PHILADELPHIA'S SODA TAX: A VIOLATION OF THE UNIFORMITY CLAUSE*

I. INTRODUCTION

The Pennsylvania Constitution contains an amendment known as the Uniformity of Taxation Clause (Uniformity Clause).[1] It requires all taxes enacted in Pennsylvania to be uniform within the class—the group of people or things with common characteristics[2]—being taxed.[3] In 2016, the Philadelphia City Council enacted the Sugar-Sweetened Beverage Tax (Soda Tax).[4] The Soda Tax imposes a 1.5-cent tax per fluid ounce of sugar-sweetened beverage, to be paid by the distributors of these beverages.[5] City Council justified the tax by arguing that the funds it raised would be used to provide prekindergarten education for Philadelphia residents.[6]

The Soda Tax has attracted significant controversy across the political spectrum.[7] This Comment will not address these political arguments. Instead it will evaluate the legal underpinnings of the Soda Tax. In particular, this Comment will argue that in view of both constitutional and common law, Philadelphia's Soda Tax violates the Uniformity Clause of the Pennsylvania Constitution. This Comment argues for an alternative system of taxation that provides a framework to render the Soda Tax constitutional.

This Comment proceeds as follows. Part II.A will summarize the Soda Tax and how it operates. Part II.B will then walk through the history and application of Pennsylvania's Uniformity Clause. Part II.C will follow with an analysis of *Commonwealth ex rel. Department of Justice v. A. Overholt & Co.*,[8] and how it applied the uniformity clause. Part II.D will then evaluate how the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution applies to taxing statutes. Lastly, Part II.E will summarize the results of the current litigation

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1. PA. CONST. art. VIII, § 1.
2. *See Class*, BLACK'S LAW DICTIONARY (10th ed. 2014).
3. PA. CONST. art. VIII, § 1.
4. *See* PHILA., PA., CODE § 19-4103 (2016) (effective Jan. 1, 2017).
5. *See id.*
6. *See* Don Sapatkin, *Harvard Study: Soda Tax Would Make Phila. Healthier*, PHILA. INQUIRER (Apr. 28, 2016, 6:31 AM, updated Apr. 28, 2016, 10:51 AM), http://www.philly.com/philly/health/20160428_Harvard_study__Soda_tax_would_make_Phila__healthier.html [perma: http://perma.cc/ W9UZ-ZNBM].
7. *See id.* (noting that Democratic presidential contender Bernie Sanders opposed the tax, while rival Hillary Clinton supported the tax).
8. 200 A. 849 (Pa. 1938).

regarding Philadelphia's Soda Tax. Section III will then explain why the Soda Tax fails to conform with the Uniformity Clause and proposes a new tax system to ameliorate this unconstitutionality.

II. Overview

A. *Sugar-Sweetened Beverage Tax*

On January 1, 2017, Philadelphia's Soda Tax went into effect.[9] The Soda Tax is assessed on any "sugar-sweetened beverage," which includes soft drinks, sweetened iced tea, syrups that are used to make fountain drinks, or concentrates with added sugar for such beverages like fruit juices.[10] Under this tax, a "[s]ugar-sweetened beverage" is any nonalcoholic beverage containing some form of "caloric sugar-based sweetener" or an artificial sweetener as an ingredient.[11] The Soda Tax imposes a 1.5-cent tax on each fluid ounce of sugar-sweetened beverages.[12]

Beverage distributors are the ones responsible for paying this tax when they distribute to entities within the city of Philadelphia.[13] The tax defines a distributor as anyone who supplies beverages containing sugar additives to a dealer.[14] A dealer is anyone who is in the retail business of selling sugar-sweetened beverages and is located within Philadelphia.[15] Distributors must register with the city government and pay the tax whenever they engage in a transaction with a dealer.[16] The distributor is also required to disclose in each receipt provided to the dealer the amount of taxable beverage supplied and the tax owed.[17]

The Soda Tax requires distributors to calculate the volume of taxable beverage in terms of fluid ounces.[18] For example, a package containing twelve twelve-ounce cans of soda will have a total of 144 ounces of soda. These 144 fluid ounces will be taxed at a rate of 1.5 cents per ounce, for a total tax of $2.16.[19] A beverage distributor selling five hundred twelve-can packages to a dealer in a single transfer will be responsible for adding an additional $1,080 in tax to the invoice sent to the dealer.[20]

9. PHILA., PA., CODE § 19-4103 (2016).
10. *See id.*
11. *Id.* § 19-4101(3)(a)(.1)–(.2).
12. *Id.* § 19-4103(2)(a)–(b).
13. *See id.* § 19-4105(1).
14. *Id.* § 19-4101(2).
15. *Id.* § 19-4101(1).
16. *Id.* § 19-4105(1).
17. *Id.* § 19-4104(2).
18. *Id.* § 19-4106.
19. *See id.* § 19-4103(2).
20. *500 x $2.16 = $1,080.00*.

B. *Uniformity of Taxation in Pennsylvania*

The Pennsylvania Constitution's Uniformity Clause requires that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."[21] This Part will first discuss the adoption of the Uniformity Clause. Next will be a discussion of how the clause has been interpreted and applied in Pennsylvania. Lastly, this Part will evaluate how the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution has been applied in combination with Pennsylvania's Uniformity Clause.

1. Adoption of the Uniformity Clause

Pennsylvania adopted the Uniformity Clause in 1874.[22] Prior to its adoption, there was no constitutional law for courts to rely on to overturn a tax law that unequally burdened taxpayers.[23] In *Sharpless v. Mayor of Philadelphia*,[24] a case decided before the Uniformity Clause was adopted, a group of Philadelphia "residents and owners of real and personal estate" challenged a tax increase enacted by the city.[25] The city levied the tax in order to pay off a debt incurred after it purchased stock in railroad companies that were expanding their infrastructure *outside* of the city.[26] The Supreme Court of Pennsylvania upheld the tax and stated that it could not strike down a tax statute unless some specific constitutional provision allowed them to do so.[27] The court acknowledged that the city's expenditure on railroad company stocks may have seemed risky or dangerous to taxpayers, that were forced pay for it, but those considerations had "no influence" on the legal question.[28] The *Sharpless* court made clear that it required an explicit piece of law to evaluate the fairness and equality of a tax.[29]

The people of Pennsylvania addressed this issue by adopting the Uniformity Clause in 1874.[30] This clause was intended to ensure that the distribution of the tax burden was equal upon the citizens, so that no one group could be favored or

21. PA. CONST. art. VIII, § 1.

22. *See* Amidon v. Kane, 279 A.2d 53, 58 (Pa. 1971) (discussing the history of the Uniformity Clause).

23. *See* Kristin E. Hickman, *The More Things Change, the More They Stay the Same: Interpreting the Pennsylvania Uniformity Clause*, 62 ALB. L. REV. 1695, 1699–1705 (1999) (discussing Pennsylvania courts' approach to challenges of unfair tax statutes).

24. 21 Pa. 147 (1853).

25. *Sharpless*, 21 Pa. at 149.

26. *See id.*

27. *See id.* at 163–65 ("We are not the guardians of the rights of the people of the state, unless they are secured by some constitutional provision which comes within our judicial cognisance.").

28. *Id.* at 159.

29. *See id.* at 163 ("If a State Legislature shall pass a law, within the general scope of their constitutional powers, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice." (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798))).

30. *See* Hickman, *supra* note 23, at 1699.

unequally disadvantaged by a tax.[31] The underlying logic of the Uniformity Clause was that those who possess more wealth, assets, or interests protected by the government should pay more in taxes to support this protection.[32] The clause applies to all types of taxes.[33]

The Uniformity Clause was amended in 1968 to remove several of the exemptions listed in the original provision and place them in a separate constitutional section.[34] These were specific tax exemptions for certain types of property.[35] Despite the 1968 amendment, the essential text of the Uniformity Clause has remained the same.[36]

2. Interpretation and Application

A basic question that courts must confront when applying the Uniformity Clause is how a tax operates in relation to a class of taxpayers.[37] In the year immediately following the clause's passage, the Pennsylvania Supreme Court was confronted with this issue in *Kittanning Coal Co. v. Commonwealth*.[38] At issue in *Kittanning* was a three-cent state tax assessed on each ton of coal mined, purchased, and sold by corporations that "possesse[d] the corporate right or privilege to mine, or to purchase or sell coal."[39] The appellant corporation argued that the tax classification violated the Uniformity Clause because while all mining corporations were forced to pay the tax, noncorporate mining

31. *Id.* at 1704 ("Ultimately, the people responded to this struggle by enacting an amendment requiring uniformity of taxation so that the burdens would be equally shared.").

32. *See* Kittanning Coal Co. v. Commonwealth, 79 Pa. 100, 105 (1875). To better illustrate this concept, consider the hypothetical example of a taxpayer who owns a large and luxurious estate in a small town. Her estate is significantly larger and more valuable than the houses of other members of her community. It is reasonable to believe that her local municipality collects a larger amount of property tax from her, compared to her less wealthy neighbors, an amount that is proportional to the value of her estate. This is because, theoretically, her estate utilizes more government resources. Perhaps she requires more attention from law enforcement to protect her estate from crime, or the fire department must perform additional emergency preplanning due to the size or uniqueness of her property. Of course, this is a generalization, but it illustrates the theoretical concept that citizens who possess more value must carry a tax burden proportional to that value.

33. Commonwealth *ex rel.* Dep't of Justice v. A. Overholt & Co., 200 A. 849, 852 (Pa. 1938) (discussing the "all taxes" language in *In re* Cope's Estate, 43 A. 79, 81 (Pa. 1899)).

34. *See* PA. CONST. art. VIII, §§ 1–2; Hickman, *supra* note 23, at 1699 ("All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." (quoting PA. CONST. of 1874, art. IX, § 1 (amended 1968)).

35. *See* Hickman, *supra* note 23, at 1699 (quoting PA. CONST. of 1874, art. IX, § 1 (amended 1968))).

36. *See id.* at 1699.

37. *See, e.g.*, Commonwealth v. Del. Div. Canal Co., 16 A. 584, 586 (Pa. 1889); *Kittanning*, 79 Pa. at 101.

38. 79 Pa. 100 (Pa. 1889).

39. *Kittanning*, 79 Pa. at 100.

organizations were not.[40] The court held that the tax did not violate the principle of uniformity because it was within the legislature's power to establish that classification.[41] The court maintained that the power to classify was not changed by the Uniformity Clause of 1874, which asserted "that all taxes shall be uniform on the *same class* of subjects."[42] In *Kittanning*, the court determined that the legislature chose to classify mining corporations, rather than other mining entities, and to tax them uniformly at the rate of three cents per ton.[43]

Over a decade later, the Pennsylvania Supreme Court revisited the Uniformity Clause and placed some boundaries on the power of tax classification. In *Commonwealth v. Delaware Division Canal Co.*,[44] the court upheld a tax levied on those who held corporate loans.[45] The appellants challenged the tax as a violation of uniformity because the specific tax applied only to corporate loans and not to other types of business loans.[46] Like in *Kittanning*, the court held that it was within the legislature's authority to classify only corporate loans.[47] However, it ruled also that the authority to classify was not limitless—classifications needed to be reasonable and they needed to address the inequalities of tax burdens.[48] The court acknowledged that "[a]bsolute equality" in taxation is not possible, but "a mere approximate equality" is what should be expected.[49] The court maintained that in order to comply with the Uniformity Clause, there must be "substantial uniformity" in the tax burden.[50] Since the tax was being uniformly applied to all corporate loans, the court held that it was constitutional.[51] Both *Kittanning* and *Delaware Division Canal Co.* illustrate how the court, immediately following the passage of the Uniformity Clause, focused on the class being taxed (mining corporations or corporate loans) and then asked whether the tax was applied uniformly *within that class*.

The Pennsylvania Supreme Court first struck down a tax in *Kelley v. Kalodner*.[52] In *Kelley*, the Pennsylvania Supreme Court held that the state's graduated income tax system, as it was applied to income derived from property, violated the Uniformity Clause.[53] A taxpayer from Philadelphia challenged the tax, which instituted a graduated system by which the tax rate increased as a

40. *See id.* at 101.

41. *Id.* at 104.

42. *Id.*

43. *Id.* at 101 (stating that the tax was imposed on corporations, and not individuals or partnerships, at a rate of three cents per ton).

44. 16 A. 584 (Pa. 1889).

45. *Del. Div. Canal Co.*, 16 A. at 591.

46. *Id.* at 586.

47. *Id.* at 584.

48. *Id.* at 588.

49. *Id.*

50. *Id.*

51. *Id.* at 584.

52. 181 A. 598 (Pa. 1935).

53. *Kelley*, 181 A. at 601–02.

taxpayer's income increased.[54] This tax system also exempted low-income taxpayers from paying any income tax.[55] The court reasoned that since the tax exempted people with lower incomes from taxation it was not being uniformly applied.[56] The court also held that using a tax bracketing system to set the rates on *property* taxes (which it said the income tax was, at least to some extent) violated the Uniformity Clause.[57] It reasoned that the same type of property could not be taxed at different rates merely due to the quantity of that property.[58] The state argued the tax should stand because it was passed with the intention of equitably distributing the burden of taxation.[59] The court refused this argument and, instead, applied the Uniformity Clause to strike down the tax.[60]

A few decades later, in 1964, the Pennsylvania Supreme Court addressed the validity of a fixed-amount tax in *Saulsbury v. Bethlehem Steel Co.*[61] In *Saulsbury*, the court held that an occupational-privilege tax, levied by two different municipalities, violated the Uniformity Clause.[62] The two tax ordinances, which were identical, assessed an annual ten-dollar tax on every individual who made six hundred dollars or more per year and worked within the geographic limits of the municipality.[63] The court found that the tax class comprised all people who shared in an "occupational privilege."[64] The court therefore held that the tax was unconstitutional because it was being applied within the class of "all people who share in an occupational privilege" only to those who made six hundred dollars or more per year.[65]

Justice Cohen argued in dissent that only taxing those individuals who earned at least six hundred dollars a year was a reasonable classification.[66] He argued that both municipalities had determined that those who had an

54. *See id.* at 599. Under the bracket system, income of $5,000 or less per year was taxed at a rate of 2%. *See id.* Income of more than $5,000 but no more than $10,000 was taxed at a rate of 2.5%. *See id.* As a graduated or progressive system, these tax rates continued to increase as the amount income increased. *See id.* at 599–600. The highest tax rate was 8%, assessed on all income over $100,000. *Id.*

55. *See id.* at 602. Taxpayers who earned less than $1,000 or $1,500 were exempted from paying the income tax, with the exemption amount depending on whether they were single or married. *Id.*

56. *Id.*

57. *See id.*

58. *See id.*

59. *Id.* at 603.

60. *See id.* ("[W]e are urged by defendants to sustain this tax . . . because the necessity of the times requires that the tax burden be more equitably distributed. Obviously, we need not dwell on this proposition. The [Uniformity Clause] is the fundamental law of the commonwealth and cannot be flagrantly violated even for the reasons just stated.").

61. 196 A.2d 664 (Pa. 1964).

62. *Saulsbury*, 196 A.2d at 666.

63. *Id.* at 665.

64. *Id.* at 666.

65. *See id.* ("If a tax is levied on an occupational privilege, it must apply to all who share the privilege. Part of the class may not be excused, regardless of the motive behind the action.").

66. *See id.* at 668 (Cohen, J., dissenting).

occupation but earned less should be pardoned from bearing the burden of the tax.[67] Justice Cohen asserted that the six-hundred-dollar provision was a reasonable "device of classification" and, thus, uniformity was not at issue.[68] Yet still, the majority seemed to disregard the intentions of the municipalities and their interest in exempting low-income taxpayers. Instead, it focused on the language and operation of the tax ordinance.[69]

The focus on the language of the statute, rather than the underlying intent of the tax, was on display again in *Amidon v. Kane*.[70] In *Amidon*, the Pennsylvania Supreme Court addressed a tax based off of the taxpayer's income, but this time the court took issue with the statute's definition of income.[71] The statute purported to impose a tax on *any* form of income but deferred its definition of income to the IRS's more narrow definition.[72] The court held the tax unconstitutional under the Uniformity Clause due to a disparity between two different definitions of income within the statute.[73] The court ruled that the statute established a very wide classification of individuals who were subject to the tax, but only enforced the tax on a smaller group of income earners.[74] The court held that even if a tax's classification is reasonable, when its "operation or effect" produces "arbitrary or unjust or unreasonably discriminatory results," the Uniformity Clause is violated.[75] The disparity in the definitions of income, the court held, established preference for certain income earners.[76] Because this preference violated uniformity, the court struck down the statute as unconstitutional.[77]

3. Equal Protection Application

Beginning in 1932, Pennsylvania courts began examining how the Fourteenth Amendment's Equal Protection Clause might apply to the Uniformity Clause.[78] In *Commonwealth v. Girard Life Insurance Co.*,[79] Girard challenged a tax assessed on insurance premiums under the Uniformity Clause

67. *See id.*
68. *See id.*
69. *See id.* at 666–67 (majority opinion).
70. 279 A.2d 53 (Pa. 1971).
71. *See Amidon*, 279 A.2d at 63.
72. *See id.* at 55. The Pennsylvania income tax statute stated that it was imposed on income derived from any source. *See id.* at 42. The statute then incorporated the federal definition of "taxable income" from the Internal Revenue Code. *See id.* The court discussed how the federal definition of taxable income included numerous exceptions and deductions that narrowed the types of income that would be taxed. *See id.* at 43.
73. *See id.* at 63.
74. *See id.* at 57.
75. *Id.* at 59.
76. *See id.* at 62–63.
77. *See id.*
78. *See* Hickman, *supra* note 23, at 1709–10.
79. 158 A. 262 (Pa. 1932).

and the Equal Protection Clause.[80] The tax at issue was imposed on stock insurance companies but not mutual companies.[81] Girard argued that this classification was unreasonable because the two types of companies were very similar.[82] In its analysis, the Pennsylvania Supreme Court held that the concepts underlying Pennsylvania's Uniformity Clause and the Fourteenth Amendment are so similar that they "run together."[83] The court thus relied on the U.S. Supreme Court's Equal Protection Clause jurisprudence and held that the classification was reasonable.[84]

The U.S. Supreme Court later held that the requirements of the Equal Protection Clause may apply to the states' taxing powers.[85] Generally, states must have a rational basis for imposing a tax classification.[86] A classification will satisfy the Equal Protection Clause so long as there is a "plausible policy reason for the classification."[87] This requires the government body enforcing the tax to show that the facts upon which the classification is based "rationally may have been considered to be true" by that body when it passed the tax.[88] The classification also must be related to a perceived end.[89] If it is "so attenuated" from this end that it can be said to become "arbitrary or irrational," then the classification fails the rational basis test and violates the Equal Protection Clause.[90] However, given rational basis review, when the Equal Protection Clause is applied to a tax classification, a heavy burden is placed upon the challengers of that classification.[91]

Rational basis review gives states the necessary flexibility for implementing

80. *Girard Life Ins. Co.*, 158 A. at 262–63.

81. *Id.* at 263.

82. *See id.* at 264 (discussing Girard Life Insurance's argument that the tax discriminated among itself, a stock insurance company, and mutual companies, yet "the two classes of companies compete for business and their policies are substantially the same").

83. *Id.* at 263.

84. *See id.* ("The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction." (quoting State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527, 539 (1931))).

85. *See* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526 (1959) ("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.").

86. *See* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 107 (2003) ("The law in question does not distinguish on the basis of, for example, race or gender. . . . Rather, the law distinguishes for tax purposes among revenues obtained . . . by two enterprises . . . . Where that is so, the law is subject to rational-basis review . . . ." (citations omitted)). The rational basis test will apply, unless the classification is based on certain inherent characteristics (such as race or gender) or a fundamental right. *See id.*

87. Nordlinger v. Hahn, 505 U.S. 1, 11 (1992).

88. *Id.*

89. *See id.*

90. *Id.* So long as the classification "rationally further[s] a legitimate state interest," and is not based on an "inherently suspect characteristic" (e.g., race or gender), then the classification is constitutional. *Id.* at 10.

91. *See* Commonwealth v. Buckley, 508 A.2d 281, 282 (Pa. 1986).

tax systems.[92] An example of this can be seen in the U.S. Supreme Court case *Fitzgerald v. Racing Ass'n of Central Iowa*.[93] In *Fitzgerald*, Iowa racetracks contested a state tax that taxed revenues from racetrack slot machines at a rate of 36% but only taxed riverboat slot machine revenues at 20%.[94] The racetracks, which were already facing financial struggles, argued there was no rational basis for the state to tax them at a higher rate than their riverboat competitors.[95]

The U.S. Supreme Court disagreed and held that the statute served a legitimate state interest.[96] The Court pointed out that, within the same act that established the higher tax rate, the Iowa legislature also permitted racetracks to legally operate slot machines in the first place.[97] The Court asserted that a rational state legislature could believe that the statute was economically benefitting racetracks by permitting them to operate slot machines, while also taxing them at a higher rate.[98] The Court discussed how the tax differential provided an economic benefit to the riverboat industry, which was also encountering financial hardships.[99] The Court maintained that these two plausible policy considerations reflected a "rational way for a legislator to view the matter."[100] Thus, the tax satisfied the Equal Protection Clause.[101]

Fitzgerald was just one instance of the Equal Protection Clause applying to a state taxation scheme. Applying the Clause's standards on states' taxation provisions, however, has faced some criticism.[102] Professor Kristin Hickman argues that the Fourteenth Amendment cannot be reconciled with the intent behind Pennsylvania's Uniformity Clause.[103] Professor Hickman points to *Leonard v. Thornburgh*[104] as an example of this inconsistency.[105] In *Leonard*, a Philadelphia resident challenged a provision of the Philadelphia Wage Tax, under which nonresidents who earned income in Philadelphia had a lower wage

92. *See id.* at 526–27 ("[The Equal Protection 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.").

93. 539 U.S. 103 (2003).

94. *See Fitzgerald*, 539 U.S. at 105.

95. *See id.* at 105–06.

96. *See id.* at 108.

97. *See id.*

98. *Id.*

99. *See id.* at 109 (suggesting that the lower tax rate for riverboats would give them a better opportunity to earn income from the slot machines).

100. *Id.*

101. *See id.* at 110.

102. *See* Hickman, *supra* note 23, at 1710.

103. *See id.* at 1712 ("[Under the Fourteenth Amendment,] [t]he Supreme Court of the United States has expressly condoned in the area of taxation 'those discriminations which the best interests of society require' to encourage economic development. Yet historically, such preferences were clearly the circumstance the uniformity clause was enacted to combat." (footnote omitted) (quoting Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890))).

104. 489 A.2d 1349 (Pa. 1985).

105. *See* Hickman, *supra* note 23, at 1713.

tax cap than residents.[106] The taxpayer, who, as a Philadelphia resident paid a higher rate of tax than nonresidents, challenged this tax disparity under the Uniformity Clause.[107] In response, the city argued that it was reasonable to classify city residents separately from nonresidents because city residents utilized more city resources and should therefore pay a greater rate of tax.[108]

The Pennsylvania Commonwealth Court held the tax unconstitutional for violating the Uniformity Clause.[109] It rejected the city's argument as "unquantifiable and unrealistic."[110] The court held that the city could not reasonably believe that the tax was directly related to the actual benefits a taxpayer receives from the city.[111] The court reasoned that the city's costs generated by taxpayers varied too significantly to make any rational relation to a classification based on residency.[112] It further stated that any attempt by the government to calculate the cost of resources that an individual or group of individuals uses would be "futile."[113] The court ruled that the actual tax class all taxpayers—residents and nonresidents—who worked within the city's geographical limits.[114] Since a group within that class (residents) was being taxed at a higher rate than another group (nonresidents), the tax violated the Uniformity Clause.[115]

On appeal, the Pennsylvania Supreme Court overturned the Commonwealth Court.[116] Like in *Girard Life Insurance*, the court ruled that both the Uniformity Clause and the Equal Protection Clause were relevant and should be "analyzed in the same manner."[117] Based on this, the court ruled that the legislature's decision to classify residents and nonresidents differently for the purposes of taxation had a rational basis.[118] The court believed that there was a "deeper level of analysis" to the classification than simply residency.[119] The presumption that nonresidents utilize city resources "to a lesser extent" than residents was sufficient under the rational basis standard.[120] The city did not

106. *Leonard*, 489 A.2d at 1351.

107. *Id.*

108. *See* Leonard v. Thornburgh, 477 A.2d 577, 580 (Pa. Commw. Ct. 1984), *rev'd*, 489 A.2d 1349 (Pa. 1985).

109. *Id.*

110. *Id.*

111. *See id.* at 581.

112. *See id.*

113. *Id.*

114. *Id.* at 580 ("The City of Philadelphia is the *authority levying the tax*. Those paying the Wage Tax are within its territorial limits because they either work, live in the city, or both. Regardless of which standard is met, the authority levying the tax must apply it equally and uniformly to all subjects within its territorial limits.").

115. *See id.*

116. Leonard v. Thornburgh, 489 A.2d 1349, 1353 (Pa. 1985).

117. *Id.* at 1351.

118. *Id.* at 1352.

119. *Id.*

120. *Id.*

need to quantify this difference since it "must necessarily exist."[121] According to the court, the legislature did not need to point to hard facts to have a rational basis for enacting a classification.[122]

The Pennsylvania Supreme Court's decision in *Leonard* illustrates just how low a bar the rational basis test sets. The court, in its opinion, even acknowledged that binding precedent forbade classifications based on mere residency.[123] Yet the court still found a possible justification for the tax classification without any supporting empirical evidence.[124] When these tax statutes are challenged for uniformity issues, the rational basis test will typically favor the legislature as a constitutional exercise of its classification power, and any claim of a uniformity violation will be difficult to prove.[125]

C. Commonwealth *ex rel.* Department of Justice v. A. Overholt & Co.

1. Background and Facts

In *Commonwealth ex rel. Department of Justice v. A. Overholt & Co.*,[126] the Pennsylvania Supreme Court addressed a constitutional challenge under the Uniformity Clause to a liquor tax.[127] The "State Floor Tax" (liquor tax) applied to liquors being stored during the final days of Prohibition.[128] The statute defined liquors broadly,[129] and assessed a two-dollar tax per gallon of liquor regardless of the liquor's market value.[130] Pennsylvania brought individual suits to collect the tax against A. Overholt & Company (Overholt), the Large Distilling Company (Large), and Joseph S. Finch and Company (Finch).[131] The three cases were consolidated, and a jury verdict was rendered against the companies.[132] The three companies filed motions for judgement and a new trial.[133] After oral argument, the Court of Common Pleas granted the motion for judgement finding that the tax violated Pennsylvania's Uniformity Clause and

121. *Id.* at 1353.

122. *See id.*

123. *See id.* at 1352 (citing Columbia Gas Corp. v. Commonwealth, 360 A.2d. 592, 595–97 (Pa. 1976)); *see also* Danyluk v. Bethlehem Steel Co., 178 A.2d 609, 610 (Pa. 1962); Carl v. S. Columbia Area Sch. Dist., 400 A.2d 650, 653 (Pa. Commw. Ct. 1979).

124. *See Leonard*, 489 A.2d at 1352.

125. *See id.*

126. 200 A. 849 (Pa. 1938).

127. *Overholt*, 200 A. at 850.

128. *Id.*

129. *See id.* (defining "spirituous and vinous liquors" as "[d]istilled spirits, rectified spirits, and wines, as defined in this section, and alcohol, other than denatured alcohol unfit for beverage purposes," and defining "distilled spirits" as "[a]ny liquid useable for beverage purposes which contains more than one-half of one per cent alcohol by volume, obtained by distillation or any process of evaporation, *** including brandy, rum, whiskey, gin, and any other alcoholic beverage." (omission in original) (quoting 47 P.S. § 781)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

the Fourteenth Amendment's Due Process and Equal Protection Clauses.[134]

On appeal to the Pennsylvania Supreme Court, the court compared the rate of tax to the market value of each type of liquor. The court determined that Overholt had about 1.4 million gallons of taxable liquor, with a range of distillation dates.[135] The market values of Overholt's liquor, as of the date of the Act's passage, ranged from two dollars per gallon to nine dollars per gallon, depending on the date of distillation.[136] More than 800,000 gallons were valued at two dollars per gallon, a market value equal to the amount of the tax.[137] The effective tax rate on the two-dollar liquor was thus 100%.[138] However, the liquor valued at nine dollars per gallon was also being taxed at a rate of two dollars per gallon of liquor, for an effective tax rate of only 22%.[139] The court made similar findings for Large and Finch.[140]

2. The Court's Analysis

The court proceeded to evaluate the Uniformity Clause.[141] It cited prior cases that emphasized the Uniformity Clause's intent to secure "relative equality of taxation."[142] In line with this intent, past cases recognized that a tax should not exempt any group of a recognized class from taxation while leaving other members of the class to carry the burden.[143] The court maintained that if a tax is to be levied uniformly upon the class "there should be some system of apportionment."[144] The taxpayer's apportioned burden should be proportional to her interests which are protected by the government.[145] The court cited the "substantial uniformity" standard, which requires a tax to be "as nearly uniform as practicable in view of the instrumentalities with which . . . [the] tax laws operate."[146] The court also noted that taxpayers may view their duty unfavorably and as a burden, but they are more willing to fulfill their obligation if they believe they are paying their proportionate share in comparison with other

134. *Id.*

135. *See id.* at 850–51.

136. *See id.*

137. *Id.* at 851.

138. *See id.*

139. *See id.*

140. The court found that Large had 79,000 gallons of liquor with a market value of two dollars per gallon and over 185,000 gallons of liquor with a market value of roughly sixteen dollars per gallon, for effective tax rates of 100% and approximately 13%, respectively. *See id.* Similarly, the court found that Finch had over four-million gallons of taxable liquor, ranging in market value from forty cents per gallon to sixteen dollars per gallon, for effective tax rates from as much as 500% (for the forty-cent liquor) to as little as 12.5% (for the sixteen-dollar liquor). *See id.*

141. *See id.* at 852.

142. *Id.* (quoting *In re* Cope's Estate, 43 A. 79, 81 (Pa. 1899)).

143. *See id.* (quoting *Cope's Estate*, 43 A. at 81).

144. *Id.* at 853 (quoting 2 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 1040 (8th ed. 1927)).

145. *See id.* (quoting COOLEY, *supra* note 144, at 1040).

146. *Id.* (quoting Del., L. & W. Ry. Co.'s Tax Assessment, 73 A. 429, 430 (Pa. 1909)).

taxpayers.[147]

The Pennsylvania Supreme Court ruled that the liquor tax constituted a property tax under the law.[148] The tax was assessed on the property (liquor) by volume, and made no reference to the market value of that property because it was fixed at two dollars per gallon of liquor.[149] The court relied on *Delaware, L. & W. Railway Co.'s Tax Assessment*[150] for how to evaluate a uniformity issue with a fixed property tax.[151] It determined that, for a property tax to conform with the Uniformity Clause, it must be *ad valorem*—based "upon market value" of the property.[152] An *ad valorem* tax levies a burden proportional to the market value of the item being taxed, which (so the argument goes) produces uniformity and, in turn, establishes a just system of taxation.[153] Since the liquor tax at issue was not *ad valorem*, but instead "deliberately and systematically disregarded" the market values of the liquors, the court held that it violated the Uniformity Clause.[154]

In holding the tax unconstitutional, the court analogized the liquor tax to an unconstitutional real estate tax.[155] The court discussed a hypothetical real estate tax imposed on two separate tracts of land.[156] The first tract is worth four hundred dollars, while the second tract is worth sixteen thousand dollars.[157] If owners of both tracts of land are liable to pay the same exact amount of real estate tax, then the owner of the four-hundred-dollar tract will end up facing a significantly higher tax rate than his neighbor.[158] To avoid these results, the court noted that property taxes must be assessed upon the property itself.[159] The amount of tax owed needs to depend on the features of the property.[160]

147. *See id*.

148. *See id.* at 852.

149. *See id.* at 850, 852 ("[The Commonwealth] conceived a specific tax to be one that imposed upon property by its 'height, number, weight or other measurements', without reference to valuation." (discussing the State's argument at trial)).

150. 73 A. 429 (Pa. 1909).

151. *See Overholt*, 200 A. at 852–53 (quoting *Del., L. & W.*, 73 A. at 430).

152. *See id.* at 852 (quoting *Del., L. & W.*, 73 A. at 430) ("The large property owner and the small holder pay upon the same ratio, and when the valuation has been ascertained and fixed upon a fair basis, which means that the valuation should be based as nearly as practicable upon market value, and, if not on market value, then upon the relative value of each property to market value, there results what is known in organic and statute law as uniformity, which is the desideratum to be attained in any just system of taxation." (quoting *Del., L. & W.*, 73 A. at 430)).

153. *See id.*

154. *Id.* at 853 (quoting Commonwealth *ex rel* Dep't of Justice v. A. Overholt & Co., 45 Dauphin Cty. Rep. 171, 189 (Pa. Ct. Com. Pl. 1938)).

155. *See id.*

156. *See id.*

157. *Id.*

158. *See id.*

159. *See id.* ("Whether the thing taxed is a quantity of *liquor* or a quantity of *land* makes no difference; each is property. The burden of a property tax rests upon the property on which it is imposed and if the same tax is laid on two properties of unequal supporting economic power, the burdens are unequal.").

160. *See id.*

In a situation where the same amount of tax is levied on two different properties, and both properties are within the same class but have unequal market values, then the tax violates the Uniformity Clause.[161] The court extended this reasoning to the liquor tax. [162] If a specific type of liquor, valued at forty cents per gallon, is taxed at the same amount (two dollars per gallon) as a liquor valued at sixteen dollars per gallon, then the tax violates the Uniformity Clause.[163] The court concluded that the facts of this case presented an "outstanding example" of an "inequality of burden."[164] Due to this inequality, the court determined that the taxing statute, as a whole, could not be enforced.[165]

D. The Due Process Clause

1. Application in Federal Courts

Tax statutes have also been challenged under the Due Process Clause.[166] In facing Due Process Clause challenges, the Pennsylvania Supreme Court relies on the U.S. Supreme Court's approach to these same issues.[167] The U.S. Supreme Court applies a burden-versus-benefit analysis to tax challenges brought under the Due Process Clause.[168] It established this framework in *Wisconsin v. J.C. Penney Co.*[169]

In *J.C. Penney*, the state of Wisconsin passed a tax that was assessed on corporate income paid out in dividends.[170] J.C. Penney, a Delaware corporation headquartered in New York, had several store locations in the state of Wisconsin.[171] Its corporate dividend checks were drawn from New York bank accounts.[172] J.C. Penney challenged the dividend tax, arguing that Wisconsin was acting outside of its taxing authority by imposing a tax on transactions conducted beyond state borders.[173] The Wisconsin Supreme Court concluded that the tax was unconstitutional under the Due Process Clause.[174] It held that the Wisconsin

161. *See id.*

162. *See id.* ("Whether the thing taxed is a quantity of *liquor* or a quantity of *land* makes no difference; each is property.").

163. *Id.*

164. *Id.*

165. *See id.* at 854.

166. *See, e.g.*, Leventhal v. City of Philadelphia, 542 A.2d 1328, 1332 (Pa. 1988); Allegheny County v. Monzo, 500 A.2d 1096, 1102 (Pa. 1985).

167. *See Monzo*, 500 A.2d at 1102 (relying on analysis in the Supreme Court case Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940)).

168. *See J.C. Penney*, 311 U.S. at 444.

169. *See* 311 U.S. 435, 444 (1940).

170. *J.C. Penney*, 311 U.S. at 441–42.

171. *Id.* at 443.

172. *Id.*

173. *Id.*

174. J.C. Penney Co. v. Wis. Tax Comm'n., 289 N.W. 677, 681–82 (Wis.), *rev'd and remanded*, 311 U.S. 435 (1940).

legislature was overstepping its authority by taxing foreign corporate transactions.[175]

The U.S. Supreme Court, however, reversed and remanded the case.[176] It held that the proper test under the Due Process Clause is whether the tax burden "bears fiscal relation" to the benefits provided by the state to the taxpayer.[177] The Court reasoned that J.C. Penney derived a benefit by having permission to do business in Wisconsin.[178] It earned profits from Wisconsin, which contributed to its corporate dividends.[179] Therefore, the tax on those dividends bore a "fiscal relation" to the benefit of doing business in Wisconsin.[180]

2. Pennsylvania's Application of the Due Process Clause

During the late 1970s and 1980s, certain Pennsylvania municipalities utilized specific taxes to pay for the construction of new convention centers.[181] These taxes were assessed on local hotels.[182] A hotel owner challenged one of these taxes in *Allegheny County v. Monzo*.[183] At issue in *Monzo* was Allegheny County's 1% hotel room tax, which was imposed on the rental price of a room.[184] The revenue from this tax went towards the construction of a convention center in downtown Pittsburgh.[185] The owner of a hotel (Monzo), located on the outskirts of Allegheny County, challenged the tax under the Due Process Clause.[186]

Monzo argued that the tax revenues would only benefit hotels in downtown Pittsburgh because they were located near the convention center.[187] Additionally, Monzo asserted that the tax put hotels near the county border at a disadvantage.[188] These hotels competed with out-of-county hotels that were not burdened by the 1% tax.[189] The county responded that the benefit of the tax was for the general public, therefore the benefit to Monzo's hotel did not need to be proportional to the tax burden.[190]

The Pennsylvania Supreme Court applied essentially the same test from

175. *See id.*

176. *J.C. Penney*, 311 U.S. at 446.

177. *Id.* at 444 ("The simple but controlling question is whether the state has given anything for which it can ask return.").

178. *Id.* at 444–45.

179. *Id.* at 446.

180. *Id.*

181. *See, e.g.*, Leventhal v. City of Philadelphia, 542 A.2d 1328, 1332 (Pa. 1988); Allegheny County v. Monzo, 500 A.2d 1096, 1102 (Pa. 1985).

182. *See Leventhal*, 542 A.2d at 1330; *Monzo*, 500 A.2d at 1097–98.

183. 500 A.2d 1096 (Pa. 1985).

184. *Monzo*, 500 A.2d at 1097–98.

185. *Id.* at 1100–01.

186. *Id.* at 1098–99.

187. *Id.* at 1100–01.

188. *Id.*

189. *Id.*

190. *Id.* 1104–05.

J.C. Penney: "Where the benefit received and the burden imposed is [sic] palpably disproportionate, a tax is . . . a taking without due process under the Fourteenth Amendment . . . ."[191] The court held that the benefit of the proposed convention center offered no benefit to the majority of hotels that were burdened by the tax.[192] Those who visited the convention center would stay in hotels located in downtown Pittsburgh.[193] Consequently, the tax violated the Due Process Clause.[194]

Additionally, the court held that the revenue gained from the hotel tax was not being used for the general public.[195] The tax was a "special tax" imposed for a "special local purpose for the benefit of a part of the body politic and which rests upon the supposition that a portion of the public is specially benefitted."[196] Since the tax revenue was not being put to general public use, the benefits to the taxpayer had to be proportional to the tax burden.[197] The court had already determined that the tax was disproportionate because it offered no benefit to the taxpaying hotels located outside of downtown Pittsburgh.[198]

A Philadelphia hotel owner challenged an almost identical tax to the one in *Monzo* in *Leventhal v. City of Philadelphia*.[199] The city of Philadelphia passed a 3% tax on hotel room rentals, with revenues to be used for the construction of a convention center in Center City.[200] Leventhal owned a hotel located by the Philadelphia International Airport (seven miles from Center City) and challenged the tax under the Due Process Clause.[201] He raised essentially the same arguments as the hotel owner in *Monzo*.[202] He argued that the tax disproportionately burdened the hotels near the airport as compared to the hotels in Center City.[203] He further asserted that his hotel would not have the benefit of increased demand, which hotels near the convention center would receive.[204]

The Pennsylvania Supreme Court distinguished this case from *Monzo* and held that Philadelphia's hotel tax was constitutional.[205] The court's holding was based on Leventhal's failure to provide evidence that the tax would harm his

191. *Id.* at 1102. It should be noted that the Pennsylvania Supreme Court mentioned that this tax would also violate the Equal Protection Clause under the Fourteenth Amendment and the Uniformity Clause under the Pennsylvania Constitution. *See id.*

192. *Id.* at 1106.

193. *Id.* at 1104.

194. *Id.* at 1106.

195. *Id.*

196. *Id.* at 1105.

197. *See id.*

198. *Id.* at 1104.

199. 542 A.2d 1328 (Pa. 1988).

200. *Leventhal*, 542 A.2d at 1330.

201. *Id.* at 1131.

202. *Id.* at 1333.

203. *See id.*

204. *Id.*

205. *Id.* at 1332.

business or that he would not benefit from the convention center.[206] The City, on the other hand, had offered evidence that the convention center would benefit hotels near the airport.[207] Experts for the City testified that Leventhal's hotel would benefit from the convention center since convention travelers would likely pass through the airport and frequent his hotel.[208]

Overall, to prevail on challenges under the Due Process Clause, taxpayers must submit substantial evidence that the tax at issue will cause them harm and fail to confer a benefit on them.[209] This is often difficult to prove. Legislatures are given "wide discretion" in creating taxes and tax statutes are presumed valid.[210] Additionally, a burden-versus-benefit challenge cannot be raised if tax revenues are being used for the general public, such as for schools.[211] This Due Process Clause challenge will only arise if the tax revenues are being used "for a special local purpose."[212]

E. Current Litigation Pertaining to the Soda Tax

Philadelphia's Soda Tax is being challenged in Pennsylvania state court.[213] The plaintiffs are a group of businesses that sell or distribute sugar-sweetened beverages within Philadelphia.[214] They are challenging the tax on several grounds, including the Uniformity Clause.[215] The plaintiffs argue that the 1.5-cent per fluid ounce tax imposes an unequal burden because it does not account for the beverages' market value.[216]

The plaintiffs filed a claim in the Philadelphia Court of Common Pleas

206. *See id.* at 1333.

207. *Id.* at 1334.

208. *Id.* Hypothetically, if Leventhal's hotel had been located in Northeast Philadelphia, the court may have been more inclined to render a favorable holding for him. Most of those who are familiar with the city know that Northeast Philadelphia is quite a distance away from Center City's convention center and is certainly not within walking distance. Northeast Philadelphia does not contain any major transportation hubs such as the Philadelphia International Airport or the train station—30th Street Station. A hotel located in Northeast Philadelphia, therefore, would be able to assert facts similar to those in *Monzo*. *See* Allegheny County v. Monzo, 500 A.2d 1096, 1098–1101 (Pa. 1985). Since the hotels in Northeast Philadelphia would be burdened by the special tax and not offered any benefit, that tax could be declared a violation of the Due Process Clause. *See id.* at 1106; *Philadelphia Neighborhoods*, U. PA. LIBR. (last visited Oct. 26, 2017), http://sceti.library.upenn.edu/PhilaNeighborhoods/neighborhoods.cfm [perma: http://perma.cc/C9NV-GFNA].

209. *See Leventhal*, 542 A.2d at 1334; *Monzo*, 500 A.2d at 1104.

210. *Leventhal*, 542 A.2d at 1331.

211. *See Monzo*, 500 A.2d at 1105 ("[A] taxpayer may not successfully object, on the ground that he derives no benefit from taxation and thereby is denied due process, to taxation for general public use which includes taxes for schools." (discussing Airway Arms, Inc. v. Moon Area Sch. Dist., 446 A.2d 234, 244 (Pa. 1982))).

212. *See id.*

213. *See* Williams v. City of Philadelphia, 164 A.3d 576, 579 (Pa. Commw. Ct. 2017).

214. *See* Williams v. City of Philadelphia, No. 1452, 2016 WL 7422362, at *1 (Pa. Ct. Com. Pl. 1st Dec. 19, 2016), *aff'd*, 164 A.3d 576, 579 (Pa. Commw. Ct. 2017).

215. *Williams*, 164 A.3d at 581–82.

216. *Williams*, 2016 WL 7422362, at *5.

seeking declaratory and injunctive relief to invalidate the Soda Tax.[217] After a hearing, the Court of Common Pleas issued an opinion dismissing the plaintiffs' claims.[218] The court held that the tax did not violate Pennsylvania's Uniformity Clause.[219]

The plaintiffs relied on *Overholt* to argue that the Soda Tax violated the Uniformity Clause, but the Court of Common Pleas held that the case did not apply.[220] The court ruled that the liquor tax in *Overholt* was a property tax, whereas the Soda Tax is a privilege tax.[221] The court asserted that the Soda Tax is imposed "on the privilege of distributing [sugar-sweetened beverages] in the City of Philadelphia."[222] It concluded that a privilege tax, such as the Soda Tax, does not need to rely on the market value of the item.[223]

The Court of Common Pleas relied on *Wanamaker v. School District of Philadelphia*[224] to support its holding.[225] *Wanamaker* addressed the issue of whether a real estate tax, which was based on how much of a building was being used for commercial purposes, violated the Uniformity Clause.[226] The plaintiffs in *Wanamaker* argued that the tax should instead be assessed on the value of the buildings in order to conform with the Uniformity Clause.[227] The Pennsylvania Supreme Court held that since the tax was based on the use of the property, it did not need to be based on the property's value.[228] The court maintained that use and ownership of property are distinct concepts.[229] The court then asserted that a privilege (use) tax may be based upon how a taxpayer chooses to use its property, and the tax does not have to consider the value of the property.[230] A taxpayer can voluntarily choose to use its property in some fashion, and, in turn, it is choosing to subject itself to taxation for this use.[231] Since the tax was based on whether building owners chose to use their buildings for commercial purposes, it did not have to consider the value of the building.[232]

217. *Id.* at *1.

218. *Id.* at *6–7.

219. *Id.*

220. *Id.* at *6.

221. *Id.*

222. *Id.*

223. *See id.*

224. 274 A.2d 524 (Pa. 1971).

225. *Williams*, 2016 WL 7422362, at *6.

226. *Wanamaker*, 274 A.2d at 535 (Roberts, J., dissenting) ("Examination of the formula reveals that the School Board can tax at 1.25% of the assessed value, with an adjustment made for the number of days the building is open for business, and the amount of square footage available, but not used, for business.").

227. *See id.* at 527 (majority opinion).

228. *Id.*

229. *Id.* at 526.

230. *See id.* at 527.

231. *See id.*

232. *Id.*

In *Williams v. City of Philadelphia*,[233] the Court of Common Pleas did not refer to Justice Roberts's dissenting opinion in *Wanamaker*.[234] In his dissent, Justice Roberts argued that the majority had "largely obliterated the Uniformity Clause from the Pennsylvania Constitution" as it pertained to real estate taxes.[235] He argued that the Uniformity Clause required taxes to assess property values on a uniform basis.[236] Justice Roberts maintained that the concept of taxing the *use* of property, and disregarding its value, is something that only applies to personal property, not real property.[237] He went further and argued that the tax at issue was not a privilege tax, but a property tax.[238] If a tax is levied on a property's *only* use, then it is a tax on the property itself (a property tax), and a tax on the property itself must be based on its value.[239] Justice Roberts asserted that the plaintiff, a department store, could only use its building for commercial purposes, therefore this tax was not assessed on the property's use, but on the property itself.[240]

The Court of Common Pleas did not acknowledge the dissent from *Wanamaker*, but stated that the majority's opinion was supportive of finding the Soda Tax as a privilege tax.[241] It maintained that "the legal incidence of the [soda] tax is based on the privilege of distributing [sugar-sweetened beverages] in Philadelphia."[242] The court concluded that since the Soda Tax is not a property tax, it does not need to be based on the market value of the beverages.[243]

The plaintiffs appealed this ruling to the Commonwealth Court of Pennsylvania where they again challenged the Soda Tax's validity under Pennsylvania's Uniformity Clause.[244] At the Commonwealth Court, the plaintiffs

233. No. 1452, 2016 WL 7422362, at *6 (Pa. Ct. Com. Pl. 1st Dec. 19, 2016), aff'd, 164 A.3d 576, 579 (Pa. Commw. Ct. 2017).

234. *See Williams*, 2016 WL 7422362, at *6.

235. *Wanamaker*, 274 A.2d at 530 (Roberts, J., dissenting).

236. *See id.*

237. *See id.* at 531.

238. *See id.* at 533–34.

239. *Id.* at 534. In arguing this concept, the dissent relied upon the U.S. Supreme Court case *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288 (1921). In *Dawson*, Kentucky had imposed a tax of $0.50 per gallon for any whiskey transferred out of the state. *Id.* at 289. The tax was challenged for violating Kentucky's uniformity of taxation requirement. *Id.* at 291–92. The businesses that challenged the tax argued it was a property tax that must be based on the value of the whiskey. *Id.* at 291. The State contended that the tax was not a property tax but was a license tax assessed upon the privilege of operating a distilling business. *Id.* at 292. The Court held that the tax was a property tax targeting one of the only uses a distilling or whiskey storage business had: the right to transfer it to a place for its sale or consumption. *Id.* at 294. Therefore, the statute was taxing the value of property, and the purpose for owning this property was to own its value. *See id.* "To levy a tax by reason of ownership of property is to tax the property." *Id.* Since this was a property tax, but was not based on the value of the property, it violated the uniformity requirement. *See id.*

240. *Wanamaker*, 274 A.2d at 534 (Roberts, J., dissenting).

241. Williams v. City of Philadelphia, No. 1452, 2016 WL 7422362, at *6 (Pa. Ct. Com. Pl. 1st Dec. 19, 2016), *aff'd*, 164 A.3d 576, 579 (Pa. Commw. Ct. 2017).

242. *Id.*

243. *Id.*

244. Williams v. City of Philadelphia, 164 A.3d 576, 582 (Pa. Commw. Ct. 2017).

argued that the Soda Tax established four different classes: soft drinks, distributors, retailers, and consumers.[245] They argued that the Soda Tax applies to these classes "on an unequal basis" because it imposed an "enormous range of tax burdens across the classes."[246]

The Commonwealth Court was not persuaded by the plaintiff's arguments and upheld the Soda Tax.[247] The court affirmed the decision of the Court of Common Pleas and held that the Soda Tax is an "excise tax" imposed on the beverages when they are "supplied, acquired, delivered, or transported for purposes of holding them out for retail sale in [Philadelphia]."[248] Since the Soda Tax is an excise tax and not a property tax, it need not be applied on an *ad valorem* basis.[249] The Commonwealth Court concluded that since the Soda Tax did not need to be based on the market value of the beverages, the 1.5-cent per fluid ounce tax conformed to the Uniformity Clause.[250]

III. Discussion

The Soda Tax violates the Uniformity Clause. The tax will provide an unequal burden of taxation for beverage distributors. Its application will draw similar results to those seen in *Overholt*. Philadelphia City Council, however, can make a simple alteration to the operation of the Soda Tax so that it conforms to the Uniformity Clause.

This Section will begin by explaining why the Soda Tax does not violate the Due Process Clause. Next it will discuss why the Soda Tax's classification of sugar-sweetened beverages is also constitutional. This will be followed by an explanation of why the Soda Tax violates Pennsylvania's Uniformity Clause and why Pennsylvania courts have misinterpreted the Uniformity Clause within the current litigation challenging the Soda Tax. Lastly, a method will be proposed for bringing the Soda Tax within the constitutional boundaries of the uniformity requirement.

A. *The Soda Tax Does Not Violate the Due Process Clause*

The Soda Tax does not violate the Due Process Clause because it does not need to provide a proportional benefit to soda distributors. If the revenues from a tax are being used for a general public purpose, then the tax will withstand a challenge under the Fourteenth Amendment's Due Process Clause.[251] The Soda Tax's revenues are being used for a general public purpose.[252] Prior to the tax

245. *Id.* at 583 (quoting *Williams*, 2016 WL 7422362, at *5).

246. *Id.* (quoting *Williams*, 2016 WL 7422362, at *5).

247. *See id.* at 596.

248. *Id.* at 595.

249. *See id.*

250. *Id.* at 594–96.

251. *See* Allegheny County v. Monzo, 500 A.2d 1096, 1105 (Pa. 1985).

252. *See* Claudia Vargas, Tricia L. Nadolny & Julia Terruso, *Big Chunk of Soda Tax Money Not Going to Pre-K*, PHILA. INQUIRER (June 13, 2016, 7:33 PM, updated June 16, 2016, 12:05 PM), http://www.philly.com/philly/news/politics/20160614_Drink_tax_proposal_had_some_sweetners.html

going into effect, the city announced that nearly half of the tax revenue would be used for prekindergarten education.[253] As the court in *Monzo* discussed, precedent indicates that taxes that raise funds for schools are "raising revenue for the general public use" and will withstand a Due Process Clause challenge.[254] Unlike *Monzo* and *Leventhal*, the revenue from the Soda Tax is not being used to finance a specific construction project.[255] A court should have little difficulty in determining that this tax revenue is for general public use.

Even assuming the Soda Tax revenue does not qualify as being for "general public use," it would still survive a due process challenge under the burden-versus-benefit framework.[256] Under this framework, taxpaying soda distributors would argue that the revenue from the tax offers no benefit to their businesses, or to the industry as a whole. The primary revenue use, prekindergarten education, will not increase the demand of sugary beverages. They would argue that the burden, 1.5 cents per fluid ounce, is disproportionate to the benefit of prekindergarten education.[257]

As is evident from the *Leventhal* decision, soda distributors that challenge the Soda Tax on due process grounds would need to present substantial evidence of the burden and lack of benefit.[258] To establish the burden, potential evidence might include a showing of lost revenues due to the tax. For the lack of benefit, distributors could show how their businesses are not improving under the Soda Tax with evidence of stagnant sugary beverage sales, improved sales of competitors whose beverage products are not subject to the tax, or improved sales of competitors located outside of Philadelphia. Even with this substantive evidence, distributors might still face difficulty establishing a nexus between the Soda Tax and their underperforming business. A number of factors, other than the Soda Tax, could be attributed to the abovementioned issues, which the city would no doubt argue in its defense.[259]

Even if soda distributors argue over the burden and benefit, Pennsylvania courts will likely still uphold the Soda Tax on due process grounds. In applying the reasoning from *J.C. Penney*, these distributors (local and nonlocal) are being afforded the benefit of doing business in Philadelphia.[260] While the Soda Tax revenue may not directly benefit these businesses, there are indirect benefits. A strong educational system may benefit businesses with better employees or higher standards of living within the city. The city also provides other benefits by

[perma: http://perma.cc/J5D5-MRY8].

253. *See id.*

254. *Monzo*, 500 A.2d at 1102 (citing Airway Arms, Inc. v. Moon Area Sch. Dist., 446 A.2d 234, 243 (Pa. 1982)).

255. See *supra* Part II.D.2 for an analysis of the uses of tax revenue in *Monzo* and *Leventhal*.

256. See *supra* Part II.D for an overview of the burden-versus-benefit framework.

257. See *supra* Part II.D for an analysis of burden-versus-benefit considerations.

258. *See* Leventhal v. City of Philadelphia, 542 A.2d at 1328, 1333 (Pa. 1988).

259. An example could be a possible trend in consumer preference for healthier, nonsugary beverages.

260. *See* Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444–45 (1940); *see also supra* notes 183–94 and accompanying text.

maintaining the streets and highways, which allow residents to go out and purchase sugar-sweetened beverages. The city maintains the police and fire departments, which protect businesses selling sugar-sweetened beverages. It also operates the Philadelphia Water Department, which provides and maintains water and sewer systems to the businesses.[261] Due to the numerous services provided by the city, which afford these businesses the opportunity to sell sugary beverages, they cannot claim they are without benefit.

As previously discussed, the revenue from the Soda Tax is being used for the general public use.[262] This prevents a burden-versus-benefit challenge under the Due Process Clause. Besides this, any argument that the Soda Tax is providing no benefits to the distributors is a difficult one to make. All of this leads to the conclusion that the Soda Tax would withstand rational basis review under the Fourteenth Amendment Due Process Clause.

B. The Classification Is Constitutional

Classifying sugar-sweetened beverage distributors as the group to be taxed does not violate the Uniformity Clause's substantive standards. Under the Uniformity Clause, the rational basis test is applied in accordance with the Fourteenth Amendment's Equal Protection Clause to determine if a tax classification is constitutional.[263] Under rational basis review, if a legislative body could have rationally considered a plausible policy reason for determining the classification, then the classification is constitutional.[264] Following from this, a classification will only be deemed unconstitutional if it is arbitrary or irrational.[265] The rational basis test gives deference to the legislature and provides it with flexibility in creating classifications for tax purposes.[266] Due to this deference, a tax upon sugar-sweetened beverages is constitutional.

City officials in Philadelphia have proclaimed several policy reasons for imposing the Soda Tax. Mayor Jim Kenney is a proponent of the tax because its revenue will be used for establishing a universal prekindergarten system for the city, as well as other programs.[267] Moreover, targeting the sugar-sweetened beverage industry could provide potential health benefits.[268] A study performed by researchers from Harvard found that the tax will potentially dissuade

261. *See* *Water Utility*, CITY OF PHILADELPHIA, http://www.phila.gov/WATER/WU/Pages/default.aspx [perma: http://perma.cc/28RF-ZUJT] (last visited Oct. 26, 2017).

262. See *supra* notes 252–55 and accompanying text for an explanation of the uses of Soda Tax revenue.

263. *See* Commonwealth v. Girard Life Ins. Co., 158 A. 262, 263 (Pa. 1932) (stating that the concepts of the Uniformity Clause and the Equal Protection Clause "run together"); *supra* notes 86–88 and accompanying text; *see also* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526 (1959) (recognizing that the state's taxing power is subject to the Equal Protections Clause).

264. *See* Nordlinger v. Hahn, 505 U.S. 1, 11 (1992).

265. *See id.*

266. *Allied Stores of Ohio*, 358 U.S. at 526–27.

267. Sapatkin, *supra* note 6.

268. *Id.*

consumers from purchasing unhealthy sugary beverages.[269] As a result, the number of diabetes diagnoses and rate of obesity among Philadelphia residents could decline.[270] Such a decline would save millions of dollars in health spending.[271] Some have criticized these consumption and health projections as indeterminable.[272] Regardless of whether these projections are accurate or not, the health benefits of taxing sugar-sweetened beverages are a plausible policy reason for the tax.[273]

The city of Philadelphia can discriminate against sugar-sweetened beverage distributors. Under the rational basis test, the end must justify the means.[274] The "end" is the policy goal of the legislature, and the "means" is the means by which it accomplishes the end. In this situation, the end is Philadelphia's interest in protecting the health of its residents, and the means is the Soda Tax. City Council plausibly believes that increasing the tax on sugary beverages—which are generally known to be unhealthy—will discourage people from purchasing them and, in turn, benefit their health, a satisfactory justification under the rational basis test.[275]

Using a tax to increase the price of unhealthy beverages rationally relates to protecting the health of consumers. An increase in price will dissuade consumers from purchasing the beverages. Indeed, this has already happened—after the Soda Tax was passed there was an immediate decrease in sugary beverage sales in areas affected by the tax.[276] These decreased sales will result in a decreased consumption of the beverages and could have a positive effect on the health of residents.[277]

Moreover, any argument that the tax will be unfairly detrimental to businesses selling sugary beverages will not be considered under the rational basis test.[278] Despite reports of decreased sales and mass layoffs due to the tax,[279] the Pennsylvania Supreme Court, under its precedents, will strictly

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. See *supra* notes 85–91 and accompanying text for a discussion of the rational basis test under the Equal Protection Clause.

274. *See supra* notes 87–89 and accompanying text.

275. See *supra* notes 92–101 and accompanying text for a discussion of policy considerations under the rational basis test.

276. Julia Terruso, *Soda Companies, Supermarkets Report 30–50 Pct. Sales Drop from Soda Tax*, PHILLY.COM (Feb. 21, 2017, 5:25 PM, updated Feb. 21, 2017, 5:28 PM), http://www.philly.com/philly/news/Soda-companies-supermarkets-report-50-percent-losses-from-soda-tax.html [perma: http://perma.cc/9JVQ-8VDU].

277. *See* Sapatkin, *supra* note 6.

278. *See* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 108–09 (2003) (holding that the plausible policies for taxing racetrack slot machines overshadowed any economic detriment that may occur to the racetrack).

279. *See* Julia Terruso, *Pepsi to Lay Off 80 to 100, Blames Soda Tax*, PHILLY.COM (Mar. 1, 2017, 11:00 AM, updated Mar. 1, 2017, 3.49 PM), http://www.philly.com/philly/news/politics/Pepsi-announces-80-100-layoffs-blames-soda-tax.html [perma: http://perma.cc/7EAD-CQYC].

consider whether the Soda Tax rationally relates to its goal of promoting the residents' health. The court must defer to the judgment of Philadelphia's City Council on whether the health benefits of the tax are worth its economic impact.[280] The economic impact of the tax is irrelevant in determining whether the Soda Tax passes the rational basis test.

The sugar-sweetened beverage classification passes under the rational basis test. Philadelphia's City Council could have plausibly considered the health benefits as a reason for passing this tax. There is evidence that the Soda Tax dissuades the purchase of sugary beverages, which, in turn, prevents the consumption of those unhealthy products. The court will not consider the negative economic impact of the Soda Tax—this was a consequence the City Council could have debated before passing the tax. The health benefits of discouraging soda consumption render the Soda Tax's classification constitutional.

C. The Soda Tax Violates Pennsylvania's Uniformity Clause

The Soda Tax imposes an unequal burden within the class of soda distributors and thus violates the Uniformity Clause of the Pennsylvania Constitution. Placing a 1.5-cent per fluid ounce tax on a broad range of beverages, varying in market value, violates the principle of uniformity of taxation.[281] The taxpayers (beverage distributors) will be forced to pay a tax that is not proportional to the value of the product they are selling. *Overholt* offers analogous circumstances to Philadelphia's Soda Tax.[282] Both tax regimes involve taxes that are assessed on a class of beverages, calculated by the beverages' volume, and completely disregard the varying market values of those beverages.[283]

A real-life demonstration comparing two sweetened beverage brands shows the tax disparity. On March 1, 2017, the prices of two popular energy drink brands were recorded at a convenience store located in North Philadelphia.[284] The brands were Monster Energy and Rockstar Energy, both of which contained sugar. The Monster Energy drink was sold in a sixteen-ounce can, and was listed at a price of $2.99. The Rockstar Energy drink was also in a sixteen-ounce can, but was listed at a price of $2.49.[285] The Soda Tax assesses an equal amount for both brands—1.5-cent per fluid ounce per can.[286] The distributors of these beverages are thus responsible for paying a $0.24 tax on every sixteen-ounce can

280. *See supra* notes 92–101 and accompanying text.

281. *See* Commonwealth *ex rel.* Dep't of Justice v. A. Overholt & Co., 200 A. 849, 852–53 (Pa. 1938).

282. *See id.* at 850–51.

283. *Compare id.*, *with* PHILA., PA., CODE §§ 19-4101–03 (2016).

284. The author entered this store on March 1, 2017 and recorded the prices.

285. It should be noted that the price listed for both brands did not include any tax. For simplicity's sake, the convenience store's markup in price was not taken into consideration.

286. *See supra* notes 10–12 and accompanying text. For this calculation, simply multiply the number of ounces by 1.5 cents (i.e., *16 oz. x $0.015 = $0.24*).

of energy drink they sell or ship to dealers located in Philadelphia.[287]

The disparity arises when the taxable amount is compared to the retail price of the product. Rockstar is being sold at the price of $2.49 per can but is being taxed $0.24. Therefore, Rockstar is being taxed at a rate of 9.6% of its retail price.[288] On the other hand, the can of Monster Energy drink, priced at $2.99, is being taxed at a rate of 8.0% of its own value.[289] On its face, the Soda Tax appears to levy a uniform system of taxation, but when differences in market value are taken into account, the rate of taxation differs significantly.

The comparison described above discusses only two brands of energy drinks, which are very similar. The Soda Tax, however, covers a wide variety of beverages.[290] Sugar-sweetened iced tea is another covered beverage.[291] At the same North Philadelphia convenience store, Turkey Hill[292] iced tea was also available for purchase. This beverage was listed at the price of $1.89 for an 18.5-ounce bottle.[293] Under the Soda Tax, a Turkey Hill distributor must pay $0.28 of tax on each bottle shipped to Philadelphia dealers.[294] The tax rate on a bottle of iced tea is therefore 14.8%.[295] Disparate effective tax rates evidence a lack of uniformity within the Soda Tax. Some beverages within the classification will face lower tax rates, such as Monster Energy's 8.0% rate, while others will be taxed at a much higher rate, such as Turkey Hill's 14.8%.

The above illustration shows how the Soda Tax may violate Pennsylvania's Uniformity Clause. The taxpaying distributors that ship large volumes of beverages will be significantly impacted by this tax disparity. The difference of a few percentage points, as seen above, will apply to thousands upon thousands of beverage cans and bottles. This will result in a varying tax burden.[296] This large disparity in tax owed, compared to market values of the beverages, is why the

287. *See supra* notes 11–12 and accompanying text.

288. To determine this figure, divide the amount of tax by the retail price of the product (i.e., *$0.24 ÷ $2.49 = 0.096*, or 9.6%).

289. As in the previous calculation, divide the amount of tax by the retail price of the product (i.e., *$0.24 ÷ $2.99 = 0.08*, or 8%).

290. *See supra* note 11 and accompanying text.

291. *See, e.g.*, *Iced Tea*, TURKEY HILL, http://www.turkeyhill.com/drinks/iced-tea/iced-tea [perma: http://perma.cc/LR9Y-BMFL] (last visited Oct. 26, 2017) (stating Turkey Hill Iced Tea contains 20 grams of sugar per 240 milliliters).

292. TURKEY HILL, http://www.turkeyhill.com/ [perma: http://perma.cc/KY7W-HMYV] (last visited Oct. 26, 2017).

293. This information was recorded by the author at a North Philadelphia convenience store on March 1, 2017.

294. *See supra* notes 11–12 and accompanying text. For the above-the-line calculation, simply multiply the number of ounces by 1.5 cents (i.e., *18.5 oz. x $0.015 = $0.28*).

295. To determine this figure, divide the amount of tax by the retail price of the product (i.e., *$0.28 ÷ $1.89 = 0.148*, or 14.8%). It should also be noted that for simplicity's sake, the convenience store's markup was not deducted from the price.

296. If a Monster Energy distributor ships 10,000 sixteen-ounce cans of beverage and is taxed at $0.24 per can, it will owe $2,400 under the Soda Tax. When a Turkey Hill distributor, who also ships 10,000 18.5-ounce bottles of beverage, is taxed $0.28 per bottle, it will owe $2,800 under the Soda Tax.

Soda Tax lacks "substantial uniformity."[297]

The court's decision in *Overholt* supports the conclusion that the Soda Tax is unconstitutional. The liquor tax at issue in *Overholt* and Philadelphia's Soda Tax operate in similar fashion.[298] Both charge a fixed amount of tax based on the volume of the beverage.[299] Neither consider the market value of the beverages that are being taxed.[300] Both focus on the wholesaler or distributor as the entity responsible for paying the tax.[301] The application of the liquor tax in *Overholt* is analogous to the application of the Soda Tax, and the court's reasoning in that case should be binding precedent for a Pennsylvania court in *Williams*.

The key takeaway from *Overholt* is that if a tax disregards the market value of a class of items so as to produce an unequal tax burden within the class, then the tax violates uniformity.[302] The Soda Tax sets out a clearly defined class—anyone who distributes beverages containing sugar-based or artificial sweeteners to retailers in Philadelphia.[303] This tax, similar to the liquor tax in *Overholt*,[304] charges distributors in the class 1.5-cents per fluid ounce of beverage sold or shipped.[305] The tax places an unvarying tax burden on an industry selling products with varying market values. This forces distributors, selling beverages valued at a lower price, to pay a greater proportion in tax.[306] *Overholt*, based on its analogous facts and holding, compels the conclusion that the Soda Tax, as it stands, violates the Uniformity Clause and thus violates the Pennsylvania Constitution.

D. The Uniformity Clause Requires the Soda Tax to Be Applied on an Ad Valorem *Basis*

The Commonwealth Court of Pennsylvania and the Court of Common Pleas have improperly applied the Uniformity Clause to the Soda Tax. They both ruled that the Soda Tax is not a property tax, therefore it does not need to

297. *See* Commonwealth *ex rel.* Dep't of Justice v. A. Overholt & Co., 200 A. 849, 853 (Pa. 1938).

298. *Compare id.* at 850 (evaluating the uniformity of a liquor tax which was assessed at two dollars per proof gallon), *with* PHILA., PA., CODE § 19-4103(2)(a)–(b) (2016) (assessing a tax of 1.5 cents per fluid ounce of sugar-sweetened beverages).

299. *Compare Overholt*, 200 A. at 850 (explaining that the liquor tax was fixed at two dollars per proof gallon of liquor), *with* § 19-4103(2)(a)–(b) (assessing a tax of 1.5 cents per fluid ounce of sugar-sweetened beverages).

300. *See Overholt*, 200 A. at 853 (holding that the disregard of the market value of liquor in taxation violated the Uniformity Clause); *see also* § 19-4103(2)(a)–(b) (making no reference to the market value of the beverage being taxed).

301. *See Overholt*, 200 A. at 850 (striking down a liquor tax which required corporations to pay a tax for the liquor they owned); § 19-4103(2)(a)–(b) (requiring distributors of sugar-sweetened beverages to pay a tax on the beverages they sell or ship to retailers).

302. *See Overholt*, 200 A. at 853.

303. *See supra* notes 10–11, 13–14 and accompanying text.

304. *See Overholt*, 200 A. at 850.

305. *See supra* note 12 and accompanying text.

306. *See supra* notes 284–97 and accompanying text.

be imposed on an *ad valorem* basis.[307] The Court of Common Pleas refused to follow *Overholt* because it dealt with a property tax and instead followed *Wanamaker*.[308] Both courts were wrong.

The Uniformity Clause was adopted to ensure that no group within a classification could be improperly disadvantaged by a tax statute.[309] The reasoning behind this was that those taxpayers who possessed more wealth or value should pay a higher amount of tax since they are theoretically afforded more government resources.[310] These crucial underlying intentions weigh in favor of finding the Soda Tax unconstitutional. The previous comparison of the energy drink brands with the iced tea brand illustrates that those beverage dealers who sell less expensive drinks will bear a higher tax burden.[311] Moreover, the beverage dealers who sell lower-priced products already draw less revenue per unit than their more expensive competitors, and yet still they are expected to pay the same amount of tax per unit. The Uniformity Clause was created to prevent this exact situation.[312] The court must consider the historical background and intent behind the Uniformity Clause to determine how it invalidates the Soda Tax.[313]

The underlying intent of the Uniformity Clause does not recognize any meaningful distinction between excise taxes and property taxes. The people of Pennsylvania adopted the Uniformity Clause to ensure that those with more wealth, assets, or interests pay a greater share of tax to ensure greater governmental protection.[314] This principle was to be applied to *all* types of taxes.[315] It is illogical and certainly atextual to require only property taxes to reflect the taxable item's value but allow excise taxes to disregard it. When an excise tax is imposed on an act that is connected with a good (i.e., sale of cigarettes), the text and the purpose of the Uniformity Clause require the tax to reflect the value of those goods.[316] Those who are selling or buying higher-valued items should be required to pay a higher amount of tax. The Commonwealth Court and Court of Common Pleas failed to recognize this basic principle. They simply labeled the Soda Tax as an excise tax and abruptly concluded that it need not reflect the market values of the beverages.[317] That

307. *See* Williams v. City of Philadelphia, 164 A.3d 576, 594–95 (Pa. Commw. Ct. 2017); Williams v. City of Philadelphia, No. 1452, 2016 WL 7422362, at *6–7 (Pa. Ct. Com. Pl. 1st Dec. 19, 2016), *aff'd*, 164 A.3d 576 (Pa. Commw. Ct. 2017).

308. *See supra* notes 226–31 and accompanying text.

309. *See supra* notes 31–32 and accompanying text.

310. *See supra* note 32 and accompanying text.

311. *See supra* notes 284–97 and accompanying text.

312. *See supra* notes 31–32 and accompanying text.

313. *See supra* Parts II.B.1–2.

314. *See supra* note 32 and accompanying text.

315. *See supra* note 33 and accompanying text.

316. *See Excise*, BLACK'S LAW DICTIONARY, *supra* note 2 (defining "excise" as "[a] tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)"); *supra* notes 30–33 and accompanying text.

317. *See supra* notes 241–43, 248–49 and accompanying text.

conclusion fails to recognize the reality that different transactions vary in value; therefore, a tax should be based on the value of the transaction. The distinction between excise taxes and property taxes should bear no real weight under a Uniformity Clause analysis—both should reflect a taxable item's market value.

Aside from the intent behind the Uniformity Clause, *Wanamaker* should not be considered in an analysis of the Soda Tax. The debate in *Wanamaker* centered on a real estate tax.[318] The facts of *Overholt* are more similar to the Soda Tax than the facts in *Wanamaker*.[319] The taxed liquor suppliers in *Overholt*, who were exiting the Prohibition era, are analogous to the taxed beverage distributors under the Soda Tax.[320] Both tax statutes impose a fixed rate based on the quantity of the beverage.[321] Both taxes also set a disproportionate burden on certain owners when compared to the value of those owners' product.[322]

Despite these similarities, one may still be convinced by the argument that the Soda Tax is a privilege tax, not a property tax, and need not be based on a beverage's value. The dissent in *Wanamaker* made a compelling argument that a privilege (use) tax imposed upon a piece of property, which has only one type of use, is actually a property tax.[323] Justice Roberts argued that the Wanamaker Department Store had only one choice in how it used its property: for a commercial purpose.[324] The company's purpose was to generate profits.[325] The only way it could do this was by effectively using its building space for commercial purposes.[326] Regardless of whether it was used for storage, manufacturing, or for an open shopping area, it was still commercial use.[327] If a piece of property can only be used in one type of way, and a tax is imposed on this type of use, then the tax is not being imposed on the use—it is being imposed on the property itself.[328]

This line of thinking also holds true for the Soda Tax. The Soda Tax is targeting the only way a beverage product can be used in a distribution business—the transfer of that product for sale. The purpose of a beverage distribution business is to earn revenue, and the business earns revenue by distributing its product. The Commonwealth Court took a simplistic view on this issue and found that the Soda Tax is an excise tax.[329] The court decided this because the tax is imposed on the supply, acquirement, delivery, or

318. *See supra* note 227 and accompanying text

319. *See supra* notes 128–47, 227–33 and accompanying text.

320. *See supra* notes 128–30 and accompanying text.

321. *See supra* notes 12, 128–30 and accompanying text.

322. *See supra* notes 128–47, 284–97 and accompanying text.

323. *See supra* notes 234–40 and accompanying text.

324. *See supra* notes 239–40 and accompanying text.

325. *See* Wanamaker v. Sch. Dist. of Phila. 274 A.2d 524, 534 (Pa. 1971) (Roberts, J., dissenting).

326. *See id.*

327. *See id.*

328. *See id.*

329. *See supra* notes 248–49 and accompanying text.

transportation of the beverages.[330] It cannot be denied that the tax is triggered by these specific acts.[331] The Soda Tax, however, is targeting only beverage distributors—a more careful analysis shows that it is actually a property tax.

The only use a beverage distributor has for its beverage products is to distribute them. The ability to distribute is concomitant with the value of owning the property. Distributors take ownership of beverage products in order to leverage the value of distributing those products. Therefore, to tax the distribution of beverage products is to tax the value of owning that product. To tax the value of ownership is to tax the ownership of property itself—a property tax.[332] This is the essential value of the beverage and is why distributors take ownership of it in the first place. The Soda Tax is taxing the "reason of ownership," and is therefore a property tax that must be based on the value of the property.[333]

E. *Bringing the Soda Tax Within Constitutional Boundaries*

Altering Philadelphia's Soda Tax from a specific fixed amount to an *ad valorem* system would bring it within the confines of the Uniformity Clause. Allowing the market value of the product to determine the amount of tax owed will establish equality with respect to the tax burden.

Since classifying sugar-sweetened beverage distributors as the group to be taxed is constitutional and need not be amended, only the operation of the tax itself requires correction. Removing the flat 1.5-cent per fluid ounce tax rate, and changing it to an *ad valorem* tax, will make the Soda Tax uniform. A potential tax rate could be 11% of the market value, the average rate under the current Soda Tax (albeit unweighted) of the three previously mentioned brands.[334] This new system of tax would generate nearly the same amount of revenue as the current system.[335] Monster Energy, currently taxed $0.24 per sixteen-ounce can, would now be taxed $0.33 per can.[336] Rockstar Energy, also taxed $0.24 per can, would be taxed $0.27 under the new system.[337] Turkey Hill Iced Tea, which was

330. *See supra* note 248 and accompanying text.

331. *See supra* notes 16–17 an accompanying text.

332. *See supra* note 239 and accompanying text.

333. *See Wanamaker*, 274 A.2d at 534 (Roberts, J., dissenting).

334. *See supra* notes 288–95 and accompanying text. Monster Energy is currently taxed at 8%, Rockstar Energy is 9.6%, and Turkey Hill is 14.8%. The average unweighted tax rate on these three beverages is 10.8% (i.e., *8.0% + 9.6% + 14.8% = 32.4%*, and *32.4% ÷ 3 = 10.8%*).

335. Under the current Soda Tax, a sixteen-ounce can of Monster Energy drink, with a retail price of $2.99, generates $0.24 of tax revenue. *See supra* notes 285–87 and accompanying text. An 11% tax rate would generate $0.33 of tax revenue. Similarly, Rockstar Energy, with a retail price of $2.49, also currently generates $0.24 of tax per unit. *See supra* notes 285–87 and accompanying text. An 11% tax rate would generate $0.27 of tax revenue. Finally, Turkey Hill Iced Tea, which comes in an 18.5-ounce container and has a retail price of $1.89, is assessed $0.28 of tax. *See supra* notes 293–94 and accompanying text. Under the new system, an 11% tax rate would assess $0.21.

336. *See supra* note 335 and accompanying text.

337. *See supra* note 335.

taxed at the highest amount for $0.28, would now be taxed $0.21.[338] An 11% tax rate will increase the amount of tax owed for more expensive beverages and lower the tax owed for cheaper beverages.[339] This equalizes the tax burden for the beverage distributors, thus making the Soda Tax constitutional under the Uniformity Clause.

Of course, the 11% tax rate is based on only three brands, and is not reflective of average tax rate of all brands sold in Philadelphia. The city should consider the other various brands distributed to city businesses. A wider survey of these brands' current tax rates will provide greater insight into what is an appropriate *ad valorem* tax rate. Once the Philadelphia City Council determines the tax rate, and amends the Soda Tax to reflect the market value of the beverages, then it will conform with the Uniformity Clause.

IV. CONCLUSION

Philadelphia's Soda Tax, as currently written, should be invalidated under Pennsylvania's Uniformity Clause. A 1.5-cent per fluid ounce tax imposes an "inequality of burden" on beverage distributors, disadvantaging distributors of less expensive products. Those who sell cheaper beverages will be forced to pay a larger portion of the tax relative to the market price of their products. This inequality in burden is precisely what the Uniformity Clause forbids.

Philadelphia has the constitutional authority to target the sugar-sweetened beverage industry with a tax. The legislature's broad power of classification permits this. The sugar-sweetened beverage industry is unable to argue that the tax burdens them without any benefit. Since the revenue from the Soda Tax is being used on early education and other city programs—both benefits to the general public—they cannot argue that they deserve a proportional benefit.

If Philadelphia amends the Soda Tax's operation from a fixed amount of tax (currently 1.5 cents per fluid ounce) to a percentage of the retail sales price, it will be uniform. A percentage of the sales prices will allow the tax owed on a beverage to reflect the market value. This simple change will bring the Soda Tax within constitutional boundaries without sacrificing revenue for early education.

338. *See supra* note 335.
339. *See supra* note 335.