews after an exhaustive study of state uniformity provisions. *See* Matthews, *supra* note 6, at 525-26.

59. Grad, *supra* note 9, at 956.

60. *Id.* at 956-57.

61. State *ex rel.* Fort Howard Paper Co. v. Lake Dist. Bd. of Review, 82 Wis. 2d 491, 511, 263 N.W.2d 178, 188 (1978).

62. Grad, *supra* note 12, at 29; *see* Knowlton v. Supervisors of Rock County, 9 Wis.

ment, the states do not derive their power from constitutional grants of authority.[63] The state constitution is a document of limitation: it limits power even when it purports to establish it.[64] As a consequence, each and every provision in a state constitution must be interpreted in light of the instrument's function to place restrictions on governmental authority.[65] Thus, because they appear in state *constitutions,* uniformity provisions are not amenable to interpretations that undermine their function as a limitation on the state's plenary power of taxation.

Because of these limitations, state supreme courts were com-

378, 387 (1859), *discussed at* note 35 *supra* and accompanying text. *Accord,* Turner v. Superior Court, 3 Ariz. App. 414, 417, 415 P.2d 129, 132 (1966); Standlee v. State, 96 Idaho 849, 852, 538 P.2d 778, 781 (1975); Central La. Tel. Co. v. Louisiana Public Serv. Comm'n, 262 La. 819, 264 So. 2d 905, 908 (1972); Dwyer v. Omaha-Douglas Pub. Bldg. Comm'n, 188 Neb. 30, 36, 195 N.W.2d 236, 241 (1972); City of Las Vegas v. Ackerman, 85 Nev. 493, 501-02, 457 P.2d 525, 531 (1969); School Dist. No. 12 v. Wasco County, 270 Or. 622, 627, 529 P.2d 386, 388 (1974); Nugent v. City of East Providence, 103 R.I. 518, 525, 238 A.2d 758, 762 (1968); Peoples Nat'l Bank v. South Carolina Tax Comm'n, 250 S.C. 187, 190, 156 S.E.2d 769, 771 (1967); Dennis v. Sears, Roebuck & Co., 223 Tenn. 415, 426, 446 S.W.2d 260, 265-66 (1969); State v. Texas Mun. Power Agency, 565 S.W.2d 258, 271 (Tex. 1978); Lewis Trucking Corp. v. Commonwealth, 207 Va. 23, 29, 147 S.E.2d 747, 751 (1966); State v. Bailey, 152 W.Va. 53, 56, 159 S.E.2d 673, 675 (1968).

63. Grad, *supra* note 12, at 29; *see* Client Follow-up Co. v. Hynes, 75 Ill. 2d 208, 215, 390 N.E.2d 847, 849, 28 Ill. Dec. 488, 490 (1979).

> Under traditional constitutional theory, the basic "sovereign" power of the State resides in the legislature. Therefore, there is no need to grant power to the legislature. All that needs to be done is to pass such limitations as are desired on the legislature's otherwise unlimited power.

Id. (paraphrasing G. BRADEN & R. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 111 (1969)). *Accord,* Kilpatrick v. Superior Court, 105 Ariz. 413, 415, 466 P.2d 18, 20 (1970); Jones v. Mears, 256 Ark. 825, 827-28, 510 S.W.2d 857, 859 (1974); Methodist Hosp. v. Saylor, 5 Cal. 3d 685, 691, 488 P.2d 161, 165, 97 Cal. Rptr. 1, 5 (1971); People v. Superior Court, 175 Colo. 391, 394, 488 P.2d 66, 67 (1971); State v. Dickinson, 188 So. 2d 781, 783 (Fla. 1966); Idaho Tel. Co. v. Baird, 91 Idaho 425, 428, 423 P.2d 337, 340-41 (1967); National Educ. Ass'n v. Board of Educ., Unified School Dist. No. 234, 225 Kan. 607, 609, 592 P.2d 463, 465 (1979); Hainkel v. Henry, 313 So. 2d 577, 579 (La. 1975); State *ex rel.* Farmer's Elec. Coop. v. Environmental Improvement Auth., 518 S.W.2d 68, 72 (Mo. 1975); Cottingham v. State Bd. of Exam., 134 Mont. 1, 11, 17, 328 P.2d 907, 912, 915 (1958); Elliott v. McNair, 250 S.C. 75, 84, 156 S.E.2d 421, 426 (1967); Perry v. Lawrence County Election Comm'n, 219 Tenn. 548, 551, 411 S.W.2d 538, 539, *cert. denied,* 389 U.S. 821 (1967); Fain v. Chapman, 89 Wash. 2d 48, 53, 569 P.2d 1135, 1139 (1977); State v. Brown, 151 W. Va. 887, 893, 157 S.E.2d 850, 853 (1967); Witzenburger v. State *ex rel.* Wyo. Community Dev. Auth., 575 P.2d 1100, 1134 (Wyo. 1978).

64. Grad, *supra* note 12, at 29; *see* Hoffmann v. Clark, 69 Ill. 2d 402, 422, 372 N.E.2d 74, 83, 14 Ill. Dec. 269, 278 (1977).

> Indeed, the inherent power of government to tax is so well established that it would undoubtedly be held to exist even in the absence of any constitutional provision authorizing it. . . . As a result, any attempt to grant a specific taxing power in a state constitution becomes, in effect, a limitation on the inherent power.

Id. (quoting from 6th Ill. Constitutional Convention, Report of the Committee on Revenue and Finance, 10 (1970)).

65. *See* Grad, *supra* note 12.

pelled to invalidate legislative attempts to classify property for differential taxation.[66] Public interest groups then focused their attention on the state constitutions themselves. In many states with strict uniformity requirements, the fundamental law was amended to provide for preferential treatment of agricultural or forest lands.[67] This trend became so fashionable that some states added open space amendments to constitutional provisions that did not require absolute uniformity.[68] In fact, two jurisdictions amended their constitutions to provide for differential taxation of real property after their respective state courts had validated preferential taxation schemes for agricultural land.[69]

The impact of this development on the concept of uniformity in state constitutions can be demonstrated by updating an earlier study of these provisions. In 1959, Newhouse concluded that twenty-two states have uniformity structures interpreted to require absolute uniformity.[70] All but six of these states have since amended their constitutions to provide for differential assessment of agricultural, open space, or forest lands.[71] Thus, from this group, strict uniformity requirements unaltered by open space amendments still exist only in Arkansas,[72] Idaho,[73] Indiana,[74] Mississippi,[75]

66. *See, e.g.*, State Tax Comm'n v. Gales, 222 Md. 543, 161 A.2d 676 (1960); Boyne v. State *ex rel* Dickerson, 80 Nev. 160, 390 P.2d 225 (1964).

67. *See, e.g.*, CAL. CONST. art. 13, § 8; KAN. CONST. art. 11, § 12; ME. CONST. art. 9, § 8; NEB. CONST. art. 8, § 1; NEV. CONST. art. 10, § 1; OHIO CONST. art. 2, § 36; TENN. CONST. art. 2, § 28; TEX. CONST. art. 8, §§ 1-d, 1-d-1; WIS. CONST. art. 8, § 1.

68. *See, e.g.*, DEL. CONST. art. 8, § 1; KY. CONST. § 172A; VA. CONST. art. 10, § 2.

69. *See* PENN. CONST. art. 8, § 2(b)(i) (adopted after Bensalem Township School Dist. v. County Comm'rs, 8 Pa. Commonw. Ct. 411, 303 A.2d 258 (1973) (upholding preferential assessment of land restricted by covenant to remain in open space use for five years)); FLA. CONST. art. 7, § 4(a) (following Lanier v. Overstreet, 175 So. 2d 521 (Fla. 1965) (upholding legislative definition of "just valuation" of agricultural land to include its value for that use only)).

70. NEWHOUSE, *supra* note 6, at 665. The states are: Alabama, Arkansas, California, Florida, Idaho, Illinois, Indiana, Kansas, Maine, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, Ohio, South Carolina, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming. *Id.*

71. *See* ALA. CONST. art. XI, § 217; CAL. CONST. art. 13, § 8; FLA. CONST. art. 7, § 4(a); ILL. CONST. art. 9, § 4(b); KAN. CONST. art. 11, § 12; ME. CONST. art. 9, § 8; MASS. CONST. Articles of Amendment, art. 41; NEB. CONST. art. 8, § 1; NEV. CONST. art. 10, § 1; N.H. CONST. art. 5b; OHIO CONST. art. 2, § 36; TENN. CONST. art. 2, § 28; TEX. CONST. art. 8, §§ 1-d, 1-d-1; UTAH CONST. art. 13, § 3; W. VA. CONST. art. 6, § 53; WIS. CONST. art. 8, § 1.

72. Arkansas provides for property to be taxed according to value determined equally and uniformly throughout the state. ARK. CONST. art. 16, § 5. In addition, the constitution states: "No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value . . . ." *Id.* In a recent decision, the Arkansas Supreme Court held, *inter alia*, that legislation authorizing use-value assessments for agricultural and timber lands violated these uniformity provisions. Arkansas Pub. Serv. Comm'n v. Pulaski County Bd. of Equalization, 266 Ark. 64, 582 S.W.2d 942 (1979). The court emphasized the fact that the state uniformity clause explicitly precludes classification

South Carolina,[76] and Wyoming.[77]

The open space amendments vary in form almost as much as do their parent uniformity provisions. A significant number of the amendments authorize use-value assessment for open space areas.[78] A few jurisdictions set up elaborate classification schemes, assigning different rates of taxation for certain classes of real property.[79] Other states simply grant certain landowners partial relief from property taxation.[80] The Kansas Constitution authorizes assessment of agricultural land on the basis of its productivity;[81] the Texas Constitution mandates such procedures.[82] In California, open

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of property for taxing purposes, and ordered compliance with the constitutional mandate. *Id.* at —, 582 S.W.2d at 949-50. The decision immediately prompted proposals to reform the uniformity requirement. *See* PROPOSED ARKANSAS CONSTITUTION OF 1980, TENTATIVE DRAFT art. 7, § 5 and Schedule II, § 2 (July 1979); S.J. Res. 1, Extended Session of the Arkansas General Assembly (January 1980). Arkansas voters will decide at the November 1980 general election whether to adopt any constitutional changes relating to the requirement of uniform taxation.

73. Although one provision in the Idaho Constitution requires only that taxes shall be uniform upon the same class of subjects within the territorial limits of a taxing jurisdiction, another provision requires that the legislature provide such revenue as may be needed so that every person shall pay a tax in proportion to the value of his or her property. IDAHO CONST. art. 7, §§ 2, 5. The state supreme court has interpreted this uniformity structure to prohibit classification of property for real estate tax purposes. *See* Idaho Tel. Co. v. Baird, 91 Idaho 425, 429, 423 P.2d 337, 341 (1967).

> A constitutional rule of uniform ad valorem taxation forbids legislative classifications of property for the purpose of imposing a greater burden of ad valorem taxation on one class than on another; that is, all property not exempt from taxation must be assessed at a uniform percentage of actual cash value, and a single fixed rate of taxation must apply against all taxable property.

Id. Accord, Merris v. Ada County, 100 Idaho 59, 593 P.2d 394, 401 (1979). *See generally* NEWHOUSE, *supra* note 6, at 381-87.

74. Indiana provides for a uniform and equal rate of taxation. IND. CONST. art. 10, § 1. For a discussion of Indiana decisions interpreting tho state's uniformity clause, see Myers, *supra* note 5-12.

75. Mississippi provides that taxation shall be uniform and proportionate to value. MISS. CONST. art. 4, § 112. *See generally* Rohertson, *Problems of Valuation and Equalization in Mississippi's Ad Valorem Tax System,* 48 MISS. L.J. 201, 230-35 (1977).

76. South Carolina provides for uniform taxation with certain exceptions not including agricultural, forest, or open space land. S.C. CONST. art. 10, § 1.

77. Wyoming provides for just valuation ot property with uniform taxation. WYO. CONST. art. 1, § 28; art. 15, § 11.

78. For these amendments, with the dates of adoption indicated in parentheses, *see, e.g.,* DEL. CONST. art 8, § 1 (1977); FLA. CONST. art. 7, § 4(a) (1968); KY. CONST. § 172A (1969); MD. CONST. art. 43 (1960); MASS. CONST. amend. art. 41, art. 112 (1978); ME. CONST. art. 9 § 8 (1970); NEB. CONST. art. 8, § 1 (1978); N.J. CONST. art. 8, § 1, ¶ 1b (1963); OHIO CONST. art. 2, § 36 (1974); UTAH CONST. art. 13, § 3 (1969); WASH. CONST. art. 7, § 11 (1968).

79. *See, e.g.,* ALA. CONST. art. XI, § 217 (1972); TENN. CONST. art. 2, § 28 (1973).

80. *See, e.g.,* MO. CONST. art. 10, § 7 (1976); NEV. CONST. art. 10, § 1 (1974); VA. CONST. art. 10, § 2 (1971); W. VA. CONST. art. 6, § 53 (1946); WIS. CONST. art. 8, § 1 (1974).

81. KAN. CONST. art. 11, § 12 (1976).

82. TEX. CONST. art. 8, § 1-d-1 (1978).

space land can be valued for property tax purposes on a basis that is consistent with its enforceably restricted use,[83] while in Oklahoma, the legislature has been directed to assess all real estate on the basis of its "highest and best" use value for the previous year.[84]

Before establishing criteria for evaluating the content of these open space amendments, we must regain our focus on the proper function of state constitutions. To the extent that a state's fundamental law should be brief, general, and devoid of unnecessary restrictions on governmental activity, amendments to the document must face particular scrutiny.[85] They should be used to eliminate excessive detail and to make the original constitution more concise.[86] State supreme court decisions can help determine whether these open space provisions tend to reduce the constitutional instability fostered by strict uniformity clauses, or rather serve as independent causes of inflexibility in state constitutional law. Moreover, these opinions can be useful in developing guidelines for articulating the appropriate content of constitutional limitations on state governmental powers of taxation.

II. Evaluating the Content of Open Space Amendments

The desirability of adopting a particular constitutional amendment must be judged against standards reflecting an appreciation of the role of state constitutions. Professor Grad proposes a balancing test: he asserts that each proposal must be evaluated to determine "whether the value of embodying *this* proposal in higher law, beyond change by normal lawmaking processes, is greater than the cost of so doing."[87] This process begins by asking whether the subject matter of the provision is sufficiently important to be given its enduring and controlling position in a constitution.[88] This consideration must then be weighed against the purported costs of constitu-

83. Cal. Const. art. 13, § 8 (1976).

84. Okla. Const. art. 10, § 8 (1972).

85. *See generally* Grad, Some Implications of State Constitutional Amendment for the Draftsman, in The Drafting of State Constitutions: Working Papers for a Manual (Mimeograph, National Municipal League 1967).

86. *Id.* at 4. Occasionally, the amendment process may be used to accommodate evolving values of a fundamental nature, such as the environmental rights provisions recently adopted in several jurisdictions. *See, e.g.*, Fla. Const. art. 2, § 7 (1968); Ill. Const. art. 11, § 1-2 (1971); Mich. Const. art. 4, § 52 (1964); N.Y. Const. art. 14, § 4 (1970); Pa. Const. art. 1, § 28 (1971); R.I. Const. art. 1, § 17 (1970); Va. Const. art. 11, §§ 1-2 (1971). For an excellent discussion of these provisions, see Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193 (1972).

87. Grad, *supra* note 9, at 972.

88. *Id.* at 950.

tional regulation of a subject: inflexibility, obsolescence, constitutional instability, and nullification of inconsistent government action.[89] When these adverse consequences are warranted by the positive aspects of a constitutional proposal, then an amendment can be justified.[90]

Under this analysis, the first requirement for justification of certain subject matter in the form of an amendment to a state constitution is that the proposal be important enough to warrant constitutional status.[91] The few open space amendments that contain a statement of purpose indicate that they are designed to accommodate the need for tax legislation promoting the preservation of open space areas.[92] Admittedly, most commentators remain quite skeptical about the efficacy of differential taxation for preserving open space land.[93] Nevertheless, an overwhelming number of jurisdictions have adopted preferential taxation programs for these areas.[94] While strong public sentiment should by no means be the conclusive factor in determining whether a provision merits constitutional consideration, popular pressure should be given serious attention if the interests promoted are sufficiently broad and permanent.[95]

The strong public support for open space taxation schemes may indicate that considerations other than natural resource preservation are being promoted by these statutes. In the case of agricultural land, for example, differential taxation programs may be supported simply because they provide tax relief for farmers.[96] This possibility is suggested in an early Iowa decision where the state supreme court upheld an agricultural property tax credit statute on the basis that inherent differences in the nature of property will support a classification scheme for tax purposes.[97] The court held

89. *Id.* at 972.
90. *Id.* at 959-60.
91. *Id.* at 950.
92. *See, e.g.*, CAL. CONST. art. 13, § 8; TEX. CONST. art. 8, § 1-d-1.
93. *See generally* Currier, *supra* note 5.
94. *See* note 5, *supra.*
95. Grad, *supra* note 9, at 950. Professor Grad adds this important caveat:

> It must be said, however, that more is necessary to warrant inclusion than a mere demonstration of pressures, and that the satisfaction of some other value ought to be required to convince the constitution-maker that the particular proposal which has a popular demand behind it is of sufficiently enduring and important character to argue for its inclusion in the state constitution. The problem here is likely to be greater in the case of special privileges protected in existing constitutions, for special interest groups are not likely to surrender constitutionally protected advantages without a fight.

Id. at 950-51.
96. *See* Currier, *supra* note 5, at 840; Hagman, *Open Space Planning and Property Taxation—Some Suggestions,* 1964 WIS. L. REV. 628, 652.
97. Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66 (1948).

that the legislature "could reasonably have concluded that agricultural lands are taxed excessively for school purposes as compared with property devoted to other uses and that such taxes should be equalized in accordance with benefits received."[98] The court also approved the power of state legislatures to calibrate their tax laws in order to encourage an industry deemed vital to the welfare of the state.[99] The court said in effect that what is good for agriculture is good for the state as a whole.[100] A similar philosophy has been expressed by Connecticut courts in dismissing challenges to differential taxation programs for forest lands and open space in that state.[101] Thus, certain ecological or historical factors may legitimately weigh heavily in support of constitutional status for provisions closely tied to local matters of important economical

98. *Id.* at 402, 35 N.W.2d at 73. *Accord,* Great N. Ry. v. Whitfield, 65 S.D. 173, 272 N.W. 787 (1937).

99. 240 Iowa at 408, 35 N.W.2d at 76.

> The power of state legislatures to adjust their tax laws in order to encourage an industry or undertaking deemed vital to the welfare of the state or in furtherance of some related principle of public policy has frequently been upheld.
>
> The governor of the state in commenting upon the report of the school code commission said in his message to the legislature that enacted this law, "We all know that agriculture is Iowa's basic resource. Upon its prosperity depends the prosperity of our great number of small businesses and communities." It was most effectively demonstrated during the depression of the early nineteen thirties that the well-being of the state as a whole is directly dependent upon the welfare of agriculture. The prosperity of our basic industry was no less vital when this act was passed nor is it less vital now when many other countries look to us for food and agriculture must supply their needs.

Id.

100. *Id.* at 409, 35 N.W.2d at 76.

101. *See* Baker v. Town of West Hartford, 89 Conn. 394, 398-99, 94 A. 283, 284-85 (1915).

> The purpose of this legislation was to induce owners of land to plant their property with forest trees. As a reward for such action the property owner was to have his property so planted exempt from taxation. . . . The obvious purpose of the Act of 1911 is one in which every citizen of this State has an interest. Our woodlands protect sources of rivers and lesser streams. Upon our forests largely rests the beauty of our New England scenery. The lumbering industry of this State is one of vast importance to a locality whose forests have been rapidly disappearing. The power sought to be used in this case has long been exercised in Connecticut, and has remained unchallenged until the present controversy. In deciding whether in a given case, the object for which taxes are assessed falls upon the one side or the other of this line of public use, courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, and what objects or purposes have been considered necessary to the support and for tho proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and to be proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

Id. See also Curry v. Planning and Zoning Comm'n, 34 Conn. Supp. 52, 376 A.2d 79 (1977) (upholding a statute providing for a ten-year decrease in the conveyance tax imposed on sales of property classified as open space land).

significance.[102]

The most compelling reason for including open space taxation amendments in state constitutions, however, is the lack of any alternative means for validating differential taxation programs.[103] In many jurisdictions, a rigid uniformity structure precluded adoption of preferential taxation for open space land. For example, early farmland preservation acts were invalidated by state courts in Maryland,[104] Nevada,[105] New Jersey,[106] and Ohio.[107] The prohibition on classification of property for tax purposes in these jurisdictions prevented state courts from following the example of federal constitutional doctrine favoring legislative discretion.[108] Actually, the courts had very little choice; the power to classify property for taxation had been circumscribed by earlier generations of constitution writers distrustful of the broad powers vested in state legislatures.[109] That power can only be restored to the legislatures by special clauses in state constitutions. In this manner, the courts became the principal catalyst to the adoption of open space taxation amendments in modern constitutions.[110]

The narrow construction of uniformity structures in state courts even tended to inhibit federal courts from upholding classification schemes for taxing real property. State judicial interpretations of constitutional tax limitations are binding on federal courts construing uniformity provisions in state constitutions.[111] If a state court does not countenance a classification system of taxation, then federal courts are at a loss to find the requisite rational basis for its

102. Grad, *supra* note 9, at 952-53. This fact may explain why some jurisdictions added open space amendments to constitutional provisions that do not require absolute uniformity. *See* notes 68-69, *supra.* Significantly, neither Iowa nor Connecticut have adopted open space taxation provisions; in both jurisdictions, the state constitution is silent as to the requirement of uniformity in property taxation.

103. *See generally* Grad, *supra* note 9, at 954-55.

104. State Tax Comm'n v. Gales, 222 Md. 543, 161 A.2d 676 (1960).

105. Boyne v. State *ex rel.* Dickerson, 80 Nev. 160, 390 P.2d 225 (1964).

106. Switz v. Kingsley, 69 N.J. Super. 27, 173 A.2d 449 (1961).

107. State *ex rel.* Park Investment Co. v. Board of Tax Appeals, 175 Ohio St. 410, 195 N.E.2d 908 (1964), *cert. denied,* 379 U.S. 818 (1964).

108. *See* notes 51-65 *supra* and accompanying text.

109. *See* notes 28-31 *supra* and accompanying text.

110. In some jurisdictions, the mere apprehension of invalidation by a state supreme court prompted an amendment to the constitutional requirement of uniformity. *See* Kelsey v. Colwell, 30 Cal. App. 3d 590, 595, 106 Cal. Rptr. 420, 423 (1973). In Kansas, the state constitution was amended to provide for open space taxation after an opinion by the Kansas attorney general indicated that the differential assessment law would not pass constitutional muster. *See* Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and Proposal,* 25 KAN. L. REV. 215, 218 (1977).

111. Weissinger v. Boswell, 330 F. Supp. 615, 622 (M.D. Ala. 1971).

existence.[112] In *Weissinger v. Boswell,*[113] for example, a federal court struck down a statewide property tax system permitting different assessment ratios for different counties. Alabama courts had strictly interpreted the state uniformity clause[114] to prohibit classification. The variations between counties conflicted with this mandate. Consequently, no rational basis could be found to sustain the discrimination and the court ordered the state to equalize assessments between counties.[115] One year later, the Alabama uniformity provision was replaced by a detailed classification scheme for the taxation of real property.[116]

A recent Illinois decision does suggest that courts in some jurisdictions may counteract the amendment breeding effect of past interpretations of the uniformity concept. In *Hoffmann v. Clark,*[117] landowners challenged a new statewide use-value assessment law

112. *Id.* at 623. *See also* Louisville & N. R.R. v. Public Serv. Comm'n, 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd* 389 F.2d 247 (6th Cir. 1968). Where the state sanctions a de facto system of classification for property tax purposes, however, a strict uniformity provision may not be binding on federal courts. *See* Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

> Since, so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another, the only question relevant for us is whether the state has done so. If the discrimination of which the Railway complains had been formally written into the statutes of Tennessee, challenge to its constitutionality would be frivolous. If the state supreme court had construed the requirement of uniformity in the Tennessee Constitution so as to permit recognition of these diversities, no appeal could successfully be made to the Fourteenth Amendment. Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text. . . . And if the state supreme court chooses to cover up under a formal veneer of uniformity the established system of differentiation between two classes of property, an expesure of the fiction is not enough to establish its unconstitutionality. Fictions have played an important and sometimes fruitful part in the development of law; and the Equal Protection Clause is not a command of candor.

Id. at 369. (Frankfurter, J., opinion for the Court).

113. 330 F. Supp. 615 (M.D. Ala. 1971).

114. ALA. CONST. art. XI, § 211 (1901)(providing in part, "All taxes levied on property in this state shall be assessed in exact proportion to the value of such property. . . .").

115. Weissinger v. Boswell, 330 F. Supp. 615, 625 (M.D. Ala. 1971). For an excellent discussion of the *Weissinger* case, see Yudof, *The Property Tax in Texas Under State and Federal Law,* 51 TEX. L. REV. 885, 915-18 (1973).

116. ALA. CONST. amend. 325 (1972, amended 1978).

117. 69 Ill. 2d 402, 372 N.E.2d 74 (1977).

for open space land.[118] The uniformity clause confronting the court appeared to prohibit classification of property in counties with populations under 200,000 people.[119] By looking to convention debates, however, the court inferred that "the uniformity limitation meant only that taxes must be equal and uniform among the members of the same class" in all taxing jurisdictions.[120] The court then adopted a relatively broad judicial definition of legislative authority concerning matters of taxation:

> We are not, therefore, through judicial interpretation, disposed to fulfill the fears expressed in the report of the Committee on Revenue and Finance by placing upon the constitutional provision here under consideration a "narrow" or "unintended" limitation upon the General Assembly. We are at this period of time early in the life of this constitution. We should not now through narrow construction make it difficult or impossible for the legislative body at some future time to resolve revenue problems which are not now known or foreseeable. We acknowledge that classification of real property was severely criticized by some during the convention and that the convention had before it reports from other States where classification had been practiced, which warned of its abuse. We cannot read into the Constitution a limitation which it does not contain solely to prevent some possible future abuse. Whether the principle of classification may at some time in the future be unwisely applied is not of judicial concern. The formation of tax policy, although it may be foolish and unwise, as long as it remains within constitutional limits, is peculiarly within the province of the elected representatives of the People.[121]

This attitude represents a significant departure from traditional notions about the constitutional mandate of uniformity.[122] If it does

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118. Revenue Act of 1939, §§ 20a-1 to 20a-3, ILL. REV. STAT. ch. 120, §§ 501a-1 to 501a-3 (1977).

119. ILL. CONST. art. 9, § 4 provides in pertinent part:

(a) Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

(b) Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or to [*sic*] continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential real property in that county.

120. 69 Ill. 2d at 419, 372 N.E.2d at 82.

121. *Id.* at 424, 372 N.E.2d at 84-85. For an analysis of the *Hoffmann* decision in the context of differential taxation schemes to preserve agricultural land, see Myers, *supra* note 5, at 15-18.

122. The *Hoffmann* decision apparently surprised a number of people, including the Illinois General Assembly. *See* Turano, *The Conference Committee Report—A Potentially Dangerous Tool*, 68 ILL. B.J. 26 (1979).

The General Assembly, expecting a contrary holding, hurriedly passed another Act in 1977—while the *Hoffman* [*sic*] appeal was pending—making provision for farmlands to

in fact signal a trend toward vesting a greater amount of discretion in the legislature for tax matters,[123] then the need for amending existing uniformity provisions in some state constitutions may be diminishing.

Thus far, this Article has been concerned with the various justifications for putting open space taxation provisions in state constitutions. It should be noted, however, that these amendments can have important negative effects on state constitutional law. Because every provision in a state constitution acts as a limitation on the plenary power to govern, the infestation of legislative matter changes the character of the document from organic law to "more of a geologic accretion of protections against the fears of the past."[124] As each additional layer becomes more elaborate, costly court decisions may be needed to interpret the meaning of these constitutional regulations.[125] Professor Munro stated it succinctly: "Litigation thrives on constitutional verbosity."[126]

In addition, if the open space amendments are narrowly drawn, they can become an independent cause of excessively frequent amendments, adding to the atmosphere of constitutional instability.[127] Any detailed constitutional provision can stimulate

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be assessed for tax purposes by a new "alternative" method of assessment, which method permits no roll-back or recapture of taxes for prior years in the event of a change in the agricultural use of the property.

Id. at 26 (footnotes omitted). As a consequence of these developments, Illinois currently has two farmland preferential assessment statutes. *See* ILL. REV. STAT. ch. 120, §§ 501a-1 to 501a-3, 501e (1977).

123. *See* Swindler, *supra* note 12, at 595.

An encouraging trend appears to have developed in quite recent years, as state legislatures have been urged to act more boldly under existing constitutional power, and courts in a number of states have sustained their actions. Where the constitutional language is not in itself restrictive, the general policy endorsed by the constitutional language need not be subjected to rules of strict construction. And where historically a word or phrase has taken on a new meaning or understanding now in general acceptance, which differs from the meaning of the time of enactment of the constitutional passage in which the word or phrase appears, the recent usage will apply. The self-executing nature of many constitutional provisions has been reaffirmed, and in matters of constitutional questions the issue of standing has been disposed of in a manner more conformable with recent federal decisions. The matter of the wisdom of legislation is once again being left to the legislature, and any changing view of public policy relating to legislative enactments is apt to be accepted by the courts.

Id.

124. Grad, *supra* note 9, at 30.

125. In Florida, for example, the state supreme court has issued three decisions in the last four years requiring an interpretation of the agricultural use value assessment provision in the state constitution. *See* Bass v. General Dev. Corp., 374 So.2d 479 (Fla. 1979); Straughn v. Tuck, 354 So. 2d 368 (Fla. 1977); Straughn v. K & K Land Management, Inc., 326 So. 2d 421 (Fla. 1976).

126. Munro, *supra* note 9, at 4.

127. *See generally* Grad, *supra* note 9, at 959.

subsequent amendments simply to keep the minutiae of regulations current with contemporary needs.[128] In Texas, for example, a statute-like open space provision has been followed by a more recent amendment mandating taxation of agricultural land on the basis of its productive capacity.[129] These provisions have been followed in turn by a clause explaining how the other two directives can be read together.[130] Clearly, any desires by the Texas legislature to deviate from this detailed constitutional norm will have to be satisfied by further amendment to the fundamental law.[131]

Open space amendments also aggravate the problem of constitutional instability by creating negative implications which further restrict the scope of rigid uniformity provisions.[132] Professor Grad explains:

> Whenever a narrowly limiting provision is amended by adding an exception to the limitation, the general scope of the provision is likely to become even more narrowly limited in that the stated exception may be taken by implication to disallow other exceptions not expressly stated. Every detailed constitution thus develops certain sore points which become the foci for veritable clusters of constitutional amendments. One critic has aptly characterized such provisions as "constitutional amendment breeders."[133]

Strict uniformity clauses epitomize the amendment breeding provisions in state constitutions. Their demand for absolute equality forces legislators seeking to use the taxing power for some perceived social good to promote a constitutional amendment that will allow for differential treatment of certain groups of taxpayers. Seldom is the result a clause that simply enables the legislature to classify property for taxing purposes.[134] The process is a political one; the narrower the scope of the amendment, the greater the likelihood it

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128. *Id.* at 969.

129. TEX. CONST. art. 8, §§ 1-d, 1-d-1.

130. TEX. CONST. art. 8, § 1-d-1(b).

131. The recently amended Alabama uniformity clause, which contains thirteen paragraphs of an elaborate scheme to classify property for taxing purposes, is another good example of the kind of detail that fosters constitutional instability. *See* ALA. CONST. amend. 373.

132. Grad, *supra* note 85, at 16.

133. Grad, *supra* note 9, at 969-70 (footnotes omitted).

134. *See* Grad, *supra* note 85, at 5.

> Most amendments are initiated by groups, either private or public, who seek constitutional change to remedy a situation which adversely affects them. Such a group will usually suggest an amendment, which although solving its immediate problem, ignores the broader aspects of the same situation leaving no further detailed amendment matters which could have been resolved with a single more general one, and leaving unresolved the problem of an overly detailed constitution (footnotes omitted).

Id. For a flavor of the politics involved in the passage of an open space amendment, see Comment, *Property Taxes and Farmers in Ohio: The Park Investment Story*, 7 U. TOL. L. REV. 1125, 1180-94 (1976).

will escape controversy.[135] Yet the courts are apt to imply from this narrow exception that other deviations not specifically enumerated in the constitution cannot be allowed.[136] As other groups seek preferential treatment, the cycle begins again and a new amendment is promoted while the parent uniformity clause remains unchanged.[137]

The experience in Missouri reveals both the uncertainty and the inflexibility that can result from excessive constitutional regulation of state and local taxing powers. One provision in the state constitution dictates that taxes must be uniform upon the same class of subjects within the territorial limits of the taxing authority.[138] Other provisions classify taxable property:

> Section 4(a). All taxable property shall be classified for tax purposes as follows: class 1, real property; class 2, tangible personal property; class 3, intangible personal property. The general assembly, by general law, may provide for further classification within classes 2 and 3, based solely on the nature and characteristics of the property. . . .
>
> Section 4(b). Property in classes 1 and 2 and subclasses of class 2, shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass of class 2. . . .[139]

These provisions clearly imply that property in class 1—real property—cannot be classified for differential taxation purposes.[140] Ap-

135. Grad, *supra* note 85, at 5.

136. *See, e.g.*, City of E. Orange v. Township of Livingston, 102 N.J. Super. 512, 246 A.2d 178 (1968).

> It is clear that the people in adopting S.C.R. 16 as an amendment to the Constitution, and the Legislature by its enactment of the Farmland Assessment Act of 1964, did not intend to treat in any way or to confer any special, different, or new tax status upon municipally-owned watersheds. Such a result is not warranted by implication.

Id. at 535, 246 A.2d at 190 (footnotes omitted). *See generally* Grad, *supra* note 12, at 29.

137. The resulting pattern of frequent constitutional amendment had led some authorities to become quite pessimistic about the probability of reversing this cycle. *See* Grad, *supra* note 9, at 969. Recent developments nevertheless provide some grounds for optimism. For many years, the Louisiana Constitution had the dubious distinction of being the longest on record. *See* Owen, *The Need for Constitutional Revision in Louisiana*, 8 LA. L. REV. 1 (1947). In 1974, however, a state constitutional convention undertook the task of streamlining the fundamental law of the state, which had grown with its 536 amendments to attain a length of about 255,500 words. The new constitution contains about 35,000 words. Although the document still contains matter which might otherwise be left to the legislature, about 158,600 words from the old document were shifted into the statute books. *See* Morgan, *A New Constitution for Louisiana*, 63 NAT'L CIVIC REV. 343, 344 (1974).

138. MO. CONST. art. 10, § 3.

139. MO. CONST. art. 10, §§ 4(a)-(b).

140. *See* Drey v. State Tax Comm'n, 345 S.W.2d 228 (Mo. 1961).

> We recognize that inequalities in assessment are inevitable; that perfect equality in assessment and exactitude in the distribution of the tax burden upon the owners of different types and kinds of real estate is not humanly possible. Like classification of real property and uniform taxes upon the same class of subjects, however, are not only possible but are required, by Constitution of Missouri, 1945, Art. X, §§ 4(a) and 3,

parently sensitive to this issue, the Missouri legislature initiated the passage of a constitutional amendment that would authorize preferential tax treatment of both forest lands and blighted areas.[141] More recently, the legislature made a similar but unsuccessful attempt to add another amendment authorizing differential taxation for agricultural land.[142] The specific grant of authority to tax forest lands preferentially may lead Missouri courts to conclude that the exercise of other powers not specifically enumerated must be circumscribed.[143] Thus, by negative implication, the state's recently enacted Agricultural Valuation and Assessment Act[144] could be overturned by the courts.[145]

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respectively. There are no subclassifications of real estate for the purposes of taxation.
. . . .
. . . It seems hardly necessary to add that all wild timberlands must be assessed on an equal and comparable basis with all lands in the county whether rural or urban, farm land or timberland, improved or unimproved; that town lots, farm lands and wild timberlands may not be classified separately and assessed at different rates (less than 30%, 30%, and 30 to 100%, respectively), and that the constitutional requirements are not met by the assessment of all wild timberlands in the county on an equal, comparable and reasonably uniform basis while intentionally, designedly and systematically applying different rates to other entire classes of real property.

Id. at 236-37. *But see* State *ex rel.* Howard Elec. Coop. v. Riney, 490 S.W.2d 1, 9 (Mo. 1973) (a difference in methods of assessment does not produce subclassification of property in violation of § 4(a) of art. 10). A similar problem exists in Michigan, where the state uniformity clause provides in part, "Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates." MICH. CONST. art. 9, § 3. This phrase may imply that classification of open space land for differential taxation purposes is prohibited. *See* Nord, *The Michigan Constitution of 1963,* 10 WAYNE L. REV. 309, 357 (1964). *See also* Stanley & Tunstall, *State and Local Taxation,* 19 WAYNE L. REV. 643, 691 (1973) (urging greater equalization between types of property to avoid the de facto classification of farmland and residential property as one class and industrial and commercial property as another).

141. MO. CONST. art. 10, § 7.

142. *See* Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's Farmlands,* 42 Mo. L. REV. 369, 380-81 (1977).

143. *See* Grad, *supra* note 12, at 29.

One consequence of state constitutions as documents of limitation is that they limit powers even when they purport to grant them, for the express grant of powers in a document of limitation is usually interpreted to mean that the power must be exercised in the precise way in which it has been granted. It may mean, by negative implication, moreover, that the specific powers granted by enumeration are *all* of the powers that may be exercised, because the enumeration of some may be taken to prohibit the exercise of those not enumerated. Since the state has plenary powers without the constitutional grant, one way to give meaning to a purported grant is to draw a negative implication as to powers not included.

Id.

144. MO. ANN. STAT. §§ 137.017-.026 (Vernon Supp. 1979).

145. *Accord,* Lapping, Bevins & Herbers, *supra* note 141, at 380-81. The authors advocate passage of a constitutional amendment to authorize differential taxation of farmland. This approach was taken by the drafters of the 1974 Louisiana Constitution when they wanted to provide for differential taxation of open space land and historic landmarks under

In short, open space amendments actually contribute to the inflexibility of existing uniformity provisions in many state constitutions. These strict uniformity clauses, like all provisions in a state constitution, must be interpreted in light of the fact that they are express limitations on the otherwise plenary powers of state governments. The repeated attempts to restore some of this power by piecemeal amendments indicate that these rigid limitations no longer reflect contemporary notions about the need for precise equality in property taxation.[146] Yet the passage of these amendments creates negative implications that jeopardize differential tax legislation unaccompanied by a similar constitutional underpinning. In Missouri, for example, the legislature can use differential taxation to encourage urban renewal while the use of a similar technique to discourage conversion of agricultural land to nonfarm uses is of doubtful constitutional validity.[147] In Wisconsin, the reverse is true; that state's legislature can adopt preferential taxation laws for preserving farmland, but not to promote the use of private capital for urban redevelopment.[148] In both jurisdictions, the presence of specifically enumerated exceptions to the general rule of uniformity makes it all the more difficult for legislatures to respond to pressures for new and different programs involving the taxation of real property.[149]

Occasionally, a state court will interpret its constitution to validate a new differential taxation program despite the presence of a strict uniformity provision.[150] In *Frazer v. Carr*,[151] for example, the Tennessee Supreme Court upheld the consolidation of Davidson County and the City of Nashville against allegations that the taxing provisions of the new metropolitan government violated the state uniformity clause.[152] These provisions established two service

a uniformity structure substantially similar to the one in Missouri. *See* LA. CONST. art. 7, § 18. The constitution of the state of Washington follows a similar pattern. *See* WASH. CONST. art. 7, §§ 1, 11.

146. *See* Grad, *supra* note 85, at 16.

147. *See* notes 138-144 *supra* and accompanying text.

148. *See* notes 45-47 *supra* and accompanying text; WIS. CONST. art. 8, § 1.

149. For examples of the kinds of programs that may require constitutional amendments under existing uniformity structures in several jurisdictions, see Minan & Lawrence, *State Tax Incentives to Promote the Use of Solar Energy*, 56 TEX. L. REV. 835 (1978); Shull, *The Use of Tax Incentives for Historic Preservation*, 8 CONN. L. REV. 334 (1976).

150. *See, e.g.*, Hoffmann v. Clark, 69 Ill.2d 402, 372 N.E.2d 74 (1977).

151. 210 Tenn. 565, 360 S.W.2d 449 (1962).

152. TENN. CONST. art. 2, § 28 (1870, amended 1973), providing in part:

> All property shall be taxed according to its value, that value to be ascertained in such manner as tbe Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any otber species of property of the same value. . . .

districts with different rates of taxation corresponding to the level of services provided to taxpayers in both urban and rural areas of the county.[153] The court never really addressed the question whether this differential taxation scheme violated Tennessee law,[154] but focused instead on the constitutional amendment authorizing city-county consolidations[155] and on the "practical nature" of state constitutions.[156] The court quoted the following passage from a previous decision:

> 'Constitutions,' said Mr. Story, 'are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, they must be supposed to read them with the help of common sense. . . . They must be interpreted in the light of practical sense and *enforced according to their manifest intention.*' (Emphasis added)[157]

With these rules of construction in mind, the court concluded that taxpayers in rural Davidson County would never have approved an enabling amendment that would impose a tax upon them for services they would never receive.[158] Moreover, the court reasoned, the drafters of this enabling amendment would never have wasted their time designing a provision that would so surely meet defeat.[159] The

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This provision was changed substantially in 1973 to allow for a classified property tax system. TENN. CONST. art. 2, § 28. The constitutionality of the amendment was upheld in Snow v. City of Memphis, 527 S.W.2d 55 (Tenn. 1975), *appeal dismissed*, 423 U.S. 1083 (1976).

153. TENN. CODE ANN. § 6-3711 (Supp. 1979). *See also* White, *Differential Property Taxation in Consolidated City-Counties*, 63 NAT'L CIVIC REV. 301 (1974). *See generally* Grubbs, *Legal Aspects of City-County Consolidation in Tennessee*, 30 TENN. L. REV. 499 (1963); Mendelson, *Consolidation of County and City Functions and Other Devices for Simplifying Tennessee Local Government*, 8 VAND. L. REV. 878 (1955).

154. In dicta, however, the court quoted with approval the following conclusion from the lower court's opinion:

> 'To argue that the farmer in the outlying area of Davidson County, without benefit of urban services, must be taxed at the same rate as the property owner residing within the Urban Services District, with benefit of urban services, actually ignores the principle of equal and uniform taxation. . . .'

210 Tenn. at 578-79, 360 S.W.2d at 454-55.

155. TENN. CONST. art. 11, § 9.

> The General Assembly may provide for the consolidation of any or all of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located; provided, such consolidations shall not become effective until submitted to the qualified voters residing within the municipal corporation and in the county outside thereof, and approved by a majority of those voting within the municipal corporation and by a majority of those voting in the county outside tho municipal corporation.

Id.

156. 210 Tenn. at 579-82, 360 S.W.2d at 455-56.

157. *Id.* at 579, 360 S.W.2d at 455.

158. *Id.* at 580, 360 S.W.2d at 455.

159. *Id.*, 360 S.W.2d at 455.

court held that the enabling amendment authorized the differential tax rate between urban and rural areas in the new taxing district.[160]

In most instances, however, state courts will be inhibited from adopting such flexible interpretations of legislative authority under strict uniformity structures. Unlike the Illinois court in *Hoffmann* or the Tennessee court in *Frazer,* courts in some jurisdictions will find it difficult to avoid giving effect to the literal demands of rigid uniformity provisions.[161] As a result, state governments are encouraged to add enabling amendments to their constitutions before enacting new legislation. In Kentucky, for example, an amendment was passed to authorize differential taxation in consolidated city-county governments prior to the creation of the Lexington-Fayette Urban County Government.[162] This preventive measure was designed to protect the legislation from subsequent attacks based upon state constitutional grounds,[163] but it did nothing to alleviate the rigid limitations of the parent uniformity clause:[164]

> While additional amendment may temporarily solve an immediate problem, it will not resolve the underlying difficulty of the restrictive effect of the provision. It may, on the contrary, aggravate the problem because a newly added exception, for instance, may create a negative implication which further restricts the scope and flexibility of the amended provision, setting the stage for the next round of amendment.[165]

The net result is that the only certain resolution of any potential conflicts between new differential taxation legislation and restrictive uniformity structures resides, unfortunately, in the form of yet another amendment to the state constitution.[166]

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160. *Id.* at 581, 360 S.W.2d at 456.

161. Arkansas Pub. Serv. Comm'n v. Pulaski County Bd. of Equalization, 266 Ark. 64, 582 S.W.2d 942 (1979), *discussed at* note 72 *supra. See, e.g.,* Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 431-32, 147 N.W.2d 633, 645 (1967):

> In view of the unbroken precedents developed over the years concerning the same unaltered clause of the constitution, we cannot abandon *stare decisis* in this field of property taxation. We are governed not only by the logic of the previous opinions of the court in this respect but by the weight of precedent, from which we see no reason to deviate.

See generally Matthews, *supra* note 56, at 523.

162. KY. CONST. § 172A.

163. *See* Jacobs v. Lexington-Fayette Urban County Gov't, 560 S.W.2d 10, 14 (Ky. 1978).

164. In *Jacobs,* for example, the court noted that the enabling amendment allowed for differential rates of ad valorem taxes only. The court held that the differential tax rates for personal property and severed mineral interests in the new taxing entity were not sanctioned by the amendment and were therefore unconstitutional. *Id.* at 14.

165. Grad, *supra* note 85, at 16.

166. Two recent opinions from the Idaho Attorney General indicate that strict uniformity mandates continue to create serious mischief for new property tax programs. Voter demands for property tax relief in that state resulted in a legislative initiative modeled after

III. Choosing a Method of Constitutional Change

This analysis of the various reasons both for and against constitutional regulation of the taxing power permits the establishment of certain guidelines for changing existing uniformity structures in state constitutions to accommodate new demands for preferential taxation programs. An underlying principle, however, is that every state is unique, both in its governmental concerns[167] and in its philosophy toward constitutional limitations on the power of taxation.[168] Consequently, this discussion must be limited to an enumeration of the various approaches to be considered when reforming the uniformity provisions of state constitutions.

First, when the presence of frequent, narrowly drawn amendments reveals that the uniformity limitaton no longer serves contemporary needs, the constitutional provision should be repealed.[169] The noticeable pattern by which uniformity mandates erode in piecemeal fashion to allow for preferential treatment of both rural lands[170] and urban landmarks,[171] and to promote such disparate policies as the redevelopment of urban slums[172] and the production of solar energy,[173] suggests that strict limitations no longer serve a useful function. The legislature, by repealing overly restrictive uniformity clauses, can be regranted the discretion to shape effective tax policy. Any abuses of this discretion can still be checked by state and federal equal protection clauses, which stand as barriers to patently arbitrary classification schemes and unjust laws.[174] As

California's Proposition 13. *See* Idaho Code § 63-923 (1979). One of the provisions limits assessed valuations for property tax purposes to 1978 market values adjusted annually to reflect inflation but only at a rate not to exceed 2% per year. Idaho Code § 63-923(2)(b) (1979). The attorney general concluded that the 2% limitation "would, in times of higher actual inflation, result in such a great discrepancy between the actual, current value of property and the assessed value" that the just valuation requirement of the state's uniformity clause would be violated. 79-16 Ops. Idaho Atty. Gen. —, — (1979). In another decision, the attorney general noted that two parcels of property identical in value in 1978 may vary considerably in subsequent years due to such factors as a change in the desirability of locations. He concluded that the similar treatment of these dissimilarly situated pieces of property under the 2% rule may violate the mandate for equality found in the state's uniformity provision. 78-37 Ops. Idaho Atty. Gen. 148, 156 (1978). In both opinions, the attorney general relied on previous Idaho Supreme Court decisions giving strict interpretations to the state's uniformity clauses. *See* note 73 *supra*.

167. *See* Grad, *supra* note 9, at 940-42.

168. *See* Matthews, *supra* note 6; Newhouse, *supra* note 6.

169. Grad, *supra* note 85, at 16.

170. *See, e.g.*, Kan. Const. art. 11, § 12; Wash. Const. art. 7, § 11.

171. *See, e.g.*, Cal. Const. art. 13, § 8; La. Const. art. 7, § 18(C).

172. *See, e.g.*, Mo. Const. art. 10, § 7; N.J. Const. art. 8, § 1, ¶ 6.

173. *See, e.g.*, Va. Const. art. 10, § 6 ¶ (d).

174. See Newhouse, *supra* note 6, at 601-08. *See generally* McMurray, *supra* note 12, at 221-22. State and federal due process clauses may also be used to challenge property tax

long as the legislature stays within these broader constitutional boundaries, however, it can adapt to new and different situations by revising state revenue laws to keep pace with changes in public sentiment.[175]

Unfortunately, this approach stands little chance of success. If history is a proper guide, the possibility of such broad-based constitutional reform is slight. Newhouse pointed out in his 1959 study that no state with a uniformity clause had ever removed that clause without enacting a substitute provision.[176] Moreover, as noted above, proponents of a constitutional amendment allowing for preferential treatment of specific kinds of property are not likely to risk defeat by arguing in the alternative for repeal of the overly restrictive parent uniformity clause.[177] The safest approach from their perspective is to advocate the adoption of a narrower, less controversial exception to the general constitutional limitation.

The second best approach, in view of the proper form and function of state constitutions, is to replace a rigid uniformity structure with a provision that states in general terms the degree of uniformity required by law.[178] A significant degree of constitutional flexibility can be assured by explicit recognition of the legislative right to classify property for the purpose of taxation.[179] While this approach concedes that legislators cannot abide by the perfectionism demanded from strict uniformity mandates, it also serves to guarantee that this concession will not result in numerous constitutional amendments to existing uniformity provisions. Moreover, state legislatures would remain free to respond to public pressures for new tax programs that draw relevant distinctions between different kinds of property.

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classification statutes. *Compare* Bass v. General Dev. Corp., 374 So. 2d 479 (Fla. 1979) (invalidating farmland assessment statute creating an irrebuttable presumption that land for which the owner had recorded a subdivision plat was nonagricultural) *with* Property Appraisal Dep't v. Ransom, 84 N.M. 637, 506 P.2d 794 (1973) (upholding "green helt" law distinguishing between subdivided and unsubdivided agricultural land).

175. Uniformity clauses are absent in the state constitutions of Alaska, Connecticut, Hawaii, Iowa, New York, Rhode Island, and Vermont. Three of these jurisdictions—Hawaii, New York, and Vermont—have implemented innovative statewide land use programs combining differential taxation with regulatory controls over the development of open space land. For discussions of the Hawaii and Vermont programs, see D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 269-391 (1968). For a discussion of the New York program, *see* Myers, *supra* note 5.

176. NEWHOUSE, *supra* note 6, at 636.

177. *See* notes 134-35 *supra* and accompanying text.

178. Grad, *supra* note 85, at 16, 28. *See generally* NEWHOUSE, *supra* note 6, at 768-70.

179. *See, e.g.*, KY. CONST. § 171; OKLA. CONST. art. 10, § 22. The right to classify can also be implicitly recognized by constitutional provisions providing that taxes shall be uniform within each class of subjects. *See, e.g.*, COLO. CONST. art. 10, § 3; MINN. CONST. art. X, § 1; OR. CONST. art. 9, § 1.

In addition, this approach allows state courts to play a more meaningful role in reviewing the constitutionality of differential tax legislation. They would no longer be forced to choose between the unfortunate extremes of either invalidating politically popular tax programs[180] or upholding the legislation on the basis of strained interpretations of existing constitutional provisions.[181] Instead, the courts could focus their inquiry on the relationship between the legislative classification and the purpose of the tax statute. In *Elwell v. County of Hennepin,*[182] for example, the Minnesota Supreme Court upheld a "green acres" statute despite challenges based upon the state's uniformity clause. The Minnesota provision required all taxes to be uniform upon the same class of subjects.[183] The court held that this clause permitted classification of property for tax purposes if it was fairly done.[184] The court further stated that it would not disturb the legislative determination unless the classification was clearly arbitrary and had no reasonable relationship to the purpose of the law.[185] It noted that the "green acres" law was designed to equalize tax burdens on agricultural property within the state.[186] The statute provided for farmland to be assessed on a basis which did not consider nonagricultural factors.[187] The court held that this classification allowed for valuation of farmland in urban areas by standards that were similar to those used to assess agricultural land in rural areas.[188] Thus, the court concluded that a legitimate purpose justified the difference in tax treatment between agricultural land and all other kinds of real property.

The Minnesota court's standard of review in *Elwell* resembles the standard used by federal courts reviewing tax legislation under the equal protection clause of the United States Constitution.[189] As noted previously, this approach requires almost complete deference

180. *See, e.g.,* Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 147 N.W.2d 633 (1967), *discussed at* notes 45-47 *supra* and accompanying text.

181. *See, e.g.,* Hoffmann v. Clark, 69 Ill. 2d 402, 372 N.E.2d 74 (1977), *discussed at* notes 116-21 *supra* and accompanying text; Frazer v. Carr, 210 Tenn. 565, 360 S.W.2d 449 (1962), *discussed at* notes 150-59 *supra* and accompanying text.

182. 301 Minn. 63, 221 N.W.2d 538 (1974).

183. MINN. CONST. art. X, § 1.

184. 301 Minn. at 76, 221 N.W.2d at 546-47.

185. *Id.* at 74, 221 N.W.2d at 546.

186. *Id.* at 76, 221 N.W.2d at 546.

187. MINN. STAT. ANN. § 273.111 (West Supp. 1980).

188. 301 Minn. at 76, 221 N.W.2d at 546.

189. *See id.* at 75, 221 N.W.2d at 546. "The provisions of Minn. Const. art. 9, § 1, are no more restrictive upon legislative power to tax or classify than is the equal protection clause in the Fourteenth Amendment of the United States Constitution. If the statute here involved does not violate one, it does not violate the other." *Id.*

to legislative judgment on the matter of appropriate classifications in tax initiatives.[190] The presence of a separate uniformity provision in a state constitution may influence some courts to conduct a more serious inquiry into the relationship between a new tax law and its stated or implied purpose. At the same time, however, such efforts could put in motion those forces that work to erode rigid uniformity provisions beyond recognition. The experience in South Dakota is particularly noteworthy. That state's uniformity clause recognizes a legislative right to classify property for taxing purposes but also requires that taxes be uniform upon all property of the same class.[191] In *Simmons v. Ericson,*[192] the state supreme court invalidated legislation setting limitations on the tax rate for agricultural land to support local school districts. The court concluded that there was no legitimate purpose of taxation for local schools that would permit the distinction made between agricultural land and all other real property within a school district.[193]

The South Dakota legislature responded to the *Ericson* decision by proposing a constitutional amendment enabling it to classify agricultural land for the purpose of school taxation.[194] The amendment was adopted by a substantial majority of those voting on the proposal in the general elections of the following year, and the legislature soon reenacted the differential tax law favoring farmland.[195] In a subsequent challenge to the new statute, the state supreme court reversed itself and concluded that the law was a rational one.[196] The court noted that with the advent of the new constitutional amendment, the law could be invalidated only if it conflicted with the federal equal protection clause.[197] The court seemed as sensitive to the strong public sentiment favoring the differential tax legislation as it was to the narrower standard of review for tax legislation adopted by federal courts:

> This court in 1929 could see no proper distinction between agricultural land and other real estate for the purpose of school taxation. However, in 1923 and again in 1931 the State Legislature saw a distinction, and in 1930 the people of this state saw the distinction so plainly that they

190. *See* notes 51-55 *supra* and accompanying text. *See generally* Tussman & ten Broek, *supra* note 54, at 369-70.

191. S.D. CONST. art. XI, § 2.

192. 54 S.D. 429, 223 N.W. 342 (1929).

193. *Id.* at 432, 223 N.W. at 343.

194. *See* Great N. Ry. v. Whitfield, 65 S.D. 173, 175, 272 N.W. 787, 788 (1937).

195. *Id.*, 272 N.W. at 788. For a discussion of the history of the South Dakota statute, see Comment, *Preferential Assessment of Agricultural Property in South Dakota,* 22 S.D.L. REV. 632, 643-44 (1977).

196. Great N. Ry. v. Whitfield, 65 S.D. 173, 184, 272 N.W. 787, 792 (1937).

197. *Id.* at 180, 272 N.W. at 790.

> were willing to write it into the Constitution of this state. . . . We can no longer abide by the decision in *Simmons v. Ericson,* in so far as its language relates to the application of the Federal Constitution to the facts now before us. Since 1929 the severity of the adverse conditions affecting agriculture in this state, of which we are now fully aware, makes complete our realization that this court failed to see in 1929 that which was apparently then plainly visible to the Legislature and the people. . . . True, a general economic depression has affected all business and industry, but the Legislature in making this present classification is presumed to have acted upon adequate information, and from what we know of general conditions in South Dakota we cannot say that the classification is either unreasonable or arbitrary.[198]

Thus, a significant and perhaps unforeseeable change in the economic and social condition of the state persuaded the South Dakota court to recognize a greater degree of discretion in the legislature to deal with a new situation. The court now seemed quite willing to accept as true the legislature's determination that agricultural land could not bear the same tax burden for supporting local schools as other property in the same school district.[199] This example illustrates that strict interpretations of uniformity provisions allowing for reasonable classifications can provoke constitutional changes that will effectively remove tax legislation from serious scrutiny by state courts.

Finally, if existing strict uniformity provisions cannot be changed and amendments are still deemed necessary, then the amendments should be drafted in langnage that is broad enough to provide maximum fiexibility for state legislatures confronted with popular pressures to enact differential tax legislation.[200] They should avoid the unnecessary procedural detail and the restrictive terminology that foster further amendment.[201] In addition, they should be permissive rather than mandatory in nature, allowing the legislature several alternative methods for implementing the constitutional directive.[202] For example, an open space amendment

198. *Id.* at 182-83, 272 N.W. at 791-92.

199. *Id.* at 183-84, 272 N.W. at 792.

200. *See generally* Grad, *supra* note 85, at 4.

201. The Alabama and Texas provisions provide a good example of the kind of language to avoid on both of these counts. *See* ALA. CONST. amend. 373; TEX. CONST. art. 8, §§ 1-d, 1-d-1, *discussed at* notes 129-31 *supra,* and accompanying text.

202. In the most recent Texas open space amendment, for example, the legislature is directed to assess agricultural land on the basis of its productivity. TEX. CONST. art. 8, § 1-d-1. By mandating precisely how use value assessment is to be accomplisbed, however, the provision effectively precludes the legislature from considering any other methods to accomplish its constitutional task. The Delaware Constitution contains a similarly restrictive open space amendment. DEL. CONST. art. VIII, § 1. Grad suggests that if such self-executing provisions are deemed desirable, the draftsman should consider adding a clause authorizing the legislature to consider alternative metbods of accomplishing the same result in addition to those

should simply regrant to the legislature the power to define open space land and make special provisions for the taxation of such areas.[203] This approach would authorize state legislatures to carve out by statute special exceptions to the general rule of uniformity as public sentiment may demand. Consequently, lawmakers would not be required to place every new differential tax program upon its own specific constitutional foundation.

The problem nevertheless remains that any change in current uniformity structures short of repeal will be accompanied by all of the assorted risks inherent in constitutional control over the power to tax property. Due to the negative implications raised by specific exceptions to constitutional limitations, for example, the presence of even a well-drafted open space amendment can hamper efforts by the legislature to enact differential tax legislation for the preservation of historic landmarks or the promotion of urban redevelopment.[204] The second best solutions offered here are designed only to provide some assurance that revisions of existing constitutional regulations can be kept to a minimum.[205] The problems associated with such regulations are bound to persist until the authority to formulate revenue laws in accordance with the pressing needs of government is fully regranted to state legislatures.

IV. CONCLUSION

The experience with strict uniformity provisions and their numerous amendments would seem to suggest that severe constitutional tax limitations will eventually give way to piecemeal exceptions if the restrictions unreasonably interfere with legislative efforts to deal with contemporary problems.[206] In the late 1800s, a basic distrust of the legislatures' plenary powers to raise revenue led to the adoption of rigid limitations on the power of taxation, including the uniformity mandates. In many jurisdictions, these provisions effectively prohibited the classification of property for

spelled out in the constitution. Grad, *supra* note 9, at 971. It should be noted, however, that courts may find it very difficult to enforce any mandatory provisions of a self-executing nature. *See, e.g.,* Client Follow-up Co. v. Hynes, 75 Ill. 2d 208, 390 N.E.2d 847 (1979). *See generally* Dodd, *Judicially Non-Enforceable Provisions of Constitutions,* 80 U. PA. L. REV. 54 (1931).

203. *See, e.g.,* PA. CONST. art. 8, § 2(b)(i).

204. *See generally* notes 132-37 *supra* and accompanying text.

205. *See* Grad, *supra* note 9, at 970: "The cost of regulating a subject constitutionally cannot be avoided in the long run, but it can be reduced or delayed by thoughtful constitutional draftsmanship."

206. Similar conclusions have been drawn with respect to constitutional limitations on public industrial financing. *See* Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach,* 111 U. PA. L. REV. 265 (1963).

the purpose of tax legislation. Recent generations have concluded that these limitations are now too inflexible and counterproductive. They have adopted amendments to the uniformity provisions regranting to the legislatures the authority to enact special laws in certain circumstances. Unfortunately, because of their narrow focus, these additional layers of constitutional regulations have far too often simply added to the inflexiblity of existing constitutional norms.[207]

In the final analysis, the history of strict uniformity mandates in state constitutional law serves to illustrate that the ultimate check on legislative indiscretion lies in the general limitations of the federal constitution and in public opinion.[208] By attempting to regulate taxation in our state constitutions, we have only aggravated the restrictive nature of these documents. If such limitations are deemed necessary, they are best left to the statute books. Public opinion can then be channeled through our legislative institutions instead of our fundamental law. This objective cannot be completely realized, however, until we are willing to give to our legislatures the full authority and the final responsibility to formulate tax policy.

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207. *See* notes 127-49 *supra* and accompanying text. *See generally* Grad, *supra* note 12, at 30.

208. *See* McMurray, *supra* note 12, at 220-24. Professor McMurray concluded optimistically that the force of public opinion could eventually work to restore state constitutions to their original form and function:

> The singular phenomenon of regranting to the legislature by special clause in the constitution powers which were formerly taken away, and which are still withheld for most purposes, must finally result in striking off all shackles on legislative powers, other than those imposed by public opinion. The written, rigid constitution would seem to be inevitably doomed.

Id. at 215-16. The experience with strict uniformity provisions and their various amendments, however, would tend to indicate that such complete reform of existing constitutional regulations is made difficult, if not impossible, by the unwieldy process of amending state constitutions and the political nature of those proceedings. *See* notes 134-35, 176-77 *supra* and accompanying text. For general discussions of the amendment process in various jurisdictions, see Bartley, *Methods of Constitutional Change*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 21, 24-28 (W. Graves ed. 1960); Grad, *supra* note 85, at 18-26.