



# STATE UNIFORMITY DOCTRINES AND SUGARY DRINK TAXES

Issue Brief



### **Purpose of this resource**

This resource is designed for public health advocates, researchers, policy makers, and community groups who are interested in sugary drink taxes as a tool for addressing the public health harms associated with overconsumption of sugary beverages. Recent lawsuits brought by food industry plaintiffs challenging local sweetened beverage taxes in Pennsylvania and Illinois have claimed (unsuccessfully so far) that those local taxes violate state constitutional requirements for uniformity in taxation. This guide explains the doctrine of uniformity, discusses how courts have applied the doctrine in a sampling of states, and provides general, high level recommendations for assessing and navigating potential uniformity-related concerns as part of the tax-design process. Because the uniformity doctrine requires a state-specific and tax-specific analysis, an in-depth understanding of tax uniformity requirements for any given state or locality requires additional legal research and consultation with a tax professional knowledgeable about the laws of the state.

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## Executive Summary

Sugary drinks are the single largest source of added sugar in the American diet and are associated with an increased risk of chronic diseases such as type 2 diabetes, heart disease, stroke, tooth decay and even certain cancers.

Taxing sweetened beverages can be a useful policy tool for decreasing consumption and creating funding streams to support chronic disease prevention and other health-related goals. In recent years, several local jurisdictions have adopted taxes on beverages with added sweeteners; all include beverages with added sugars, and a few include those sweetened with non-caloric sweeteners (collectively referred to as “sweetened beverages”). Other local and state-level jurisdictions are considering this type of legislation. Most proposals use a volume based approach, taxing sugary drinks on a per-ounce basis at the distributor level. One recent state proposal takes a tiered approach, proposing to tax sugary drinks based on how much sugar they contain.

Food industry groups have challenged some sweetened beverage tax laws alleging they violate constitutional requirements for uniformity in taxation. Uniformity in taxation refers to the idea that similar things must be taxed similarly, and that the mode of assessment and the rate of taxation must be the same or uniform across taxpayers. If a tax law creates classes of taxpayers, those classes should have a rational basis, and be reasonably related to a legitimate government interest (called a “rational basis” test). Nearly every state constitution has some kind of tax uniformity requirement. These requirements are typically expressly stated, but sometimes courts have found them to be implied by other provisions. Additionally, courts in states that do not have express or implied requirements nonetheless have applied similar reasonableness standards when evaluating the legality of proposed tax measures. In some states, uniformity requirements may also be found in state statutes.

Advocates and policymakers should be aware of whether their state constitutions and laws have uniformity clauses or other similar requirements and how these requirements are likely to be applied to sugary drink tax proposals. Statements of findings and purpose that provide support for the reasonableness of the tax classifications and their relationship to the government interest in establishing the tax should be included in tax proposals.

Uniformity is just one small part of the tax design process. But by following best practices for tax design, and equipped with an understanding of how uniformity principles may apply in their states, advocates and policy makers can design sweetened beverage tax laws that are likely to withstand uniformity-based legal challenges.

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## Introduction

Sugary drinks<sup>1</sup> — such as sugary sodas, sports drinks, fruit punches, energy drinks, and sweetened coffee and tea drinks — are the single largest source of added sugar in the American diet.<sup>2</sup> These drinks are associated with an increased risk of chronic diseases such as type 2 diabetes, heart disease, stroke, tooth decay and even certain cancers.<sup>3</sup>

Localities and states are actively exploring a variety of strategies to reduce and prevent nutrition-related chronic diseases. Adopting taxes focused on sugary beverages is one key strategy that shows promise in both reducing consumption of added sugars as well as raising revenue for related public health initiatives. As of October 2017, seven U.S. cities or counties (Albany, Berkeley, San Francisco, and Oakland, California; Boulder, Colorado; Philadelphia, Pennsylvania; and Seattle, Washington) have adopted taxes focused on beverages with added sweeteners, using a volume-based, cents-per-ounce approach. Six of these tax laws apply to beverages sweetened with caloric sweeteners such as sugar or high fructose corn syrup; the Philadelphia tax applies to drinks sweetened with both caloric and non-caloric sweeteners. Tax proposals have also been considered by several state legislatures, although none have been adopted as of the time this issue brief was written.<sup>4</sup> Cook County, Illinois, also adopted a tax on pre-made, ready to drink beverages sweetened with both caloric and non-caloric sweeteners but then repealed the tax in fall of 2017.

The most common sweetened beverage tax strategy used to date in the U.S. has been to create excise taxes (paid by drink distributors or wholesalers), using a flat, volume-based, cents-per-ounce approach. In the summer of 2017, the Massachusetts legislature was considering a tiered approach that would tax sugary drinks according to levels of sugar content per 12 fluid ounces, so that beverages with less than 5 grams of sugar per 12 fluid ounces would not be taxed at all, and those containing 5 grams or more would be taxed either one cent or two cents per 12 fluid ounces, depending on how much sugar they contain.<sup>5</sup>

Worldwide, some nations have adopted excise taxes on sugary drinks (Mexico and France<sup>6</sup>) while others have adopted sales taxes (Navajo Nation<sup>7</sup>). At least two countries that have adopted some kind of tax on sugary drinks have structured their taxes to apply by tiers.<sup>8</sup>

Some of the local tax laws passed by U.S. communities have been challenged in court by industry groups. In two of these lawsuits, the industry plaintiffs claimed (among other things) that the taxes violated the tax uniformity provisions of their respective state constitutions. Healthy eating advocates are familiar with industry challenges to state and local nutrition policy efforts based on preemption and the First Amendment; uniformity is new type of challenge specifically relevant to the tax arena. While recognizing that state or local tax proposals could implicate a variety of legal issues depending on their design (such as Equal Protection, preemption, or dormant Commerce Clause concerns), this issue brief will focus specifically on the uniformity doctrine due to the prominent role this doctrine has played in recent sweetened beverage tax litigation.

This brief explains the doctrine of uniformity, discusses how courts have applied the doctrine in a sampling of states, explores how tiered tax designs intersect with uniformity concerns, and provides recommendations for assessing and navigating potential uniformity-related concerns as part of the larger tax design process.

For additional considerations relating to sugary beverage tax design, Healthy Food America and Change Lab Solutions have created a guide called [Best Practices in Designing Local Taxes on Sugary Drinks](http://www.healthyfoodamerica.org/taxing_sugary_drinks), available at [http://www.healthyfoodamerica.org/taxing\\_sugary\\_drinks](http://www.healthyfoodamerica.org/taxing_sugary_drinks).

### **DEFINITIONS: Key Terms**

**Sugary drinks or beverages:** beverages that are sweetened with sugar, high fructose corn syrup, or any sweetener that adds calories (often referred to as “caloric sweeteners”). These include: soda, pop, sports drinks, energy drinks, fruit ades or punches, coffee or tea drinks with added sugars, and water drinks with added sugars.

**Sweetened drinks or beverages:** beverages that are sweetened with caloric or non-caloric sweeteners.

**Real property tax:** a tax on fixed property such as land or buildings.

**Property tax:** a tax on the ownership or possession of personal property, such as clothes, cars, jewelry, food, etc. Confusingly, “property tax” is often used generically to refer to taxes on both real property and personal property.

**Sales (or use) tax:** a tax on retail sales or purchases; usually a percentage of the sales price. In the uniformity context, a sales tax might also be a property tax.

**Excise tax:** a tax on the use of property, or an activity such as the transfer of property; or on a profession — sometimes licensing fees or occupational taxes may also be referred to as excise taxes, depending on the state.

**Volume tax:** in the sugary drink/sweetened beverage context, a tax based on the number of ounces sold or in a container.

**Tier tax:** a tax that sets different levels of taxation based on some condition or factor that changes within a product, such as alcohol content in alcoholic beverages, or ethanol content of gasoline. In the sugary drink context, it would be a tax that increases in amount based on the amount of caloric sweetener contained in a defined unit.

## Uniformity of Taxation: Background

### Definition, History, and National Landscape

Uniformity of taxation refers to the idea that similar things (whether products, services, activities or other categories of things) must be taxed similarly, and that the mode of assessment and the rate of taxation must be the same or uniform across taxpayers.

#### The Taxing and Spending Clause

The Taxing and Spending Clause of the U.S. Constitution contains a uniformity clause requiring the uniform collection of taxes.<sup>9</sup> This clause is a check on Congress's taxing and spending powers, however, and so does not apply to local and state-level sugary drink taxes.

State uniformity requirements are rooted in ideas of equality and universality, and reflect a desire to provide a check on legislative taxing powers.<sup>10</sup> In the late 18th century and early 19th century, as the American economy shifted away from agricultural production to a focus on commerce and industry, business entities were increasingly being granted preferential tax treatment with respect to real property and other kinds of taxes, in part to encourage economic development.<sup>11</sup> The inequalities that resulted from this disparate treatment led to more and more states adopting uniformity clauses as part of their constitutions.<sup>12</sup>

Historically, much of the case law that examines uniformity requirements focused on taxes on land (real property). Over the last century, however, courts have taken on an increasing number of cases dealing with uniformity requirements in other types of taxes, including excise taxes.

As discussed in more detail below, the tax uniformity doctrine can appear in two different forms. In most states, it is expressly written into the state constitution. In other states, it can be implied from constitutional language that refers to proportional or fair distribution of expenses or contributions. However, even in states where there is no express or implied constitutional tax uniformity requirement, courts are still likely to require that tax laws meet minimum standards of reasonableness and rationality.

Out of the fifty states, at least 44 state constitutions include clauses that expressly require some kind of "uniformity" in taxation.<sup>13</sup> (The phrasing, scope and interpretation of these clauses varies widely from state to state, as discussed below). The constitutions of New Hampshire, Rhode Island and Vermont refer to proportional or fair distribution of expenses or contributions



but not “uniformity;” the constitutions of Connecticut, Iowa, and New York are silent as to tax uniformity (but as noted below, Iowa courts still have applied uniformity-like tests to tax laws).<sup>14</sup>

State constitutions are the primary source of uniformity requirements across the states and so are the focus of this guide. But these constitutional provisions sometimes may be implemented or expanded on through state statutory provisions that also refer to uniformity in taxation.<sup>15</sup> For example, Nebraska statutes apply uniformity requirements to property, license, and occupation taxes enacted by municipalities.<sup>16</sup>

## Identifying Tax Uniformity Clauses

Where they exist, express tax uniformity clauses are found in state constitutions. They are usually found within the article that describes the state’s taxing authority, which often have titles such as “Finance,” “Revenue,” or “Taxation.” In some cases, they can be found in the “Bill of Rights” section. As illustrated by the examples in Table A, tax uniformity language also can be found in more than one place in some state constitutions.

## Table A: Examples of Express Uniformity Provisions

State provision	Excerpt
Colorado Const. of 1876 art. X, Sec. 3, Par. 1 (a) (current through the 2017 legislative session)	Each property tax levy shall be uniform upon all real and personal property not exempt from taxation under this article ...
Georgia Const. of 1983, Art. VII, § 1, Par. III (a) (as amended through Jan. 1, 2015)	Except as otherwise provided ..., all taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.
Illinois Const. of 1970, art. IX, § 2 (current through Nov. 22, 2017)	In any law classifying the subject or object of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.
Illinois Const. of 1970, art. IX, § 4(a) (current through Nov. 22, 2017)	Except as otherwise provided ..., taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.
Michigan Const. of 1964, art. IX, Sec. 3 (current through Aug. 2017)	The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law ... The legislature may provide for alternative means of taxation of designated real and tangible personal property ... Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates.
Minnesota Const. of 1857 art. X, § 1 (generally revised in 1974, current through 2017 legislative session)	... Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes, ...
New Jersey Const. of 1947, Art. VIII, § 1, Par. 1(a) (as amended through Nov. 2016)	Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State ... shall be assessed according to the same standard of value, except as otherwise permitted ...
Oregon Const. of 1859 art. I, Sec. 32 (as amended in June 1917)	... all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax.
Oregon Const. of 1859 art. IX, Sec. 1 (as amended in June 1917)	The Legislative Assembly shall, and the people through the initiative may, provide by law uniform rules of assessment and taxation. All taxes shall be levied and collected under general laws operating uniformly throughout the State.

## Application of Express Uniformity Clauses

In considering tax design questions, an understanding of whether state tax uniformity requirements are likely to apply — and if so, in what way — is important. All the sweetened beverage taxes adopted so far by local governments in the U.S have been excise taxes, not property or sales taxes. The type of tax is a fundamental consideration. In many states, local government authority to impose sales taxes is severely limited by state law. Furthermore, from a uniformity perspective, whether a tax is classified as a property tax or excise tax may be critically important depending on the jurisdiction.

In some states, uniformity requirements apply only to taxes on real property (land). For example, the Ohio constitution states that “Land and improvements thereon shall be taxed by uniform rule according to value...”<sup>17</sup> The state constitution does not refer to uniformity that would apply to taxes on any other goods, services, or transactions.

In other states, uniformity requirements may apply only to taxes on *real property* and *personal property*, as illustrated by the Colorado example in Table A. More specifically, in several states that have uniformity requirements for land or property taxes, courts have found that these requirements do not apply to excise taxes.<sup>18</sup> For example, the California Constitution requires uniformity and equality of taxation for real property and personal property taxes.<sup>19</sup> The California Supreme Court has repeatedly declined to extend these uniformity and equality requirements to excise taxes.<sup>20</sup> Similarly, the Washington Constitution contains a uniformity clause that requires all taxes on the same class of property to be uniform.<sup>21</sup> The Washington Supreme Court has held that the uniformity requirement does not apply to excise taxes.<sup>22</sup> The New Jersey Supreme Court has held that the state constitution’s uniformity clause impacts how the state legislature may assess property taxes but does not affect excise taxes or license fees.<sup>23</sup> In addition, the court has recognized that the state legislature has broader discretion when dealing with taxing of personal property compared to real property, and “is free to tax personal property in any way so long as the classifications are reasonable and the property is assessed under general laws and by uniform rules.”<sup>24</sup>

It is also important to note, where uniformity requirements apply to both property and non-property taxes such as excise taxes, the requirements may be different depending on which of the two categories it falls under. For example, a state’s uniformity doctrine may require that taxes on property be based on assessed value (referred to as “ad valorem” basis), while the doctrine may allow non-property taxes to be assessed based on volume, weight, or other unit of measure.

## Property Tax or Excise Tax?

Guidance on the legal difference(s) between excise taxes and property taxes can be found in state case law. Although there are many similarities across jurisdictions, the analysis is context and fact specific; additional legal research is a must.

The following information provides some examples. California case law advises that property taxes are triggered simply by ownership of the property.<sup>25</sup> “An excise tax, by contrast, is a tax whose imposition is triggered not by ownership but instead by some particular use of the property or privilege associated with ownership, such as transfer of the parcel to a new owner.”<sup>26</sup> Similarly, New Jersey case law instructs that a tax is considered a property tax if the mere ownership or possession of property subjects a person to the tax. A tax on certain use(s) or transfer(s) of the property, or on the privilege of engaging in a type of business, is considered to be an excise or occupational tax.<sup>27</sup> Illinois case law provides this explanation:

A property tax is levied merely for the purpose of raising revenue and is levied against property. It does not seek or in any wise attempt to control the use, operation, or regulation of the property ... On the other hand, an occupation tax has one of two missions: Either to regulate and control a given business or occupation, or to impose a tax for the privilege of exercising, undertaking, or operating a given occupation, trade, or profession.<sup>28</sup>

Washington case law provides this guidance on what constitutes an excise tax in that state:

The obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking ... If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, irrespective of the nature or value of the taxpayer’s assets, it is regarded as an excise.<sup>29</sup>

Although the difference between a property tax and an excise tax seems like a distinction that only a lawyer (or tax professional) could love, it has important ramifications for those working on sugary drink tax proposals. In the industry lawsuit challenging the Philadelphia sweetened beverage tax, the outcome of the case turned in part on the question of whether the tax was a property tax (which in that state, includes sales taxes) or an excise tax. If the tax was a “property tax,” Pennsylvania uniformity requirements would require it to be levied based on value; if it was another kind of tax, such as an excise tax (or a “specific tax” in Pennsylvania uniformity lingo), then it could be levied according to volume.

## The Industry's Uniformity Challenge to Philadelphia's Sweetened Beverage Tax

In June 2016, Philadelphia passed an excise tax of 1.5 cents per ounce on sugar-sweetened beverages and diet drinks to be levied on distributors.<sup>30</sup> The tax was set to go into effect on January 1, 2017. In September 2016, a beverage industry coalition sued the city seeking to postpone the implementation of the tax and have it declared an invalid law.

Among their various claims, the industry coalition claimed that the Philadelphia beverage tax violated the uniformity clause of the Pennsylvania Constitution, which states 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 collected under general laws.”<sup>31</sup> The industry coalition alleged that the tax was a property tax that would result in expensive beverages being treated more favorably than cheaper beverages because it was based on volume, not value. In Pennsylvania, a property tax violates the state uniformity clause if “it is imposed on a quantity and not *ad valorem* [value] basis.”<sup>32</sup> In contrast, non-property taxes (also called “specific” taxes in Pennsylvania) may be set by fixed amount per number, weight, or other standard of measurement.<sup>33</sup>

In December 2016, the lower court dismissed the lawsuit, holding (among other things) that the tax applied to the *distribution* of sweetened beverages and thus was not a property tax that had to be assessed based on value.<sup>34</sup> In June 2017, the Commonwealth Court of Pennsylvania affirmed the lower court’s decision.<sup>35</sup> The appellate court held that the tax is an excise tax — not a property tax — and thus could be volume based instead of assessed by value.<sup>36</sup> The court explained that the Philadelphia beverage tax:

is not imposed on the ownership of the sugar-sweetened beverages or on their sale; rather, it is only imposed if the beverages are supplied, acquired, delivered, or transported for purposes of holding them out for retail sale in the City. As a result, the [beverage tax] is properly assessed at a specific rate per fluid ounce of sugar-sweetened beverage or its equivalent and not on an *ad valorem* basis.<sup>37</sup>

The industry coalition submitted an appeal to the Pennsylvania Supreme Court; its request for appeal was pending at the time this guide was written.



## Uniformity Typically Requires Taxes to Meet Some Kind of Rational Basis Test

In states that apply the uniformity doctrine to excise and other non-property taxes, the test that the tax law must pass to be considered “uniform” will depend on the state. Again, case-by-case legal analysis is a must. But, broadly speaking, it is likely that some variation of the rational basis test used for analyses under the U.S. Constitution’s 14th Amendment Equal Protection Clause will apply.

In the tax context, this rational basis test typically requires a reasonable or fair basis for grouping taxpayers into different classes, and that the tax classifications have a reasonable connection to a legitimate government interest. A rational basis standard is a low threshold to meet, and one that is deferential to legislators.

A Texas case provides an example of the rational basis approach in the tax context. In 2013, the Texas legislature passed a tax to recover healthcare costs to the state caused by the tobacco manufacturers that did not join the 1998 Texas Comprehensive Settlement Agreement and Release (Comprehensive Settlement).<sup>38</sup> In *Hegar v. Texas Small Tobacco Coalition* (2016), a coalition of manufacturers, retailers, and distributors alleged that this tax violated the “equal and uniform” clause of the state constitution. The Texas Supreme Court held that the tax did not violate the tax uniformity clause, and stated that the legislature need only have a rational basis in constructing tax classifications. It held that “the legislature must attempt to group similar things and differentiate dissimilar things in formulating rational classifications, and must show that the classifications reasonably relate to the purpose of the tax.”<sup>39</sup>

Similarly, Minnesota case law reflects that its constitution’s uniformity clause is “no more restrictive on the Legislature’s power to tax or classify than the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution,” and thus the same test is used under both analyses.<sup>40</sup>

In some states, however, something more than the typical rational basis test may apply. These states can be thought of as “rational basis plus” states. The challenge to Illinois’ sweetened beverage tax provides a highly relevant example.

### **Illinois Retail Merchants Ass’n et al. v. Cook County Dep’t of Revenue**

In November 2016, Cook County, Illinois passed a tax of one cent per ounce on sweetened beverages that are pre-made, ready-to-drink and sold in sealed containers, and on syrup and powdered sweeteners used to make ready-to-drink beverages (such as fountain drinks).<sup>41</sup> The tax was to go into effect on July 1, 2017. In June 2017, a coalition led by the Illinois Retail Merchants Association sued the county seeking to have the law declared invalid, and to postpone its implementation pending the final outcome of the case. Among other claims, the retailer group charged that the tax ordinance violated uniformity requirements in the Illinois Constitution. The industry groups were granted a temporary restraining order to delay the tax’s implementation.<sup>42</sup>

The court noted that Illinois uniformity clause in question “was meant to insure that taxpayers would receive added protection ... based on a standard of reasonableness that is more rigorous than that contained in the federal constitution,” and thus imposes limits on legislative power to classify for non-property tax purposes that are stricter than those in the Equal Protection Clause.<sup>43</sup> Nonetheless, the court noted that “broad latitude” should be given to legislators’ tax classifications, and that the uniformity clause was designed not to require “perfect rationality” but merely “to enforce minimum standards of reasonableness and fairness between groups

of taxpayers.”<sup>44</sup> The court explained that to meet uniformity requirements, a non-property tax classification must pass a two-pronged test: 1) it must be based on a real and substantial difference between the people taxed and those not taxed; and 2) it must be reasonably related to the legislation’s goal or to public policy.

The retailers alleged that the tax improperly created classifications of sweetened beverages not based on any real and substantial differences because pre-sweetened, ready-to-drink beverages are subject to the tax, but made-to-order versions of the same drinks are not.<sup>45</sup> The County defended this classification with two arguments: 1) ready-to-drink beverages are more widely available than made-to-order beverages, and 2) collection of taxes on made-to-order beverages would be much more administratively difficult because it would require collectors to make “on the spot” determinations of taxability at the point of sale. The court found that the County’s justifications supported a real and substantial difference between what is taxed and not taxed, meeting the first prong of the uniformity test.<sup>46</sup>

The retailers then argued that the tax failed to meet the second prong of the uniformity test because “the classifications bore no reasonable relationship to the purpose of the tax, which is to promote public health and reduce obesity rates, because the health consequences of identical beverages in the separate classifications are the same.”<sup>47</sup> The court rejected these arguments. Based on findings related to the health consequences of sugary drink consumption included in the ordinance, and the healthcare function performed by the County, the court found that there was a reasonable relationship between the tax classification and the purpose of the legislation. The court noted that it did not have to decide whether the legislature should have taxed all sweetened beverages that may contribute to obesity, but need only consider whether there is a reasonable relationship between the tax classification and the objective of the tax. The court held that the tax classification did not violate the Illinois uniformity clause at issue.<sup>48</sup> The tax went into effect on August 2, 2017. The Illinois Retail Merchants Association filed an appeal.<sup>49</sup> However on October 11, 2017, the Cook County Board of Commissioners voted to repeal the tax for political reasons, effective December 1, 2017.<sup>50</sup>

## Application of Uniformity and Fairness Principles in States without Express Uniformity Clauses

Even where a state constitution’s uniformity clause is deemed to not apply to excise or other non-property taxes, or where a state’s constitution does not have any tax uniformity language, courts are still likely to require that tax laws meet some standard of reasonableness or fairness,



and/or show some reasonable connection to a legitimate state interest. These standards often seem similar to standards applied to taxes under express uniformity clauses.

For example, the South Carolina Supreme Court has held that although the state's uniformity provision does not apply to excise taxes, an excise tax must have "a reasonable basis of classification, [with] all in the same class ... included and treated alike, be geographically uniform, and ... not unreasonably burden interstate commerce."<sup>51</sup>

Similarly, in some states, courts have interpreted constitutional provisions referring to a fair or proportional distribution of expenses, or to uniform application of all laws, as essentially requiring that tax classification frameworks meet a rational basis test or even a rational basis plus test.

For example, Iowa's constitution does not address tax uniformity specifically, but does require that "[a]ll laws of a general nature" operate uniformly, and that privileges or immunities shall be granted "equally" to all citizens, or classes of citizens.<sup>52</sup> Iowa courts interpret this "equality" provision to be the state's equivalent of the federal Equal Protection clause and have applied it to tax laws. But in at least one case, the Iowa Supreme Court struck down a tax classification under its state constitution "equality" standard, despite the fact that the U.S. Supreme Court upheld it under the federal Equal Protection rational basis standard. The case involved a state tax law that

taxed gross receipts from slot machines on gambling riverboats at a lower rate compared to slot machines at race tracks (20% compared to 36%). The U.S. Supreme Court found that the classification was rational under the federal Equal Protection Clause, relying in part on arguments that riverboats were important for the economic development of river communities and for promotion of riverboat history; but when the Iowa Supreme Court conducted its own analysis under the state's "equality" provision, it found that "there is no legitimate purpose supported by fact that justifies treating one gambling enterprise differently than another based on where the gambling takes place, other than an arbitrary decision to favor excursion boats."<sup>53</sup>

An example of a court relying on constitutional provisions referring to a fair or proportional distribution comes from Rhode Island. Article I, Section 2 of the Rhode Island Constitution states that the "burdens of the state ought to be fairly distributed among its citizens."<sup>54</sup> The state's supreme court has repeatedly rejected the argument that this clause means that "taxation must be uniform and equal."<sup>55</sup> Nonetheless, it has applied a test much like the rational basis test to tax laws. In *Burrillville Racing Ass'n v. Rhode Island*, the Rhode Island Supreme Court considered a challenge brought by the owner of a race track to a state statute that levied an additional admissions tax to racing events in which pari-mutuel betting was permitted (but not to events with no pari-mutuel betting).<sup>56</sup> The court upheld the statute, noting that the legislature should be presumed to have acted constitutionally, and that when the "the classification concerns taxation and neither impinges on a so-called fundamental right nor operates to discriminate against a class previously accorded 'suspect' status, the statute need only be supported by some rational and legitimate state interest."<sup>57</sup>

Similarly, the Vermont Constitution does not contain a uniformity clause but does contain a "proportional contribution" clause.<sup>58</sup> Chapter I, Article 9 of the state constitution provides in relevant part, "[T]hat every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member's proportion towards the expense of that protection ...."<sup>59</sup> The Vermont Supreme Court has held that the proportional contribution clause applies to all types of taxation, including excise taxes.<sup>60</sup> In the tax context, Vermont courts have interpreted the proportional contribution clause to place the same restrictions on governmental action as the federal Fourteenth Amendment.<sup>61</sup> Essentially, this means that two requirements must be met: First, the legislative classification of taxpayers must be reasonably related to the purpose for which it was established.<sup>62</sup> Second, the legislature's classification scheme must be fairly and equitably applied among like classes of taxpayers.<sup>63</sup> The taxpayer challenging the tax bears the burden of demonstrating that the legislative classification is not rational.<sup>64</sup>

The New Hampshire Constitution also does not contain an express uniformity clause. However, it does contain this language: “Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary.”<sup>65</sup> Another portion of the state’s constitution recognizes the state legislature’s power to “impose and levy proportional and reasonable ... taxes.”<sup>66</sup>

In a 2002 case, *Starr v. Governor*, a New Hampshire prison inmate challenged a 5% surcharge (effectively a sales tax) that only applied to prison commissary transactions and not to any other retail transactions in the state, on the grounds that the surcharge was unconstitutionally discriminatory. The court agreed with the inmate, noting that the abovementioned sections of the New Hampshire Constitution “require that taxes be proportional and similarly situated taxpayers be treated similarly.”<sup>67</sup> The court found that the prison commissary goods were not unique, and the “only distinction between these transactions and other retail transactions is the fact that the sale takes place at the State prison. No legitimate reason has been presented to create this distinction and therefore such a classification is impermissible.”<sup>68</sup>

In sum, even where a state does not have an applicable express tax uniformity clause or implied uniformity requirements, courts are still likely to require that tax systems meet minimum standards of reasonableness and rationality.

## Tiered Beverage Taxes and Uniformity and Fairness Requirements

It is also important to understand how courts may treat tiered sugary beverage taxes as compared to volume-based taxes. A tiered approach taxes beverages based on the amount of sugar they contain. Tiered tax structures that consider the amount of sugar per ounce or serving could arguably be considered more consistent with notions of uniformity and fairness than flat volume-based taxes because the higher the sugar content, the higher the tax would be.

Tiered taxes can be structured in a variety of ways. At the time of this writing, the Massachusetts legislature was considering a bill that would create an excise tax on beverages with added sugars based on sugar content tiers. Beverages with less than 5 grams of sugar per 12 fluid ounces would not be taxed. Beverages containing between 5 grams and under 20 grams of sugar per 12 fluid ounces would be assessed a tax of one cent per ounce. Beverages containing at least 20 twenty grams of sugar per 12 fluid ounces would be taxed at a rate of two cents per ounce.<sup>69</sup> The proposed law exempts certain beverages, including: beverages made of 100% fruit or vegetable juice (with no added caloric sweeteners); beverages where the first ingre-

dient is milk or a milk substitute; and beverages sweetened only with non-caloric sweeteners. The tax revenue would be used to establish a Children's Health Promotion Fund. The bill was in committee at the time this guide was written.

Tiered taxes have been used in the U.S. in other contexts. Many states (including Massachusetts<sup>70</sup>) use a tiered system for alcoholic beverage taxes, using tiers based on alcohol content. The constitutionality of these tiered tax systems is well established, "based on the rationale that beverages with a higher alcohol content contribute to various societal ills and higher taxes on those beverages promotes temperance."<sup>71</sup> Similar arguments would support use of tiered taxes in the sugary beverage context. One limitation of a tiered tax approach is that it would not address concerns about consumption of so-called "diet" beverages sweetened with non-caloric sweeteners and associated potential health effects.<sup>72</sup> In addition, tiered taxes which exempt beverages such as 100% fruit juices or flavored milk/milk substitute beverages could be vulnerable to challenge as creating an unreasonable classification between types of sugary beverages.<sup>73</sup> However, because these beverages also provide some nutritional value (in contrast to most other types of sugary beverages which do not), it seems likely that this type of classification could withstand a reasonableness review. Finally, a tiered approach arguably could be considered "fairer" than a flat, volume-based approach from the perspective of the government's objective to improve public health, because the amount of tax paid would be more closely linked to the amount of added sugar contained in the drink.

Tiered taxes have been upheld against uniformity challenges in the following contexts: sales taxes;<sup>74</sup> ethanol content of gasoline;<sup>75</sup> and residential homestead non-agricultural property taxes.<sup>76</sup>

A recent Urban Institute Research Report compared the effects of taxing sugary drinks based on volume versus sugar content. The report found that both types of taxes are likely to result in a lower consumption of sugary drinks beverages.<sup>77</sup> It also concluded that taxes based on sugar content, such as tiered taxes or taxes that scale directly with sugar content, are likely to have the greatest effect on reducing sugar consumption. Taxes based on volume or sales, according to the report, are likely to be more effective at generating revenue.<sup>78</sup>

## Uniformity Considerations

When drafting sugary drink tax legislation, policymakers and advocates should keep the potential applicability of uniformity requirements in mind. The checklist below can serve as a guide, but assistance from a lawyer or legal technical assistance provider familiar with the state's constitution and case law will be important. This checklist only addresses uniformity considerations—other considerations such as scope of home rule authority, preemption, and dormant Commerce Clause issues are also likely to be relevant.

- 1 **If you are in one of the 44 states with an express tax uniformity clause in its constitution, what does it say? Is there more than one clause?** These types of clauses are usually found in articles dealing with taxation. These articles are often, but not always, titled: "Finance," "Revenue," and/or "Taxation."
- 2 **Are there other provisions in your state's constitution, statutes, or case law that refer to uniformity?** These provisions may be found in constitutional provisions or statute sections dealing with taxation, and sometimes use phrases like "proportional," "reasonable," or "fair" when describing state (or local) authority to levy a tax. They also may be found in a "Bill of Rights" section of the state's constitution. To find them in case law requires help from a lawyer or legal technical assistance provider.
- 3 **If your state has tax uniformity requirements, to what type of taxes does it apply?** Do the state's uniformity requirements apply beyond real property taxes? If so, legal research will be needed to understand the distinction between the specific tax being considered and any case law found in your state.
- 4 **If a uniformity requirement applies, what is the legal test that is likely to be used in its application—rational basis? Rational basis plus?** Consult an attorney or legal technical assistance provider to conduct an analysis of the uniformity case law in your state, and determine how it might apply to your tax proposal and if changes in the tax structure could affect the outcome.
- 5 **What kinds of findings, or purpose or intent statements, should be included in the law to show why the tax classifications are reasonable, and how these classifications relate to a legitimate government interest?** The Illinois appellate court that upheld Cook County's sweetened beverage tax law approvingly cited to findings in the Cook County law that explained the health consequences associated with consumption of sugary beverages, and used these findings to support its holding that the tax classifications reasonably related to a legitimate government interest. This case illustrates the usefulness of including these kinds of findings and statements in a legislative proposal.

Again, this is not an exhaustive list of considerations.<sup>79</sup> Instead, it is meant to provide a framework for understanding how uniformity requirements may relate to sugary drink tax proposals. State-specific analyses are essential.

## Conclusion

Growing evidence supports the use of taxing policies on sugary drinks as a significant component of a comprehensive effort to reduce the prevalence of unhealthy weights. Interest in these kinds of tax systems is growing, both at the local and state levels.

Industry groups have moved to challenge local sugary drink tax initiatives on a variety of grounds, with the uniformity doctrine playing a key role. This guide provides a starting point for understanding uniformity considerations in sugary drink tax design, and highlights points to consider as part of the larger tax design process. Because the doctrine is state specific and its application is fact dependent, additional legal research and legal technical assistance is advised. However, it is important to note that sugary drink taxes have so far withstood court challenges in two states, and the guiding principle underlying the doctrine is reasonableness and fairness. Assuming that sugary drink taxes are designed in common sense ways and follow sound tax design principles, there is ample public health justification and legal support for the reasonableness and fairness of sugary drink taxes.

## Endnotes

- 1 Throughout this brief, the term “sugar” is used to mean caloric sweeteners, including high fructose corn syrup. Similarly, “sugary drinks” refers to beverages containing caloric sweeteners.
- 2 U.S. DEP’T OF HEALTH AND HUMAN SERVS. AND U.S. DEP’T OF AGRICULTURE, 2015–2020 DIETARY GUIDELINES FOR AMERICANS 55 (8th Ed. December 2015), *available at* [https://health.gov/dietaryguidelines/2015/resources/2015-2020\\_Dietary\\_Guidelines.pdf](https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf)
- 3 Miriam B. Vos et al, *Added Sugars and Cardiovascular Disease Risk in Children, A Scientific Statement From the American Heart Association*, 135 CIRCULATION e1017 (2017), *available at* <http://circ.ahajournals.org/content/135/19/e1017>.
- 4 The Rudd Center for Food Policy and Obesity at the University of Connecticut tracks state level legislation related to obesity, including sugar-sweetened beverage tax proposals, and has created a searchable database *available at* <http://www.uconnruddcenter.org/legislation-database>.
- 5 S.B. 1562, 190th Gen. Court, Reg. Sess. (Mass. 2017).

- 6 In 2011, France approved a measure to tax all non-alcoholic beverages with added sugar at a rate of €7.16 per hectoliter (roughly \$0.04 per liter). XAVIER AUDRAN, UNITED STATES DEPARTMENT OF AGRICULTURE, FRANCE TO TAX SOFT DRINKS — U.S. COMPANIES TO PAY THE MOST (2011), [https://gain.fas.usda.gov/Recent%20GAIN%20Publications/France%20to%20tax%20soft%20drinks.%20U.S.%20Companies%20to%20pay%20the%20most.\\_Paris\\_France\\_10-26-2011.pdf](https://gain.fas.usda.gov/Recent%20GAIN%20Publications/France%20to%20tax%20soft%20drinks.%20U.S.%20Companies%20to%20pay%20the%20most._Paris_France_10-26-2011.pdf). Similarly, in 2014 Mexico began levying a one peso (roughly \$0.05) per liter excise tax on sugar-sweetened beverages. M. Arantxa Cochero et al., *In Mexico, Evidence of Sustained Consumer Response Two Years After Implementing a Sugar-Sweetened Beverage Tax*, 36 HEALTH AFF. 1 (2017).
- 7 Healthy Dine Nation Act of 2014 (CN-54-14).
- 8 These countries include Hungary and Britain. See NORTON FRANCIS, DONALD MARRON & KIM REUBEN, RESEARCH REPORT: THE PROS AND CONS OF TAXING SWEETENED BEVERAGES BASED ON SUGAR CONTENT 7 (Urban Institute 2016). In late summer 2017, South Africa also was considering a tax proposal that would tax sugary drinks on a sliding scale, depending on how much sugar they contain. See Linda Ensor, *Budget in a Nutshell: Tax Hikes Hit South Africans' Pockets Hard*, BUS. DAY (Feb. 22, 2017), <https://www.businesslive.co.za/bd/economy/2017-02-22-budget-in-a-nutshell-tax-hikes-hit-south-africans-pockets-hard>.
- 9 U.S. CONST. art. I, § 8, cl. 1. (“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”).
- 10 William L. Matthews, Jr., *The Function of Constitutional Provisions Requiring Uniformity in Taxation*, 38 KENTUCKY LAW J. 1, 31, 35-38, 42, and 44 (1949-50).
- 11 Joe Kreye, *Reading the Constitution: The Uniformity Clause*, WIS. LEGIS. REF. BUREAU (Oct. 2016), 1, [https://docs.legis.wisconsin.gov/misc/lrb/reading\\_the\\_constitution/reading\\_the\\_constitution\\_1\\_2.pdf](https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constitution/reading_the_constitution_1_2.pdf).
- 12 William L. Matthews, Jr., *The Function of Constitutional Provisions Requiring Uniformity in Taxation*, 38 KENTUCKY LAW J. 31, 41 (1949-50).
- 13 See WADE J. NEWHOUSE, JR., CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 11 (Ann Arbor: University of Michigan Law School, 1959) [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1013&context=michigan\\_legal\\_studies](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1013&context=michigan_legal_studies). (Although this publication is somewhat out of date, much of the information in it remains relevant.)
- 14 The word “tax” does not appear in Connecticut’s constitution. New York’s constitution has this language: “The legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation.” NEW YORK CONST. of 1938, art. XVI, section 2 (with Amendments through 2014).
- 15 See, e.g., UTAH CODE ANN. § 10-1-203 (6) (2017) (requiring that “All [municipal] license fees and taxes shall be uniform in respect to the class upon which they are imposed.”). Similar to constitutional tax uniformity requirements, statutory uniformity requirements may apply to specific kinds of taxes. See e.g., ARIZ. REV. STAT. § 48-3116 (2017) (applying to real property taxes levied by irrigation and water conservation districts); D.C. CODE ANN. § 34-2401.07 (2017) (requiring that “[w]ater main taxes and water rents shall be uniform in said District.”); S.C. CODE ANN. § 12-37-30 (2017) (requiring that property taxes “for township, school, municipal and all other purposes provided for or allowed by law” to be levied using a uniform assessment, specifically the same assessment used for county taxes).
- 16 Nebraska statutes authorizing local governments to adopt property and occupation taxes include requirements that occupational taxes “make reasonable classifications of businesses, users of space, or kinds of transactions for purposes of imposing such tax” and that the taxes be uniform. See NEB. REV. STAT. § 14-109 (applying to cities of the metropolitan class); §§ 15-202, 15-203 (applying to primary class cities); § 16-205 (applying to cities of the first class); and § 17-525 (applying to cities of the second class and villages).
- 17 OHIO CONST. of 1851 art. XII, § 2 (with Amendments to 2015).

- 18 In addition to the examples discussed in the text, other examples include: Arizona (*Morris v. State*, 40 Ariz. 32 (1932)); Colorado (*Altitude Oil Co. v. People*, 70 Colo. 452 (1921)); South Carolina (*Gregg Dyeing Co. v. Query*, 166 S.C. 117, 164 S.E. 588 (1931)); and West Virginia (*Mullens v. City of Huntington*, 117 W. Va. 740, 188 S.E. 120, 121 (1936)). This is not an exhaustive list; legal research on the specific jurisdiction is advised.
- 19 CAL. CONST. of 1879 art. XIII, § 1 (with Amendments to 1980).
- 20 See, e.g., *In re Simpson's Estate*, 275 P.2d 467, 469 (Cal. 1954); *Douglas Aircraft Co. v. Johnson*, 90 P.2d 572, 574 (Cal. 1939).
- 21 WASH. CONST. of 1889 art. VII, § 1 (with Amendments to 2016).
- 22 *Black v. State*, 406 P.2d 761, 763 (Wash. 1965).
- 23 *Foosaner v. Dir., Div. of Taxation*, 275 A.2d 129, 131 (N.J. 1971).
- 24 *Gen. Motors Corp. v. City of Linden*, 696 A.2d 683, 685 (N.J. 1997) (quoting *Switz v. Kingsley*, 182 A.2d 841, 851 (N.J. 1962)).
- 25 *Thomas v. City of E. Palo Alto*, 62 Cal. Rptr. 2d 185, 187 (Cal. Ct. App. 1997).
- 26 *Thomas v. City of E. Palo Alto*, 62 Cal. Rptr. 2d 185, 187 (Cal. Ct. App. 1997).
- 27 *Knowlton v. Moore*, 178 U.S. 41, 47 (1900).
- 28 *Reif v. Barrett*, 188 N.E. 889, 892 (Ill. 1933).
- 29 *Black*, 406 P.2d at 762 (citing 1 THOMAS MCINTYRE COOLEY, THE LAW OF TAXATION § 46 (4th ed. 1924)).
- 30 PHILADELPHIA, PENN., CODE tit 19, ch. 19-4100 (2017); Tricia L. Nadolny, *Soda Tax Passes; Philadelphia Is First Big City in Nation to Enact One*, THE ENQUIRER DAILY NEWS (Jun. 16, 2016), [http://www.philly.com/philly/news/politics/20160617\\_Philadelphia\\_City\\_Council\\_to\\_vote\\_on\\_soda\\_tax.html](http://www.philly.com/philly/news/politics/20160617_Philadelphia_City_Council_to_vote_on_soda_tax.html).
- 31 PA. CONST. of 1968 art. VIII, § 1 (current through the 2017 legislative session).
- 32 *Williams v. City of Philadelphia*, No. 2077 C.D. 2016 at 31 (Pa. Commw. Ct. June 14, 2017) (quoting *In re Lawrence Township District 1947 Taxes*, 67 A.2d 372, 383 (Pa. 1949)) (citing *Commonwealth ex. rel. Dep't of Justice v. Overholt & Co.*, 200 A. 849, 852 (Pa. 1938)).
- 33 *Williams v. City of Philadelphia*, No. 2077 C.D. 2016 at 31 (Pa. Commw. Ct. June 14, 2017) (quoting *Commonwealth ex. rel. Dep't of Justice v. Overholt & Co.*, 200 A. 849, 852 (Pa. 1938)).
- 34 *Williams*, 2016 WL 7422362 at 5 (alteration in original).
- 35 *Williams*, No. 2077 C.D. 2016 at 1.
- 36 *Williams v. City of Philadelphia*, No. 2077 C.D. 2016 at 31 (Pa. Commw. Ct. June 14, 2017).
- 37 *Williams v. City of Philadelphia*, No. 2077 C.D. 2016 at 32 (Pa. Commw. Ct. June 14, 2017).
- 38 *Hegar v. Texas Small Tobacco Coalition*, 496 S.W.3d 778, 783 (2016).
- 39 *Hegar v. Texas Small Tobacco Coalition*, 496 S.W.3d 778, 785 (2016) (citing *In re Nestle USA, Inc.*, 387 S.W.3d 610, 623 (2012)) (citing *Vinson v. Burgess*, 773 S.W.2d 263, 266 (1989)).
- 40 *Lund v. County of Hennepin*, 2001 WL 356030 at \*3 (Minn. Tax 2001) (citing *In re McCannel*, 301 N.W.2d 910, 916 (Minn.1980); *Kuiters v. County of Freeborn*, 430 N.W.2d 461, 462 (Minn.1988); and *Brainerd Area Civic Ctr. v. Commissioner of Revenue*, 499 N.W.2d 468, 472 (Minn.1993)).
- 41 COOK COUNTY, ILL., CODE § 74-852 (2017); Joseph Erbenraut, *Soda Is About To Get Pricier For Another 5 Million Americans*, HUFFINGTON POST (Nov. 11, 2016), [http://www.huffingtonpost.com/entry/cook-county-soda-tax\\_us\\_58250427e4b0c4b63b0c0fe4](http://www.huffingtonpost.com/entry/cook-county-soda-tax_us_58250427e4b0c4b63b0c0fe4).

- 42 *Ill. Retail Merchants Ass'n v. Cook County Department of Revenue*, No. 17 L 5096 at 3, (Cir. Ct. Cook Cty. Jul. 28, 2017).
- 43 *Ill. Retail Merchants Ass'n v. Cook County Department of Revenue*, No. 17 L 5096 at 6, (Cir. Ct. Cook Cty. Jul. 28, 2017) (citations omitted).
- 44 *Ill. Retail Merchants Ass'n*, No. 17 L 5096 at 6.
- 45 *Ill. Retail Merchants Ass'n*, No. 17 L 5096 at 5.
- 46 *Ill. Retail Merchants Ass'n*, No. 17 L 5096 at 6-9.
- 47 *Ill. Retail Merchants Ass'n*, No. 17 L 5096 at 5.
- 48 *Ill. Retail Merchants Ass'n*, No. 17 L 5096 at 9-10.
- 49 Becky Yerak, *Cook County Soda Pop Tax Goes Into Effect, Despite Retailers' Appeal*, CHICAGO TRIBUNE, August 2, 2017, <http://www.chicagotribune.com/business/ct-cook-county-soda-pop-tax-appeal-0802-biz-20170801-story.html>.
- 50 Rachel Hinton, *Cook County Board Repeals Soda Tax*, CHICAGO SUN-TIMES, <https://chicago.suntimes.com/news/county-board-poised-to-repeal-soda-tax> (Oct. 11, 2017).
- 51 *Gregg Dyeing Co. v. Query*, 166 S.C. 117, 164 S.E. 588 (1931).
- 52 IOWA CONST. of 1857 art I, § 6 (with amendments to 2010).
- 53 *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 15 (Iowa 2004).
- 54 R.I. CONST. of 1986 art. 1, § 2 (with Amendments to 2014).
- 55 *Burrillville Racing Ass'n v. Rhode Island*, 372 A.2d 979, 983 (R.I. 1977); see *State v. McCrillis*, 66 A. 301, 303 (R.I. 1907).
- 56 Pari-mutuel betting is "a form of betting in which those who have bet on winning numbers share in the total stakes." *Pari-mutuel* definition, THE OXFORD DICTIONARY OF AMERICAN USAGE AND STYLE (2002), <http://www.oxfordreference.com/view/10.1093/acref/9780195135084.001.0001/acref-9780195135084-e-1651>; *Burrillville Racing Ass'n*, 372 A.2d at 981 (citing *Mancuso v. Taft*, 476 F.2d 187, 193 (1st Cir. 1973)).
- 57 *Burrillville Racing Ass'n v. Rhode Island*, 372 A.2d 979, 982 (R.I. 1977).
- 58 VT. CONST. of 1793 ch.1, art. 9 (current through the 2017 legislative session).
- 59 VT. CONST. ch.1, art. 9; *USGen New England, Inc. v. Town of Rockingham*, 2003 VT 102, ¶ 15, 176 Vt. 104, 110, 838 A.2d 927, 934 (2004).
- 60 *In re Hickok's Estate*, 62 A. 724, 726 (Vt. 1906).
- 61 *Alexander v. Town of Barton*, 565 A.2d 1294, 1299 (Vt. 1989).
- 62 *In re One Church St.*, 565 A.2d 1349, 1352 (Vt. 1989).
- 63 *In re One Church St.*, 565 A.2d 1349, 1352 (Vt. 1989).
- 64 *USGen New England, Inc.*, 2003 VT 102, at ¶ 15.
- 65 N.H. CONST. of 1784 Pt. 1, art. XII (current through the 2017 legislative session).
- 66 N.H. CONST. of 1784 Pt. 2, art. V (current through the 2017 legislative session).
- 67 *Starr v. Governor*, 148 N.H. 72, 74, 802 A.2d 1227, 1229 (2002).
- 68 *Starr v. Governor*, 148 N.H. 72, 74, 802 A.2d 1227, 1230 (2002).

- 69 S.B. 1562, 190th Gen. Court, Reg. Sess. (Mass. 2017).
- 70 Massachusetts uses a two-tier excise tax on alcoholic beverages. Mass. Department of Revenue, *AP 115: Alcoholic Beverage Excise Tax: G.L. c. 138, s. 21, as amended* (May 24, 2017, 2:07 P.M.), <http://www.mass.gov/dor/businesses/help-and-resources/legal-library/administrative-procedures/ap-115-alcoholic-beverage-excise-tax-gl-c.html>. The tax rate for alcoholic beverages is based on absolute percentage of alcohol per wine gallon. Alcoholic beverages containing up to or equal to 15% of absolute alcohol is taxed \$1.10 cents per wine gallon, and alcoholic beverages containing absolute alcohol between 15% and 50% is taxed \$4.05 per wine gallon. Department of Revenue, *Massachusetts Tax Rates* (May 8, 2017, 1:08 P.M.), <http://www.mass.gov/dor/all-taxes/tax-rate-table.html>.
- 71 *Wirtz v. Quinn*, 953 N.E.2d 899, 352 Ill. Dec. 218 (2011).
- 72 See PUB. HEALTH LAW CTR, *HEALTHIER BEVERAGE POLICIES AND DRINKS WITH ARTIFICIAL SWEETENERS* (2014), available at <http://www.publichealthlawcenter.org/resources/healthy-healthcare>.
- 73 See, e.g., *Federated Distributors, Inc. v. Johnson*, 125 Ill.2d 1 (1988) (invalidating tax law that imposed higher tax “spirits” tier on a low alcohol product due to the way the product was made on uniformity grounds, and directing that the product should be taxed at the lower rate with wine coolers because it had similar alcohol content).
- 74 *Mouledoux v. Maestri*, 197 La. 526 (La. 1941) (upholding use of a “bracket” approach for sales tax, creating three sales tax brackets depending on purchase amount levels).
- 75 *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984) (upholding state law that granted a 5 cent tax break to gasohol made with ethanol coming from small producers).
- 76 *Lund v. County of Hennepin*, 2001 WL 356030 (Minn. Tax 2001) (holding that two-tiered system for taxing of residential homestead non-agricultural property did not violate Minnesota constitution’s equal protection clause nor its taxation uniformity clause).
- 77 NORTON FRANCIS, DONALD MARRON & KIM REUBEN, *RESEARCH REPORT: THE PROS AND CONS OF TAXING SWEETENED BEVERAGES BASED ON SUGAR CONTENT* (Urban Institute 2016).
- 78 NORTON FRANCIS, DONALD MARRON & KIM REUBEN, *RESEARCH REPORT: THE PROS AND CONS OF TAXING SWEETENED BEVERAGES BASED ON SUGAR CONTENT* at 5 (Urban Institute 2016).
- 79 The Streamlined Sales and Use Tax Agreement (SSUTA) is a multistate agreement designed to facilitate collection of retail sales and use taxes across state borders. Twenty-four states have joined the SSUTA and have agreed to implement specific measures in their state sales and use tax laws and collection practices. For a map showing the states that have joined the SSUTA, see <http://www.streamlinedsalestax.org/index.php?page=About-Us>. Although sugary drink tax proposals in U.S. jurisdictions so far have been for excise taxes, the SSUTA may have some relevance. For example, the SSUTA includes definitions for “food and food ingredients,” including “soft drinks” and “bottled water.” SSUTA, Appendix C. Part II (p. 107-110). Although the SSUTA is not related to the doctrine of tax uniformity, people working on sugary drink tax proposals in SSUTA member states may wish to seek out more information about how the agreement is implemented in their state and whether it would have any relevance to their efforts.