

The Just and Equitable Tax Clause Limits the Power of Taxation and Provides a
Basis for Judicial Review of Unreasonable Taxes

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It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State... We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.

Corum v. University of North Carolina, 330 N.C. 761, 783 (1992) (internal citations omitted)

Although the public most often think of the First or Second Amendments of the United States Constitution when they think of constitutional law, the state constitution provides numerous protections which are vital to our individual liberty and economic freedom. Recent events like government overreach justified by the COVID pandemic and political and cultural shifts should remind us of the everlasting importance of both the United States Constitution and the North Carolina Constitution. That importance is not limited to the familiar protections for speech or religious worship or the right to bear arms. The Constitution matters—and that means *all of it*.

The North Carolina Constitution contains many provisions designed to protect and promote economic liberty. Not least among these is the Just and Equitable Tax Clause found at Article V, § 2. In the rubric of the North Carolina Constitution, this provision, as with other economic liberty provisions, is often overlooked. The time has long since come for North Carolinians to familiarize themselves of their rights under the Just and Equitable Tax Clause. So, what exactly is the Just and Equitable Tax Clause and what rights does it protect? This memo will give readers a little

background on the clause and explore its most notable caselaw, including a case in which the Supreme Court struck down a tax increase of nearly 59,900%.

The constitutional right of taxpayers to seek judicial relief and, where appropriate, relief from taxes imposed in an unjust and inequitable manner was recognized by a unanimous decision of the North Carolina Supreme Court in 2013. Appreciating that case requires a little review of where the Just and Equitable Tax Clause fits in the Constitution and what older cases had to say about the power of taxation.

A. The Just and Equitable Tax Clause is One part of a Three-Part Limitation on the power of Taxation.

Article V, §2 provides, in relevant part:
(1) Power of taxation. The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

N.C. Const. art. V, sec. 2(1).

Article V, §2(1) creates a limitation upon the “power of taxation.” That limitation has three veins: 1) the just and equitable requirement; 2) the public purposes requirement and 3) the contracting away prohibition. Although described as “clauses”, the three limitations contained at Article V, §2(1) are really phrases. Each of those phrases limits the same subject—the “power of taxation.”

Case law on the Public Purpose Clause is abundant. See, e.g., Maready v. City of Winston-Salem, 342 N.C. 708, 714 (1996) (challenged economic development incentives did not violate public Purpose Clause); Hughey v. Cloniger, 37 N.C. App. 107 (1978) (Public Purpose Clause acts as a limitation upon power to expend tax money as well as power to levy tax); Martin v. NC Public Housing Corp., 277 N.C. 29 (1970) (definition of “public purpose” as used in Public Purpose Clause expands with changing conditions), Briggs v. City of Raleigh, 195 N.C. 223, 228-29 (1928) (articulating scope of “public purpose.”), .

Case law on both the Contracting Away Clause and the Just and Equitable Tax Clause is somewhat scarce. See, e.g., Bailey v. State, 348 N.C. 130, 147-48 (1998) (tax exemption was not unconstitutional contracting away of taxing power). In re Assessment of Additional North Carolina and Orange County Use Taxes Against Village Publishing, 312 N.C. 211 (1984)(upholding tax over Article V § 2(1) challenge). Although cases addressing the Contracting Away Clause are few, no serious doubt exists that it creates a limitation upon government which is enforceable. Likewise, the scarcity of case law addressing the Just and Equitable Tax Clause does not magically transform the Just and Equitable Tax Clause from a constitutional mandate to a precatory aspiration. It would be odd indeed for two of three phrases in Article V, § 2(1) to provide the source of judicial review and remedy for

complaining taxpayers while the remaining phrase could not.

Granted, the word choice and phraseology of Article V, §2(1) are less exacting than some may like, but that is the nature of constitutions. The Supreme Court has recognized the nebulous characteristics of Article V, § 2(1) in oft-repeated refusals to provide a “slide-rule definition of what constitutes a ‘public purpose.’” Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336, 339 (2001); Maready 342 N.C. at 716; Madison Cablevision v. City of Morganton, 325 N.C. 634, 645-46 (1989); Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 144 (1968). A lack of precision is hardly a new feature of the constitution generally or of Article V, § 2(1) in particular.

By their very nature, constitutions omit details. The constitution is the cornerstone of law; statutes provide the detail but must do so within the architecture of the constitution. The legislative process offers the fluidity and rapidity necessary to evolve the law to changing circumstances whereas the constitution provides the certainty and constancy ensured by the slow pace of the amendment process. It is for these reasons that the drafters used flexible terms like “just” and “equitable” to limit the power of taxation, rather than formulating a mathematical formula to prevent abuse.

The handful of cases addressing the Just and Equitable Tax Clause make clear that Article V, § 2(1) guarantees that taxpayers will not be subject to unjust or inequitable taxation. Case law reflects that courts have, in fact, reviewed claims raised under the Just and Equitable Taxation Clause. Those cases include State v. Harris, 216 N.C. 746 (1940) (holding a license tax unconstitutional on grounds it violated the Just and Equitable Tax Clause of Article V, § 3 (the precursor of today’s Article V, §2(1))); Nesbitt v. Gill, 227 N.C.

174 (1947) (upholding a tax challenged as violative of the Just and Equitable Tax Clause); and In re Assessment of Add'l NC and Orange Cty Taxes, 312 N.C. 211, 224 (1984) (upholding a tax challenged as violative of the Just and Equitable Tax Clause because the challenged classification was “based upon a reasonable distinction substantially related to the subject of the legislation.”). Some such cases centered around challenges to classifications upon which tax schemes are based. Many attorneys and policymakers believe that judicial review under the Just and Equitable Tax Clause is limited to claims based on classifications of taxpayers or property; that simply isn’t the case.

B. The Just and Equitable Tax Clause is not Limited to Challenges based on Classifications .

The Just and Equitable Tax Clause is not limited to classifications or distinctions among taxpayers. Article V, §2 amply addresses uniformity requirements at paragraphs (2) and (3). The North Carolina Constitution has had an explicit provision requiring the Legislature to tax in a uniform manner since 1868. Prior to the adoption of the current Constitution, Article V, Section 3 provided: “Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise” 1868 N.C. Constitution, art. V, § 3. That provision has been retained in the current Constitution under Article V, Section 2(2) which states: “No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.” N.C. CONST. Art. V, § 2(2). A uniformity requirement was included in the Constitutional provision describing exemptions as well. “Every exemption shall

be on a State-wide basis and shall be made by general law *uniformly* applicable in every county, city and town, and other unit of local government.” N.C. Const. Art V, § 2(3) (emphasis added). Courts have interpreted this provision to mean that a classification made for purposes of taxation “must not be arbitrary, unreasonable or unjust.” Great Atl. & Pac. Tea Co. v. Maxwell, 199 N.C. 433, 440 (1930). See Smith v. State of North Carolina, 349 N.C. 332, 341 (1998) (explaining that the uniformity rule from the 1868 Constitution was retained and that prior case law still applies to the interpretation of the corresponding provision in the current Constitution).

Today’s Article V, § 2 was previously an undivided single paragraph found at Article V, § 3 of the previous constitution. 1868 N.C. Constitution, art. V, § 3, as amended in 1936. In 1968, the State Constitution Study Commission drafted the modern Article V, § 2 with numbered paragraphs relating to the section’s topic “State and local taxation.” In this effort, the first sentence of the former § 3 became § 2(1) while the balance of the former § 3 became § 2(2). North Carolina State Constitution Study Commission, Report of the Editorial Committee, p. 83 (6 November 1968). This distinction is important because it underscores that the limitations on the taxing power found at § 2(1) are separate and apart from the classification protections found at § 2(2).

Were judges to read the Just and Equitable Tax Clause as applying only to distinctions among taxpayers or classes of property, the Just and Equitable Tax Clause would be completely redundant of the uniformity provisions of Article V, § 2(2) and (3). It is axiomatic that the courts will read the law in a way to give meaning to all its parts. Galloway v. Jenkins, 63 N.C. 147, 157 (1869). After all,

every provision of the Constitution means “something.” *Id.* at 157 (emphasis in original). Though not a well-worn path, the Just and Equitable Tax Clause is a viable, cognizable route to judicial review of unreasonable taxes. And, in 2013, the North Carolina Supreme Court took that path and struck down a local tax increase of nearly 60,000%--that is not a typo. The City of Lumberton raise a particular type of tax from \$12.50 per year to a minimum of \$7500 per year, an increase of almost 60,000%. *IMT, Inc. v. City of Lumberton*, 366 N.C. 456 (2013).

The Just and Equitable Tax Clause deserves more attention than it seems to have garnered. Maybe 2024 will bring that attention--and with it, some respect.

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“A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.”

Constitution of 197, art. I, §35
Constitution of 1868, art. I, § 29
Constitution of 1176, Declaration of Rights, § 21