Income Taxation in Washington: In a Class by Itself

J. Thomas Carrato & Richard W. Hemstad***

Over the past half-century the desirability of a state net income tax has dominated public tax policy debate in the State of Washington. Severely constrained by our supreme court's restrictive interpretations of amendment 14 to the state constitution, the legislature has been unable to fashion a coherent tax policy for the state. As a result, we today have an extraordinarily regressive tax system[1] that does not effectively meet basic needs[2] and simultaneously reinforces public skepticism concerning the effectiveness and responsiveness of our institutions of government.

While there can be extended debate regarding the desirability of a net income tax and its form,[3] there is general agreement that such a tax would result in a state tax structure substantially less regressive, would provide greater elasticity in revenue

---

* B.S., 1970, Stanford University; J.D., 1978, University of Puget Sound.

** Professor of Law, University of Puget Sound; B.A., 1955, St. Olaf College; J.D., 1958, University at Chicago; member, Washington Bar.

1. The pronounced regressivity of Washington's tax system may be illustrated by comparing the state-local tax burden as a percentage of the adjusted gross income of a Washington family of four with its counterparts in the neighboring states of Oregon and Idaho:*

	Adjusted Gross Income					
	$5,000	$7,500	$10,000	$17,500	$25,000	$50,000
Wash.	10.4	8.3	6.8	5.8	4.7	3.5
Ore.	6.6	8.3	8.4	9.0	9.4	10.6
Idaho	9.7	8.3	7.8	8.3	8.6	9.0

*1974 figures

Washington's tax system appears to be more regressive than that of any other state. *See* ADVISORY COMM'N INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM, Vol. II REVENUE AND DEBT 45 (1977). One study flatly states: "Oregon's tax system is the most progressive whereas Washington's is the most regressive." E. LILE, FAMILY TAX BURDENS COMPARED AMONG STATES AND AMONG CITIES LOCATED WITHIN KENTUCKY AND NEIGHBORING STATES 23 (1975).

2. The Washington Supreme Court is currently considering the appeal of a superior court decision holding the state in violation of article IX, section 1, of the Washington State Constitution which provides: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders . . . ." Seattle School Dist. v. State, No. 53950 (Thurston County Super. Ct., Jan. 14, 1977).

3. *See, e.g.*, W. BLUM & H. KALVEN, THE UNEASY CASE FOR PROGRESSIVE TAXATION (1953).

growth, and would lessen the distorting effect our heavy reliance on excise taxes has on economic decisions.[4]

Rather surprisingly, the state constitution does not explicitly deny the legislature power to tax net income. The prohibition is the result of a series of Washington Supreme Court decisions severely restricting the legislative authority to define classifications of property for taxation. The purposes of this article are to demonstrate that the Washington Supreme Court interpretations of the relevant constitutional provisions are erroneous, and to present our views of a proper analysis of the legislature's power to classify for purposes of taxation.

I. THE ISSUE

In a series of decisions beginning with the 1933 landmark *Culliton v. Chase,*[5] the Washington Supreme Court thwarted popular and legislative attempts to levy a net income tax. In the process, and to achieve that result, the court[6] molded its interpretation of the "uniformity clause" of amendment 14 to the constitution: "All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax . . . ."[7] Amendment 14, adopted in 1930, dramatically changed the original constitutional article governing taxation. Three years after its adoption, however, the court decided *Culliton* and transformed the uniformity clause into a virtual prohibition against legislative classification of property for tax purposes, thereby, as will be seen, emasculating one of the major purposes of amendment 14.

Although the court's improper interpretation of the uniformity clause is generally applicable to all property taxation, the court established and embellished its uniformity criteria only in cases invalidating net income taxes. And though property is taxed despite the court's restrictive interpretations of the uniformity clause, net income is still not taxed in this state because of those restrictions. While the court was developing its strict

4. TAX ADVISORY COUNCIL OF THE STATE OF WASHINGTON, PROPOSALS FOR CHANGES IN WASHINGTON'S TAX STRUCTURE, SECOND REPORT 21 (1968); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 1-4 (1974).

5. 174 Wash. 363, 25 P.2d 81 (1933).

6. Unless otherwise noted:

a. "court" refers to the Washington Supreme Court;

b. "amendment 14" refers to amendment 14 of the Washington Constitution; and

c. any reference to equal protection refers to the equal protection clause of the fourteenth amendment to the United States Constitution.

7. WASH. CONST. amend. 14.

limitations on legislative discretion to classify for property taxes under the uniformity clause, other taxes, characterized as excise taxes, it analyzed quite differently. Classifications made for excise taxes were subjected to the more permissive standards of the equal protection clause of the United States Constitution and its practical equivalent, the privileges and immunities clause of the state constitution.[8] Thus, the court singled out income taxation for uniquely severe constitutional restrictions.

The reasoning in *Culliton* and its progeny was syllogistic: (1) income is property and a tax on income is a tax on property; (2) taxes on property must be uniform; and (3) a net income tax is not uniform.[9] The first premise in this reasoning has drawn the most criticism[10] and concern.[11] Those disputing the supreme court's decisions or attempting to avoid them have attacked the notion that income is property, arguing instead that an income tax is an excise tax. This approach, however, must overcome the definition of "property" in the Washington Constitution which provides: "The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership."[12] This definition is as comprehensive as could be devised, is *sui generis* among state constitutions, and has consistently been judicially construed to include "income."[13]

In this article we do not attack the first premise of the

---

8. The state privileges and immunities clause provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not belong equally to all citizens or corporations." WASH. CONST. art. 1, § 12. The Washington Supreme Court regards this clause as "substantially identical" to the equal protection clause in the Federal Constitution. Texas Co. v. Cohn, 8 Wash. 2d 360, 374, 112 P.2d 522, 529 (1941).

9. Justice Blake's persuasive *Culliton* dissent characterizes the majority's argument as a syllogism. His dissent is the starting point for our efforts to extract the issue of legislative classification from the morass of uniformity doctrine, and to clarify the classification analysis:

> The syllogism seems perfect, but, as I see it, there are two answers to it: (1) That, notwithstanding the definition of property contained in the amendment, the exaction imposed under the income tax law is an excise and not a property *tax*; (2) that, if it is a property tax, the classifications fixed by the act are within the constitutional limitations of the fourteenth amendment.

174 Wash. at 389, 25 P.2d at 87 (emphasis in original).

10. *See* Harsch, *State Income Taxation as Affected by Property Tax Limitations*, 6 WASH. L. REV. 97 (1931); O'Conner & Schillberg, *A Study of State Income Taxation in Washington*, 33 WASH. L. REV. 398 (1958); Note, *Constitutionality of State Income Taxes*, 8 WASH. L. REV. 81 (1933); Recent Cases, 11 WASH. L. REV. 172 (1936).

11. *See* Harsch & Shipman, *The Constitutional Aspects of Washington's Fiscal Crisis*, 33 WASH. L. REV. 225 (1958).

12. WASH. CONST. amend. 14.

13. *See* discussion at Part IV *infra*.

Culliton rationale. We simply accept the proposition that income is property, and examine the court's holdings to that effect only to discern and explain the relationship of that step to the remaining two premises.

The fundamental error in the court's three-step analysis lies in its confusion of the issues of uniformity of taxation and the legislative power to classify property for taxation. To understand the court's error requires a detailed analysis of amendment 14 to the Washington Constitution. In brief, the logic demonstrating the court's confusion can be stated as follows: The court dichotomized the treatment of property taxes and excise taxes, holding that property taxes are subject to the uniformity clause and excise taxes are not. The court reasoned that the income tax, as a property tax, does not satisfy the requisites of the uniformity clause because of the necessary legislative classifications of income inherent in any net income tax scheme. Therefore, the court interpreted the concept of "uniformity" to restrict the power of the legislature to classify "property" in any significant way for the purposes of taxation.

Uniformity, as we will demonstrate, is a distinct issue which should neither be confused with nor allowed to encroach upon the analysis of the legislature's power to classify for tax purposes. The proper analysis of any tax measure under amendment 14, which requires that "all taxes shall be *uniform* upon the same *class* of property," should entail: (1) ascertaining what legislative classifications are made; (2) scrutinizing the classifications under equal protection criteria; and (3) if any classifications of *property* are made, determining if the tax is uniform within each class of property. That analysis should be applied to any tax measure, whether property (including income) or excise. If a net income tax were properly so analyzed under amendment 14, it would be valid under equal protection *and* uniformity criteria even if characterized as a property tax.[14]

---

14. If an income tax were approved by the state supreme court without an enabling constitutional amendment changing the constitutional definition of property, which would be made possible if the reasoning of this article were adopted, a series of other limitations and ramifications would become relevant. *See* Harsch & Shipman, *supra* note 11, at 247.

The most significant of these is the one-percent limitation on levies imposed by the Washington Constitution: "[t]he aggregate of all tax levies upon real and personal property by the state . . . shall not in any year exceed one percentum of the true and fair value of such property in money." WASH. CONST. amend. 55. If income is property, this provision arguably places a one-percent limit on any net income tax. It should be noted, however, that the limit applies expressly to taxes on *real* and *personal* property. Thus, even if income is property, it is not a foregone conclusion that it falls into either of those two

This article is organized chronologically. Starting with an examination of the original constitutional provisions, we then analyze the adoption and wording of amendment 14. We follow with a description and analysis of the court's interpretation of amendment 14, the uniformity clause in particular, juxtaposing the court's progressive analysis of legislative tax classification in areas other than property taxation. We conclude that the time is at hand for the Washington Supreme Court to adopt a single consistent analysis of legislative tax classification, and to articulate the conceptually distinct requirements necessary to achieve uniform taxation of legislatively selected classes of property.

II. The Historical Context: The Original Article 7 and its Interpretation

Prior to the adoption of amendment 14 to the Washington Constitution, it made no mention of the power to classify for taxation. Article 7, entitled "Revenue and Taxation," originally read, in pertinent part, as follows:

> Section 1 ANNUAL STATE TAX — *All property* in the state, not exempt under the laws of the United States, or under this Constitution, *shall be taxed* in proportion to its value, to be ascertained as provided by law . . . .
> Section 2 TAXATION — UNIFORMITY AND EQUALITY — EXEMPTION — The legislature shall provide by law *a uniform and equal rate of assessment and taxation* on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation, of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property; *Provided,* that a deduction of debts from credit may be authorized; *Provided further,* that property of the United States and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general law provide, shall be exempt from taxation; *And provided further*[15] that the legislature shall have power, by appropriate legislation, to exempt personal property to the amount of [three hundred dollars] $300 for each head of a family liable to assessment and taxation under the provisions of

classes of property for the purposes of this constitutional limitation. All constitutional amendments establishing levy limitations were approved long after the court interpreted amendment 14 to invalidate a tax on net income. Hence, the limitations of article 7, section 2, could well be held inapplicable to income taxation, an option not available at the time such amendments were adopted.

15. This proviso was added in 1900. *See* WASH. CONST. amend. 3.

> the laws of this state of which the individual is the actual and bona fide owner.
> Section 3 ASSESSMENT OF CORPORATE PROPERTY — The legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property.
> Section 4 NO SURRENDER OF POWER OR SUSPENSION OF TAX ON CORPORATE PROPERTY . . . .[16]

The cited sections expressly applied to and imposed limitations on the power to tax property. Taken together they show that the framers considered property the principal source of the state's revenue.[17]

The journal of the state's constitutional convention casts no authoritative light on the desires or intentions of the framers of Article 7. However, the language fairly read mandates that *all* property[18] be treated alike. It was *all* to be taxed with only the limited enumerated exceptions; and it was to be taxed according to its value, with a uniform method of valuation, a uniform and equal rate of assessment, and pursuant to uniform and equal tax rates.[19] The framers granted no power to classify property other than a limited power of exemption, and no distinction based on the nature of the property owner was permissible.

With only the clearly stated intent of the framers to tax all property uniformly and equally as a starting point, the court proceeded to flesh out the details of the various constitutional limitations.[20] Predictably, the court held that, in fact, property could not be classified for special treatment or exemption,[21] that

---

16. WASH. CONST. art. 7 (emphasis added).

17. Culliton v. Chase, 174 Wash. 363, 385-87, 25 P.2d 81, 86 (1933); *see also* Harsch, *The Washington Tax System—How It Grew*, 39 WASH. L. REV. 944, 948 (1965).

18. The framers rejected providing a definitional list of what constitutes property in favor of allowing the courts to flesh out a general definition. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 651 (Rosenow ed. 1962).

19. The court noted in State *ex rel.* Wolfe v. Parmenter, 50 Wash. 164, 96 P. 1047 (1908): "One requirement of the Constitution is as mandatory in its nature as another. It is just as imperative that taxation shall be uniform and equal upon all property as it is that all property shall be taxed." *Id.* at 175, 96 P. at 1049.

20. Prior to the adoption of amendment 14, there was a dearth of property tax cases considering issues of legislative classification, particularly those classification issues addressed subsequently in the net income tax cases. This is understandable in view of the explicit and clear requirement in the original article 7 that all property be subject to uniform and equal rates of assessment and taxation; no legislature would flout such an unequivocal mandate by expressly classifying property for varying tax treatment. Thus, the cases cited in the ensuing textual discussion illustrate the court's posture with respect to the meaning and effect of the original uniformity and equality clause.

21. In State *ex rel.* Chamberlain v. Daniel, 17 Wash. 111, 49 P. 243 (1897), the court

double taxation of the same economic asset in two different classes of property was not appropriate,[22] and that strict adherence to uniform and equal rates of assessment and taxation was essential.[23] Only a few minor deviations from the absolute of uniform taxation of property were permissible. Special assessments against particular land, designed to compensate for special benefits, were allowed,[24] and the legislature possessed a limited power to classify either as personalty or realty for administrative purposes.[25]

---

held invalid a $500 personal property exemption per person and a $500 real estate improvements exemption per person, because such exemptions violated the strict requirement of equality in taxation, and because the legislative power to exempt, WASH. CONST. art. 7, § 2, was limited to property of the same character as that expressly exempted in the constitution, *i.e.*, public or quasi-public property. The *Chamberlain* decision prompted amendment 3 to the constitution, providing a similar personal exemption.

In Pacific Cold Storage Co. v. Pierce County, 85 Wash. 626, 149 P. 34 (1915), the court reiterated that the constitution mandated a uniform and equal tax on all property "in the state." Hence, the legislature could not lawfully exempt a ship engaged in interstate commerce, but domiciled, registered, and owned in Washington. The court held it was "corporeal personal property having an intrinsic value and having a situs at some place within the state." *Id.* at 628, 149 P. at 34.

22. The court refused to require a shareholder to pay personal tax levied against his corporate stock when the corporate assets, representing the stock liability, were taxed as real or personal property to the corporation. This is considered double taxation, and though not unconstitutional per se, legislative intent to impose such taxation would not be inferred. Ridpath v. Spokane County, 23 Wash. 436, 440, 63 P. 261, 263 (1901), *overruled on other grounds,* Spokane and Eastern Trust Co. v. Spokane County, 70 Wash. 48, 51, 126 P. 54, 55 (1912). *See also* Lewiston Water & Power Co. v. Asotin County, 24 Wash. 371, 64 P. 544 (1901) (corporation successfully challenges tax assessed against its outstanding shares). This form of double taxation was labelled a violation of uniformity and equality standards in State *ex rel.* Wolfe v. Parmenter, 50 Wash. 164, 96 P. 1047 (1908). *See* note 31 and accompanying text *infra.*

Interestingly, *Ridpath* is often cited as authority for the inherent legislative power to classify property: "The classification of property for assessment, where uniformity and equality exist in the classes, is a matter of legislative policy. . . . While the legislature may so adjust the revenue system as to occasion double taxation, such taxation will not be inferred unless necessarily imposed in carrying out the law." 23 Wash. at 440, 63 P. at 263. In context, however, this statement does not concern differentiating two classes of property for different tax treatment, but rather the power of the legislature to deal with a given set of objects at all, whether as personalty, realty, or even as property.

23. The court has held that arbitrary valuations violate uniformity and equality requirements, as do differing rates of assessment on timber land versus other land. Weyerhaeuser Timber Co. v. Pierce County, 97 Wash. 534, 540-44, 167 P. 35, 37-39 (1917).

24. State *ex rel.* Stranger v. Bartlett, 112 Wash. 299, 301-06, 192 P. 945, 945-47 (1920). The requirement that the special assessments relate directly to benefits conferred was a strict one. In *Bartlett,* the court declared void an assessment to set up a pest control district because the land in the proposed district was not classified according to the benefits each parcel would receive from pest control.

25. Puget Sound Power & Light Co. v. Seattle, 117 Wash. 351, 355-67, 201 P. 449, 451-54 (1921), *aff'd on rehearing,* 117 Wash. 367, 207 P. 689 (1922), *aff'd on equal protection grounds,* 264 U.S. 22, 26-30 (1924). In upholding the power of the legislature to classify for administrative purposes in *Puget Sound Power,* the court concluded that assessing a

In light of this constitutional framework for the uniform and equal taxation of property[26] it is understandable that the court would interpret more broadly the legislative power to define classes for excise taxes.[27] In reality, the distinction was not one of differing rules depending on the nature of the tax, but rather one of express limitations on the power to classify for property taxation, and no express limitations on the power to classify for excise taxation. From the equal protection limitations implicit in the state privileges and immunities clause the court fashioned a

---

street railroad's "operating property" as personal property was appropriate, even though its operating property actually included personalty and realty (in the form of easements), so long as there was uniform and equal taxation within the classes of personalty and realty. The court noted that the "realty" statutorily included in "operating property" generally was not of a fee interest character, and hence was amenable to different administrative treatment. The court quoted sweeping statements supporting legislative discretion to classify property from Chicago & Northwestern R. Co. v. State, 128 Wis. 553, 108 N.W. 557 (1906).

Puget Sound Power, however, only acknowledged the power to classify a given object as personalty or realty, not the power to subclassify those groups. The court tolerated that limited classification power for administrative convenience. It also presumed a uniform and equal rate of assessment and taxation on all property. Furthermore, as the United States Supreme Court noted at the time of the *Puget Sound Power* holdings, the only distinctions in Washington's taxation of personalty (versus realty) concerned: (1) the date of payment; (2) the penalty for delinquency; (3) the power to sell the assessed property upon delinquency; and (4) the right of redemption in the taxpayer.

The Washington Supreme Court determined the propriety of the legislative treatment of the class of "street railroad operating property" based on state uniformity and equality notions and also federal equal protection considerations. The Supreme Court examined the Washington court's decision on that issue strictly in light of federal equal protection criteria, but compared the two standards:

> [The cited cases] involved the application of somewhat stringent provisions of state constitutions as to equality of taxation on all kinds of property which left but little room for classification. Such restrictions have much embarrassed state legislatures because actual equality of taxation is unattainable. The theoretical operation of a tax is often very different from its practical incidence, due to the weakness of human nature and anxiety to escape tax burdens. This justifies the legislature, where the Constitution does not forbid, in adopting variant provisions as to rate, the assessment and the collection for different kinds of property. The reports of this court are full of cases which demonstrate that the Fourteenth Amendment [United States Constitution] was not intended, and is not be [sic] be construed, as having any such object as these stiff and unyielding requirements of equality in state constitutions.

264 U.S. at 27-28.

26. "Property taxes may be regarded as levies on the entire bundle of rights of ownership, as distinguished from a levy on the exercise of a special power of ownership . . . ." J. HELLERSTEIN, STATE AND LOCAL TAXATION (CASES AND MATERIALS) 25 (3rd ed. 1969).

> 27. 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.

Black v. State, 67 Wash. 2d 97, 99, 406 P.2d 761, 762 (1965) (quoting 1 COOLEY, TAXATION § 46, at 132 (4th ed. 1924)).

set of classification guidelines for excise taxes, a source of revenue not mentioned and one the framers either did not foresee or one they determined did not require specific constitutional guidelines.[28] Concluding that both the inheritance tax[29] and the capitation tax[30] were not taxes on property, and hence outside the purview of the uniformity provisions, the court applied its equal protection guidelines. Thus, the inheritance tax decision acknowledged legislative discretion to classify a legacy by such factors as the identity of the taxpayer and the amount of property in defining exemptions and setting rates.

With such decisions, the court developed its analytical approach to the constitutionality of classifications made by the legislature in any tax measure. Because of the strictures of article 7 of the constitution, expressly applicable *only* to property taxes, and because of the lack of any express constitutional limitations on excise taxation, the court recognized and formalized a dichotomy: the first analytical step in any tax case was to determine whether the tax was a property tax or an excise tax. If a property tax, the measure was further analyzed under the strict rules of article 7 which permitted no classification of property, except as between personalty and realty for administrative purposes. If an excise tax, the measure was further analyzed under a different

28. Pacific Nat'l Bank v. Pierce County, 20 Wash. 675, 56 P. 936 (1899), sustained a tax levied against shareholders on the assessed value of their bank stock. The court held that the tax was an excise on the bank's corporate franchise, and not a tax on the bank's property. The statute measured the value of the stock by the value of the bank's assets, including stock in other corporations. Even though such other corporations were taxed on their property, it was held not improper to impose an excise tax on the bank using the bank's stock holdings in those corporations as a partial measure. Because the property of the bank was not taxed directly, no double taxation of the assets of such other corporations resulted.

Without disturbing the validity of this method of assessing bank stock (a double taxation issue), Spokane & Eastern Trust Co. v. Spokane County, 70 Wash. 48, 51, 126 P. 54, 55 (1912), overruled *Pacific Nat'l Bank*, concluding that such a tax was a property tax. The *Spokane & Eastern Trust* court also overruled what it believed a like holding, Ridpath v. Spokane County, 23 Wash. 436, 63 P. 261 (1901). *Ridpath*, however, had merely cited *Pacific Nat'l Bank* as inapposite.

29. State v. Clark, 30 Wash. 439, 71 P. 20 (1902). The inheritance tax, imposed on property transfers from a decedent to his legatees or heirs, was held to be an excise, with consequent discretion in the legislature to classify the subjects of taxation. The tax upheld in *Clark* was progressive, with the rate based on the degree of kinship and the amount of property passed.

30. Nipges v. Thornton, 119 Wash. 464, 206 P. 17 (1922). A poll or capitation tax of five dollars per person, with exemptions for minors, elderly, and the infirm, was held valid. The court interpreted sections 1 and 2 of the Washington Constitution, article 7, to apply exclusively to "property" taxes, but not to preclude the existence of non-"property" sources of revenue. Thus, the court concluded that the legislature could exempt certain classes from a poll tax, a non-property source of revenue.

and less stringent set of rules for legislative classification developed under the privileges and immunities clause.

The restrictive effects on fiscal planners and policy makers of the strict rules of uniformity in property taxation were highlighted in 1908 in *State ex rel. Wolfe v. Parmenter.*[31] Due to the difficulty of enforcing the taxation of intangibles on the same basis as real property and tangible personal property, the legislature attempted to exempt money and certain intangibles from ad valorem taxation.[32] Rather than permitting the exemption of certain intangibles as a class of property (such a result would be an impermissible violation of uniformity and equality requirements), the court decided that "credits" were not *necessarily* included in "all property." Thus, rather than subclassify property and exempt one subclass, the court redefined the phrase "all property" to exclude certain items. The exemption of money, however, which has intrinsic value and is therefore tangible property, was held an improper attempt to tax one class of property differently from other classes. Thus, due to strict uniformity requirements, money had to be taxed uniformly with all other personal property even though as a practical matter the enforcement and collection of an ad valorem tax on money was impossible.

The need for more flexibility in the taxation of property, exemplified by decisions such as *Parmenter,* finally led to amendment of the constitution in 1930.[33]

III. The Constitutonal Amendment

At the turn of the century, taxation of property satisfied the state's fiscal needs. However, what at first had appeared to be an

---

31. 50 Wash. 164, 96 P. 1047 (1908).

32. In 1907 the legislature attempted to exclude "mortgages, notes, accounts, moneys, certificates of deposit, tax certificates, judgments, state, county, municipal and school district bonds and warrants" from the scope of "all property" to avoid the constitutional mandate that all property be taxed. 1907 Wash. Laws, ch. 48, at 69. The *Parmenter* court held that except for moneys, the above items were "credits" and were representative of underlying property, analogous to shares of corporate stock representing the issuing corporation's assets. 50 Wash. at 174-75, 96 P. at 1049 (citing *Ridpath* and *Lewiston, see* note 22 *supra*).

Thus, the court held it was a matter of legislative discretion to exclude these credits from "all property" and thereby avoid double taxation of essentially the same assets. The court also noted that such double taxation would violate principles of uniformity and equality.

The cogent dissent by Justice Fullerton is noteworthy. It rebuts the "property," double-taxation, and uniformity and equality arguments of the majority, concluding that even the credits should be taxed.

33. The court draws this very conclusion in State *ex rel.* Atwood v. Wooster, 163 Wash. 659, 661-63, 2 P.2d 653, 653-55 (1931).

egalitarian and reasonable requirement that all taxation of that primary source of revenue be carefully circumscribed by strict rules of uniformity and equality proved to be a major obstacle in the path of efforts to modify the tax structure to permit more variety and selectivity in the sources and methods of exacting revenue and to provide relief for the ad valorem taxpayer. The power to classify property for taxation purposes would provide the desired flexibility and open up new sources of revenue. Thus, in 1929, the legislature submitted a constitutional amendment to the state's voters. As finally approved by the people, amendment 14 replaced the Washington Constitution's article 7, sections 1 through 4, with the following:

> Art. 7, Sec. 1 TAXATION. The power of taxation shall never be suspended, surrendered or contracted away. *All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax* and shall be levied and collected for public purposes only. *The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership. All real estate shall constitute one class; Provided,* that the legislature may tax mines and mineral resources and lands devoted to reforestation by either a yield tax or an ad valorem tax at such rate as it may fix, or by both. *Such property as the legislature may by general laws provide shall be exempt from taxation.* Property of the United States and of the state, counties, school districts and other municipal corporations, and credits secured by property actually taxed in this state, not exceeding in value the value of such property, shall be exempt from taxation. The legislature shall have power, by appropriate legislation, to exempt personal property to the amount of three hundred ($300.00) dollars for each head of a family liable to assessment and taxation under the provisions of the laws of this state of which the individual is the actual bona fide owner.[34]

The wording and subsequent interpretation of this provision present for analysis the critical questions: "What effect should this amendment have had on legislative discretion to classify property for tax purposes?" and "What effect did it have?"

The available sources of information on legislative intent and popular understanding of the amendment are quite meager. Unfortunately, there are no express statements of intent, only inferences. The first sources are the legislative journals[35] which pro-

34. WASH. CONST. amend. 14 (emphasis added).

35. WASH. H. & S. J. (1929). *See generally* WASH. H.R. 429, 21st Sess. (1929).

vide primarily routine administrative information. However, from the Senate Journal of 1929, we can compare the original version of House Bill No. 429,[36] the Senate's recommended changes,[37] and the bill as adopted.[38] The original House bill provided:

> Section 1. All taxes shall be uniform on the same class of property and shall be levied and collected for public purposes only. The legislature shall have the power to exempt from taxation such property as it deems advisable. For the purpose of taxation property shall consist of and be classified as follows:
>
> Class 1. All real estate.
>
> Class 2. All tangible personal property.
>
> Class 3. All intangible personal property . . . .

There are two critical factors in comparing the language quoted with the then existing constitutional provision. First, the original House bill would give the legislature broad discretion to exempt property from taxation,[39] thereby permitting the selection of classes of property which would not be taxed. Second, even though expressly providing for the division of property into classes upon which taxes were to be uniform, it circumscribed the discretion of the legislature by prescribing only three permissible classes.

The Senate response was to recommend changing the bill into essentially the present form of amendment 14 with only one significant difference. That difference was the exclusion of the proposed House bill's broad discretionary power to exempt property from taxation, and the substitution therefor of the exemption proviso from the original article 7, section 2, which had been interpreted so restrictively.[40]

A Committee on Free Conference eventually resolved the differences, consistently adopting the provisions from the proposed versions which gave the legislature greater latitude in drafting tax measures. Thus, the committee adopted the broader power to classify property proposed in the Senate version, with the only limitation that "real estate" must be treated as one class of property; and the broader plenary power to exempt property

---

36. WASH. S.J. 631 (1929).

37. *Id.* at 630.

38. *Id.* at 702.

39. The discretionary power to exempt property from taxation negated the limitations of State *ex rel.* Chamberlain v. Daniel, 17 Wash. 111, 49 P. 243 (1897). *See* note 21 *supra.*

40. *See* note 21 and text acccompanying notes 21 and 31 *supra.*

from taxation proposed in the House version, thereby rejecting the restrictively interpreted power of exemption in the then existing article 7. In this final Free Conference Committee version, each house of the legislature approved[41] by the required two-thirds majority a synthesized amendment which provided a greater degree of flexibility than that allowed by either of the proposed bills.

The second helpful source for interpreting amendment 14 is an opinion of the Washington Attorney General.[42] The opinion was issued in response to a series of questions posed by the Advisory Tax Commission.[43] After analyzing the then existing article

---

41. WASH. H.J. 812 (1929); WASH. S.J. 703 (1929).

42. 29-30 WASH. OP. ATT'Y GEN. 431 (1930).

43. The questions posed in the letter dated December 5, 1929, from the Advisory Tax Commission were:

> 1. Does the provision exempting 'property of the United States and of the state, counties, school districts, and other municipal corporations' apply under the wording of the amendment as a whole to the property tax alone or also to excise and privilege taxes?

Id.

> 2. With the exception of the specific exemptions of governmental property and of certain credits as set forth in the amendment does the amendment give the legislature full power either to tax or exempt all other taxable property in this state, so as to overcome the effect of our Supreme Court decision in the case of *Chamberlain v. Daniel,* (17 Wash. 111) and later decisions? What effect, if any, does the insertion of the $300.00 property exemption have on the free power of the legislature to exempt other property that it wants to?

Id. at 436.

> 3. Does the provision defining property to 'mean and include everything whether tangible or intangible subject to ownership' compel any income tax in this state to be construed by the court to be a property tax?

Id. at 438.

> 4. If an income tax would be a property tax under this amendment would an income tax with progressive rates and with the usual form of exemptions be legal under this amendment as a whole?

Id. at 440.

> 5. Would this definition of property make our existing excise taxes property taxes?

Id. at 441.

> 6. Does the provision specifically exempting 'credits secured by property actually taxed in this state' prevent the taxation of the income from such credits by an income, excise or privilege tax?

Id.

> 7. Does this provision present any legal complications with respect to the taxation of national banks under sec. 5219 of the U.S. Revised Statutes?

Id.

> 8. Referring to article 7, section 2 of the constitution of the state of Washington, does the provision that the legislature shall have power by appropriate

7, the case law, and the proposed article 7, the Attorney General concluded: (1) With reference to the power to exempt property from taxation:

> We see no reason why this language should not be given the effect evidently intended, and authorize the legislature to exempt from taxation any property it sees fit, thereby overcoming the effect of the decision of our supreme court in the case of *Chamberlain v. Daniel,* 17 Wash. 111, and any other decisions restricting the power of the legislature to grant exemptions. . . .[44]

(2) With reference to the power to tax income:

> [W]ith "intangibles" brought into the constitution under the definition of "property" and with the power to classify granted by the proposed amendment, the objection that to hold such a tax a property tax would render it invalid, is removed, and the courts would have no such reasons to hesitate to declare the tax a property tax, as the tax would be valid as a property tax under the proposed Amendment.[45]

(3) With reference to a progressive income tax:

> If all income were treated as one class of property, an income tax law with progressive rates would violate this provision ["all taxes shall be uniform on the same class of property"]. We believe, however, that the court would, if necessary to sustain such a law, hold each group to be a separate class, provided the classification were reasonable. The power to graduate rates has been sustained by many courts, and by the Supreme Court of the United States as to the Federal income tax law . . . . If an income tax law were construed as an excise tax, any reasonable rate classification would be sustained. However, even if construed as a property tax, although not entirely free from doubt, it is our opinion that such an act "with progressive rates and the usual form of exemption" would be sustained.[46]

> legislation to exempt personal property to the amount of $300.00 for each head of a family, preclude the legislature from enacting a law excluding automobiles from such an exemption?

Id. at 445.

44. *Id.* at 436.

45. *Id.* at 439. The response to whether, because of the expansive definition of property in the proposed constitutional amendment, income would be considered property says, in effect, that it really does not matter. The attorney general concluded that with the new power to classify property granted in the amendment, the legislature could tax income, even if such a tax were considered a property tax.

46. *Id.* at 440-41. The attorney general makes reference to the fact that the progressive federal income tax did not come under a similar constitutional provision (*i.e.*, a uniformity clause). However, it should be noted that the 16th amendment to the United

It is apparent that the Attorney General considered the limitations on the state's plenary power of taxation embodied in amendment 14 to be broadly permissive in the areas of exemption and classification.

Another source of contemporary interpretation is the historical sequence of events which quickly followed. The principal interest groups within the state surely would have been aware of the Attorney General's opinion of December, 1929, and would have communicated its content, positively or negatively, throughout the state. With that information in hand, the voters adopted amendment 14 in November, 1930. At the next general election in November, 1932, the voters by initiative enacted a graduated net income tax.[47] Thus, the voters, by their actions demonstrated that they believed the income tax not only to be appropriate, but also within the limitations *they* had defined only two years earlier.

How did the state supreme court analyze the effect of amendment 14 in the first taxation decisions following its adoption? In 1931, in *State ex rel. Atwood v. Wooster,*[48] the court upheld legislation classifying money, together with certain intangibles, as one class of property and exempting it from ad valorem taxation. In an expansive discussion of the purpose and effect of the "drastic and radical change" wrought by amendment 14, the court said:

> [T]he requirements that a uniform tax be assessed against all property were swept away, and in their place were adopted constitutional provisions which say nothing about uniformity, and do not provide that all property shall be taxed, but which do permit of the classification of all property, and provide that all taxes shall be uniform upon the same class of property, and also that such property as the legislature may provide shall be exempt from taxation. So that the legislature, freed from the former limitations, may now determine what property shall be taxed, the different rates upon which different classes of property shall be taxed, and what property shall pay no tax at all, subject only to the limitations found in the new constitutional provisions.[49]

States Constitution makes no express provision for classification or progressive rates. Thus, a determination of the propriety of the federal income tax was left to the Supreme Court's interpretation of that and other constitutional provisions, most notably the equal protection clause.

47. 1933 Wash. Laws, ch. 5, at 49.

48. 163 Wash. 659, 2 P.2d 653 (1931).

49. *Id.* at 663, 2 P.2d at 655.

The court also referred broadly to the abrogation of former restrictions on classification of property in *State ex rel. Mason County Logging Co. v. Wiley*[50] where it stated:

> It is a matter of common knowledge that the purpose of the fourteenth amendment was to permit a departure from the rigid requirement of uniformity and equality, making it possible to classify different kinds of property and levy different rates according to classes, to the end, largely, that the classes of property known as intangibles might be taxed at rates low enough to offer no inducement for concealment or evasion. While the rule prescribing general uniformity regardless of class of property was abolished by the amendment, uniformity is still required within the classes.[51]

Based on the foregoing inferences, interpretations, and statements, it would appear that the legislative, executive, popular, and judicial sectors each regarded amendment 14 at the time of its passage and shortly thereafter as a dramatic relaxation of the

---

50. 177 Wash. 65, 31 P.2d 539 (1934). The court upheld 1931 Wash. Laws., ch. 40, at 117, from an attack based on amendment 14. In *Wiley*, the court validated a law fixing the value of reforestation lands, differentiating lands west of the Cascade Mountains (one dollar per acre) from lands east of the Cascades (fifty cents per acre). The law was sustained on an extremely permissive interpretation of the legislature's power to set the rate of tax under the Reforestation Land Proviso. The court considered the historical context of the proviso, and noted: "The carefully prepared act of the 1931 session of the legislature is a contemporaneous construction of the amendment by men who participated in drafting and submitting it to the people." *Id.* at 74, 31 P.2d at 543.

51. *Id.* at 70, 31 P.2d at 542 (dictum). Note that *Wiley* was decided after the court's restrictive interpretation of the uniformity clause in *Culliton*. In addition, the language is not explicitly inconsistent with the generic classification of property, a major element in the *Culliton* holding.

However, it must be noted that the law challenged in *Wiley* escaped invalidation only because its validity depended not on the restrictively construed uniformity clause, but on the Reforestation Land Proviso. Over a strident dissent by Justice Steinert, (the champion of restrictive uniformity doctrine), the *Culliton* dissenters demonstrated their continuing commitment to a permissive interpretation of the uniformity clause.

Justice Blake described the purpose of amendment 14 in its historical context in his *Culliton* dissent:

> A growing agitation for decrease in taxes developed. But the relief was not available, because the state found itself in a straight-jacket in the shape of Article VII of the Constitution, with the judicial interpretations that had been placed upon it . . . .

174 Wash. at 386-87, 25 P.2d at 86.

> As I see it, the real question presented on this appeal is whether, by construction of this amendment, we are going to thwart the effort of the state to throw off the strait-jacket in which it was bound. To do so requires a literal, technical construction of a few words of the amendment, in perversion of their true and obvious intent and purpose, and in total disregard of its historical background and the conditions which brought it into being.

Id. at 388, 25 P.2d at 87.

limits on the legislative power in the field of taxation. The old strict rule mandating taxation of *all* property, allowing no meaningful subclassification, and requiring absolute uniformity and equality in that process had been swept away; the only explicit limitation on the power of the legislature to classify property for taxation or exemption was that real estate could not be subclassified at all.

Amendment 14 had thus introduced a new analytic step: the propriety of legislative classifications. Each new tax measure would have to be scrutinized to ascertain whether lines were drawn and classes of property created. Such legislative classifications should be tested according to a set of principles developing under the federal equal protection clause and the state privileges and immunity clause.[52] If the classifications were found to be reasonable, that is, not arbitrary, capricious, or invidiously discriminatory,[53] *then* the second issue would be reached: if the legislature created classes of property, was the tax imposed uniformly on each class created? Thus, the uniformity clause would retain its full vitality only in the area of taxation in which it was most meaningful and effective; that area of taxation which the framers envisioned as the primary source of state revenue; that area of taxation for which the amenders sought to retain the clause's effectiveness: ad valorem taxation of realty.

IV. *Culliton* AND THE UNIFORMITY CLAUSE

Unfortunately, the issues never fell into place as anticipated. Instead, the court withdrew from its correct interpretation of amendment 14 in *Atwood*[54] and returned to the analytical dichotomy developed under the old constitutional provision: taxes on "property" versus all other taxes—in effect, excises. Rather than developing a single consistent set of rules for classification per se (whether of property, occupations, activities, or taxpayers), the

52. The United States Supreme Court, in its equal protection decisions, provides the basis for most Washington decisions on issues of legislation discretion to classify. *See* note 8 *supra*, and note 106 *infra*.

53. Texas Co. v. Cohn, 8 Wash. 2d 360, 370, 112 P.2d 522, 527 (1941) (citing State Bd. of Tax Comm'rs of Indiana v. Jackson, 283 U.S. 527, 537 (1931)).

54. *See* text accompanying note 48 *supra*. It is noteworthy, and perhaps determinative of this reversal, that significant changes in the court's membership occurred between the decisions in *Atwood* and *Culliton*. The *Atwood* opinion was written by Chief Justice Tolman, and joined by Justices Beals, Holcomb, Mitchell, Main, Millard, Parker, and Beeler. By the time of the *Culliton* opinion, just two years later, the court was composed of Chief Justice Beals and Justices Tolman, Holcomb, Mitchell, Main, Millard, Blake, Geraghty, and the influential Justice Steinert.

court evolved a system of analysis which first determined whether a tax fell either on *property* or on a *privilege*. It then applied different rules of legislative classification, with those for property very restrictive and those for excises quite permissive.

When the court determined that a tax fell upon property, rather than analyzing the classes of property drawn in terms of equal protection concepts and the explicit limitation on the classification of realty, it would analyze the classifications in terms of the uniformity of the tax. This notion is astonishing because uniformity is conceptually antithetical to classification. The problem is not one, however, of an irreconcilable conflict between two disparate concepts tied together in the language of amendment 14's uniformity clause. Rather, the problem is one of the court analytically placing the cart before the horse: A tax can clearly be uniform upon all property within a class; but just as clearly a tax cannot be uniform upon an entire class if that class is subclassified for the purposes of varying tax treatment.

A proper analysis would recognize the constitutionally and conceptually valid legislative discretion to define classes, subject to equal protection standards. Any tax must then be uniform upon each of those classes. We reject the view that the court may impose uniformity, as a constitutional requisite for the validity of a tax, at any level of classification other than the precise classes drawn by the legislature, except in the instance of realty, a mandatory irreducible class. To accept such a view would be to acknowledge the court's discretion to determine to what level or degree the legislature may classify for taxation purposes. Yet the view we reject is the very position the court adopted in a series of decisions beginning in 1933 concerning net income taxes on the one hand and a variety of excise taxes on the other.

The court forced itself into this untenable but staunchly maintained posture in the companion decisions of *Culliton v. Chase*[55] and *State ex rel. Stiner v. Yelle*.[56] In *Culliton* the court invalidated the state's newly and popularly adopted graduated income tax,[57] levied on the receipt of income, and measured by "net" income. The rationale was appealingly simple: (1) income is property; (2) because it is property, taxation thereof is subject to the uniformity clause; and (3) the classifications inherent in a graduated net income tax violate uniformity rules and are thus invalid.

55. 174 Wash. 363, 25 P.2d 81 (1933).
56. 174 Wash. 402, 25 P.2d 91 (1933).
57. 1933 Wash. Laws, ch. 5, at 49.

In contrast, the court's *Stiner* decision upheld the state's newly adopted business and occupation tax,[58] levied on the privilege of engaging in business activities, and measured by one or another form of gross proceeds from the activity. The rationale was again appealingly simple: (1) an "activity" is not property; (2) because it is not property, taxation thereof is not subject to the uniformity clause, but rather to the classification criteria of equal protection concepts; and (3) the business and occupation tax, utilizing reasonable classifications under those criteria, is valid.

The necessary conclusion, confirmed in subsequent cases, is that the uniformity clause embodies a distinct, highly restrictive set of rules governing legislative discretion to classify. However, this tortured expansion of the uniformity clause, resulting from legislative efforts to enact an income tax, has only been applied in the income tax cases. Thus, the conclusion is inescapable that the court indeed considers income taxation in Washington in a class by itself.

What are these classification rules imposed by the uniformity clause? What is the reasoning underpinning the proscription of certain legislative classifications? The rules and their underlying reasons were articulated in *Culliton* and its progeny. This line of cases established that uniformity standards are not met when there is any legislative attempt: (1) to classify property (read "income") by the nature of the owner or recipient (*e.g.*, corporation vs. partnership or sole proprietor); (2) to classify property by quantity (*e.g.*, income by dollar amount); (3) to classify property by status of the taxpayer (*e.g.*, single vs. married); or (4) to classify property as an incidental result of taxing another class of property (*e.g.*, rental vs. nonrental property, by taxing rent as income). The ensuing discussion focuses primarily on the court's reasoning in engrafting these four rules of classification into the uniformity clause.

To understand the reasoning of *Culliton,* it is first necessary to consider *Aberdeen Savings and Loan Association v. Chase,*[59] which laid the foundation for the first of these four rules of classification. Although *Aberdeen* was decided before the adoption of amendment 14 and did not discuss the issue of uniformity, its impact on the judicial construction of amendment 14, and particularly the uniformity clause, has been profound. In *Aberdeen* the

58. 1933 Wash. Laws, ch. 191, at 869.
59. 157 Wash. 351, 289 P. 536 (1930).

court invalidated a tax on banks and financial corporations, levied on the exercise of their corporate franchises, measured by net income, and imposed at a flat rate.[60] The decision was based entirely on equal protection and intergovernmental immunity principles. The court relied on the United States Supreme Court decision of *Quaker City Cab Co. v. Pennsylvania*[61] which had invalidated a Pennsylvania tax on taxi cab companies, measured by gross receipts, from which partnerships and individuals were exempt, in effect taxing only corporations.

In *Quaker City Cab*, the Supreme Court had "looked through" this alleged excise tax and, finding that corporations in Pennsylvania were already subject to a separate franchise tax, concluded that it was a tax imposed on the revenues of cab companies. For purposes of a tax on revenues, however, the Court deemed it unreasonable under the equal protection clause to distinguish cab companies owned by corporations from those owned by individuals and partnerships. The *Aberdeen* court applied this decision well beyond its rationale. It "looked through" the legislature's stated purpose of taxing the exercise of the corporate privileges of banks and financial institutions, even though there was no pre-existing general excise on these institutions in Washington, to find that the tax was in fact one on the income of the institutions. The *Aberdeen* court then concluded, applying equal protection standards, that it was unreasonable to distinguish the income of corporations from that of individuals and partnerships.

In a separate issue concerning whether to include the income from United States bonds and instruments in the measure of a bank's net income, the *Aberdeen* court relied on *MacAllen Co. v. Massachusetts*,[62] in which the United States Supreme Court invalidated a Massachusetts law which included the income from United States instruments and bonds in the measure of a bank's tax, holding that the particular facts indicated the tax measure had been adopted to circumvent the immunity of United States bonds and instruments from direct taxation. Again, the *Aberdeen* court ignored the particular facts essential to that decision and overstated the *MacAllen* holding to support their conclusion that taxing income from such instruments was equivalent to taxing the instruments themselves, and that such a tax was therefore invalid. With some strange amalgam of the rationale of those two

60. 1929 Wash. Laws, ch. 151, at 380.

61. 277 U.S. 389 (1928), *overruled*, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 365 (1973).

62. 279 U.S. 620 (1929).

cases, which the court had already stretched beyond their holdings, the court explained on rehearing what they had really held in *Aberdeen:* "the legislation therein attacked must be held, under the decisions of the supreme court of the United States, to attempt to establish a property and not an excise or corporation franchise tax."[63] Thus, *Aberdeen,* which began as an equal protection challenge to discrimination against financial corporations and an intergovernmental immunity challenge to including income from United States bonds in the measure of the tax, resulted in the propositions that a tax on net income is a tax on property and, in that respect, discrimination between corporations and other taxable entities was impermissible.

The second phase of the decision, that it was impermissible to single out corporations for special treatment, eventually was transformed from a rule established under equal protection principles into the first classification rule dictated by the uniformity clause. Since *Aberdeen* was the genesis of that uniformity principle, it should be noted that in 1973 the United States Supreme Court expressly overruled *Quaker City Cab,*[64] upon which the *Aberdeen* decision had so heavily relied, and the equal protection clause rule established therein, holding that the differences in mode of operation and the enjoyment of privileges inherent in the corporate form were sufficient bases to single out corporations for special treatment when levying personal property taxes.

With this contextual background, the court in *Culliton v. Chase* laid down its basic approach to the analysis of a net income tax under amendment 14. The decision in *Culliton* was evidently difficult for the court; the majority opinion by Justice Holcomb, joined by Justice Main, was bolstered by two concurring opinions, resulting in a five-vote majority in the face of a unified four vote dissent. It is noteworthy that in the companion opinion of *State ex rel. Stiner v. Yelle,*[65] Justice Holcomb switched sides, joining the *Culliton* dissenters in a unified five-member majority upholding the business and occupation tax as an excise, not governed by the uniformity clause.

The majority opinion in *Culliton* was devoted almost entirely to a discussion of why income is property, the first step in the *Culliton* rationale. The court argued that amendment 14's unique, all-inclusive definition of property required the result;

63. This oft-quoted passage is found at 157 Wash. at 392, 290 P. at 697.

64. 277 U.S. 389 (1928), *overruled,* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 365 (1973).

65. 174 Wash. 402, 25 P.2d 91 (1933).

that *stare decisis* mandated the decision in *Aberdeen* be followed; and that other states' decisions upholding their income tax provisions were inapposite. A fair reading of the wording of the uniformity clause mandates application of that clause to property taxes, the second step in the *Culliton* rationale, though the court did not explicitly set this forth in its opinion. Justice Holcomb's reasoning in support of the final and critical step leaves much to the imagination: "It needs no argument to demonstrate that the income taxes here levied are wholly lacking in uniformity."[66]

After establishing the basic constitutional analysis applicable to the net income tax, Justice Holcomb devoted the last portion of his opinion to an effort to rebut the cogent argument that the net income tax was in many ways indistinguishable from the graduated inheritance tax, which had been upheld as an excise.[67] He thought it significant that the inheritance tax was levied only upon the event of a devise and not annually, and that the right to receive property as an heir is not a "natural right," but a state granted privilege. One could question whether the legislative selection of an annual income tax base for administrative convenience, as opposed to taxing the recipient on each taxable event (analogizing the receipt of income to receipt of a devise), should govern the constitutionality of a tax scheme, and also whether, under present constitutional doctrines, the right to receive income is a "natural right."

Justices Mitchell and Millard concurred separately[68] to provide historical support for the majority position, and to analyze further the requirements of uniformity. The historical argument is interesting for its irony. Justice Mitchell noted that the *Aberdeen* decision holding a tax on income to be a tax on property was notorious at the time amendment 14 was passed, hence the public knew at the time that property included income, yet they engrafted an all-encompassing definition of property into the state constitution, bolstering rather than eliminating the effect of *Aberdeen.* Justice Mitchell failed to carry his historical analysis one step further, however, to point out that within two years of the passage of the amendment the public adopted this very income tax, implying that they intended and believed the limitations in the amendment to be sufficiently liberal to permit this tax with its inherent classification of income (admittedly property).

66. 174 Wash. at 378, 25 P.2d at 83.
67. State v. Clark, 30 Wash. 439, 71 P. 20 (1902).
68. 174 Wash. at 379, 25 P.2d at 84.

Attempting to explain the nonuniformity of this graduated tax on net income, and thereby creating the second classification rule for uniformity, Justice Mitchell continued:

> Confessedly, the Act upon its face fixes rates of taxation that become greater with the increase of the amount of taxable income. The Amendment to the Constitution provides, however, "that all taxes shall be *uniform* upon the same *class of property*" etc. This principle of uniformity in taxation has been preserved at all times in our Constitution, as appears from Article VII, sec. 2 of the Constitution, and from the fourteenth amendment. It might be reasonable, under the Amendment, to provide that, for taxation purposes, horses be put in a class and bear a rate of taxation different from that of lands devoted to reforestation; but not so with a band of one thousand horses compared with another of two thousand horses, nor one acre of land devoted to reforestation compared with another two acres of land devoted to reforestation.
>
> The Constitutional Amendment speaks of the *same class of property*. One who pays a tax on a $2000 taxable income pays a tax on precisely the *same class of property* as one who pays a tax on a $1000 taxable income, and to tax the one at a progressively higher rate than the other positively violates the other clause of the Amendment, that all taxes shall be *uniform* upon the same class of property.[69]

So much for the classification of property by quantity; it was *judicially* held "unreasonable." There was no discussion of *legislative* reasonableness, that is, the purposes or policies behind the legislative decision to subclassify income by quantity. As Justice Mitchell viewed it, the new uniformity clause required some intrinsic "natural" difference between the tax classifications selected; *e.g.*, horses vs. land, or income vs. horses, or land vs. income. For him, income was one class of property and not subclassifiable, at least by amount; this conclusion was mandated by the existence and language of the uniformity clause. Justice Steinert, who became the champion of "strict uniformity" in later opinions, concurred separately to emphasize the comprehensiveness of the definition of property in the constitution, and to reiterate the views of Justice Marshall on classification under the uniformity clause: the constitution forbids varying the tax rate based upon the quantity of any given type (land, cattle, income) of property.[70]

---

69. *Id.* at 382, 25 P.2d at 85.
70. *Id.* at 384, 25 P.2d at 85.

Justice Blake, who subsequently championed "liberal uniformity," wrote an extensive dissent in *Culliton*.[71] His initial argument was that the historical context of the legislation required that it be upheld because it was part of a cohesive legislative plan which included amendment 14, and also because of the dire fiscal consequences if the tax were invalidated. He next argued extensively that a tax on income was in reality an excise on the enjoyment of privileges afforded by the state. Justice Blake's strong dissenting argument that a tax on income is an excise, and the unsound reasoning underlying the contrary conclusion in *Aberdeen* (routinely cited as authority for the position that a tax on income is a property tax), undoubtedly explain why all subsequent statutes explicitly characterized taxes measured by net income as "privilege" or "excise" taxes.

The contrary argument that the definition of property in amendment 14 is so broad that it includes income does not directly address the Blake position that an income tax is in reality an excise tax. Conceptually, the arguments are fundamentally different, and the postulation of one does not refute the other. That is, it is not inconsistent to say that a tax on the privilege of earning income is an excise tax, and that a tax on the income produced is a property tax. In attempting to discern the "true" subject of the tax, one can only arrive at a conclusion through circular reasoning. Hence, it is as appropriate to "look through" the stated purpose of taxing the privilege of earning income and perceive the tax as one on the income itself (per *Aberdeen*), as it is to "look through" the procedure of measuring the tax by net income to perceive the tax as one on the privilege of earning (per the logic of Justice Blake's *Culliton* dissent). The futility of conceptually refuting the position that to tax income is to tax property is apparent. The better argument is: *even if* income is property, a proper analysis of the legislative classification of property will sustain the constitutionality of a net income tax. Justice Blake's final argument was to that effect:[72]

> Of course citation of cases is not necessary in support of legislative authority to classify persons in groups for the purposes of exacting excise taxes from them. The only limitation is that the classification shall not be unreasonable or arbitrary. And the courts will not weigh with too much nicety the legislative discretion in that respect. *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527 . . . .

71. *Id.* at 384, 25 P.2d at 86.
72. *Id.* at 389, 25 P.2d at 87.

> While the Amendment placed a limitation of uniformity of taxation on property in the same class. . . . I fail to see wherein there is any limitation contained therein to classify property for purposes of taxation, other than that real estate shall constitute one class.[73]

Over the strong and unified dissent, however, the *Culliton* court placed its seminally restrictive imprint on the meaning of the uniformity clause: (1) the clause applies to the taxation of income as a form of property; (2) the clause imposes a strict limitation, allowing classification only by generic type of property; (3) the clause admits no subclassification of a generic class by quantity; and (4) the tax rate cannot be progressively increased over a generic class of property.[74]

The third and fourth rules of classification created by the court under the auspices of the uniformity clause were explained in *Jensen v. Henneford*.[75] There the challenged provision imposed a normal tax of three percent on net income, less specific credits,[76] up to four thousand dollars, and a surtax of four percent on net income in excess of that amount.[77] The stated object of the tax was to place an excise on the privilege of receiving income. The initial reasoning of the *Jensen* opinion was analogous to that of *Aberdeen* and *Culliton*. Justice Steinert's majority opinion, joined by three justices, and a separate concurrence by another, first found that despite the stated subject of the tax, it was not in fact an excise on a substantive privilege granted by the state, but rather a tax on the rights to receive and hold income, rights indicating property ownership. Concluding the tax was, in fact,

---

73. *Id.* at 397-98, 25 P.2d at 90.

74. In contrast, the United States Supreme Court approved the use of progressive tax rates based on increasing levels of net income under the federal income tax laws in Brushaber v. Union Pac. Ry., 240 U.S. 1, 25 (1916). It may be argued, of course, that any analogy to federal net income taxation is inappropriate, because the sixteenth amendment to the United States Constitution specifically authorizes such a tax. Such an argument is not persuasive, however, because the sixteenth amendment does not mention progressivity of rates, or even the classification of income in general. Hence, it was left to the courts to adjudicate the propriety of any classification drawn, whether of the quality of the subject taxed, or of the taxpayers to be burdened. The criteria used to test the validity of the federal tax law's classifications were those imposed under the equal protection clause, the criteria generally applied to test the validity of legislative line-drawing. *See* Great Atl. & Pac. Tea Co. v. Grosjeans, 301 U.S. 412 (1937) (sustaining an excise imposed on the operation of chain stores, with rates progressively increasing with the number of chain stores under common management).

75. 185 Wash. 209, 53 P.2d 607 (1936).

76. The Washington Legislature has not used the term "credit" in its ordinary tax sense, as a direct deduction from the tax liability, but as a term denoting deductions allowed to arrive at net taxable income.

77. 1935 Wash. Laws, ch. 178, at 660-74.

one on property, the court held it to be controlled by the uniformity clause of amendment 14. The surtax was held violative of uniformity principles because it created a classification and graduation at the four thousand dollar level (per *Culliton*). In addition, the normal tax was held to violate uniformity rules because the tax rates were applied against "net income in excess of credits," including a one thousand dollar exemption for single persons and a twenty-five hundred dollar exemption per marital community. The court held that uniformity rules were violated because net income, which constituted one class of property under its interpretations of amendment 14, had been reclassified or graduated into two distinct classes: single persons' income and married persons' income.

By adopting this position, the court defined a unique constitutional analysis for income taxation. For the effect of this position is to confuse not only the concepts of classification and uniformity, but also the concept of exemption with both classification and uniformity. The court held that to *exempt* taxpayers according to their marital status is to *classify* income into two classes, and further, that such a *classification* violates *uniformity* doctrine. Therefore, the court held that the uniformity clause proscribes exemptions which result in the subclassification of income as a class of property. Yet any exemption necessarily creates a subclassification of the taxpayers *and* the subject of the tax; and the court itself had declared in *Atwood*[78] that the legislative power to exempt *property* from taxation is plenary, per the unambiguous language of amendment 14. The court's guiding principles for and limitations on the legislative power of exemption otherwise generally have continued to evolve under federal equal protection and state privileges and immunities concepts. The taxation of income, however, remains *sui generis* in that exemption of any subclass of that particular class of property runs afoul of the uniformity clause.[79]

The fourth and final uniformity clause restriction on the power to classsify was stated in *Jensen,* where Justice Steinert

78. State *ex rel.* Atwood v. Wooster, 163 Wash. 659, 2 P.2d 653 (1931). *See* text accompanying note 48 *supra.*

79. The apparently inconsistent position taken by the court in *Jensen* is even more questionable; it arises because the legislature fortuitously decided to impose the tax on net income less credits. If the credits had been applied before arriving at "net income" (which exists solely as a label for a figure resulting from a series of statutorily prescribed calculations), the reasoning of Justice Steinert's majority opinion would lead to the conclusion that "net income" thus derived, requiring no further statutory adjustments, constitutes a uniform class of property. This reasoning propels form over substance.

declared: "A tax upon rents from real estate is a tax upon the real estate itself. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 . . . ."[80] From this interpretation of *Pollock*, he reasoned that because the net income tax statute included rents in the measure of net income, it imposed a tax on the source of such rents, rented real estate. And because there was no comparable tax on unrented real estate, the statute divided *realty* into two classes, income-producing and non-income-producing, in direct violation of amendment 14's provision that "all real estate shall constitute one class."

The court either misstated or misinterpreted the *Pollock*[81] decision, in which the United States Supreme Court held the initial efforts to enact a federal income tax void. The rationale of the decision was that rather than being a burden which could be passed on to third parties by the taxpayer (*i.e.*, an "indirect" tax such as an excise), the income tax fell directly on the taxpayer in a manner *equivalent* to the taxation of property (*i.e.*, a "direct" tax). Because the federal income tax statute imposed a direct tax, it was declared void because the tax was not properly apportioned among the states.[82] Thus, *Pollock* dealt solely with the nature of income taxation as either *direct* or *indirect*. Many state courts misinterpreted the decision, however, as holding that taxation of income was taxation of property, rather than merely analogous thereto in the sense of being a direct tax.[83]

In *Jensen* the court even ventured beyond the general notion that a tax on income was a tax on property, to conclude that a tax on the rents from realty was a tax on that specific realty. Its position is illogical and indefensible. The court itself had expressly stated that net income was one class of property. The state constitution explicitly makes real estate one class of property. Realty exists, has value, and is taxed whether rented or not. If rented, the property continues to exist, unchanged, except that a new, separate and distinguishable asset is created: the rental income. The court has stated expressly that net income is a distinct class of property. The definition or subclassification of income bears no relationship to the taxes imposed upon the class of real property, which are ad valorem and uniform in their appli-

80. 185 Wash. at 222, 53 P.2d at 612.

81. Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895).

82. "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. 1, § 9, cl. 4.

83. *See* Harsch, *State Income Taxation as Affected by Property Tax Limitations*, 6 WASH. L. REV. 97, 99 (1931).

cation. The underlying real estate and the rents produced therefrom are two distinct classes of property; a tax upon income (rent) and a tax upon real estate are not taxes "upon the same class."[84]

Shortly after *Jensen* created the third uniformity rule of classification, the United States Supreme Court had occasion to consider the reasoning adopted by the *Jensen* majority. Concluding that reasoning was unsound, the Court stated: "The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, *New York ex rel. Cohn v. Graves,* 300 U.S. 308, 313, 314 . . . ."[85] Conceptually, the Supreme Court's position supports the better view that a tax on income is a tax on a distinct class of property, not resulting in the subclassification of other classes of property. However, the holding in *Jensen* persists[86] and has potentially pervasive effects, for if a tax on rents is a tax on the realty, then logically any tax on income is a tax on its source, a position which could create extensive problems under the constitution's immunity and exemption provisions. Additionally, the illogical holding in *Jensen* is the only classification rule erected upon the foundation of the uniformity clause that has been held to prohibit classification in the liberally regulated area of excise taxation.[87]

Later cases dealing with efforts to tax income in Washington add no new concepts to these rules of uniformity. *Petroleum Navigation v. Henneford*[88] and *Power, Inc. v. Huntley*[89] both dealt with legislative efforts to place an excise, measured by net income, on the privilege of exercising corporate franchises. As in *Aberdeen* and *Culliton,* the excise veil was pierced and the "true" nature of the tax as one on property was perceived. The cases are

84. If the position in *Jensen* were carried to its logical extreme, the tax on rents would be a tax on the real estate, no matter what form the payment of the rents took. That is to say, if rents were paid in kind, *e.g.,* a machinery manufacturer paying the rent on its building by providing machinery to the landlord, then logically a tax on those machines (personalty) would be a tax on the rented building. Or if the rents were paid in cash, to tax the cash would be to tax the real estate, and even if the cash rent were spent, the cash rent proceeds would have to be traced to its ultimate form in the lessor's hands (whether intangibles, tangible personalty, or other realty). Under the *Jensen* logic, any assets acquired with the cash rent would still be rented income and, therefore, not separately taxable, because that would create a second class of realty. The absurdity of such a result is clear.

85. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 480 (1939).

86. 53-55 OP. ATT'Y GEN. 320 (1954).

87. Thus, a tax on the activity of renting realty, measured by the gross rent proceeds, was held to create a second tax on realty in Apartment Operators' Ass'n v. Schumacher, 56 Wash. 2d 46, 351 P.2d 124 (1960).

88. 185 Wash. 495, 55 P.2d 1056 (1936).

89. 39 Wash. 2d 191, 235 P.2d 173 (1951).

noteworthy, however, because they incorporate a part of the *Aberdeen* holding into the rules for uniformity. *Aberdeen,* establishing a now invalid equal protection rule,[90] held that corporations could not be treated differently from partnerships and proprietorships unless the tax was truly an excise on the exercise of the corporate franchise. *Petroleum Navigation* and *Power, Inc.* reached the same result relying upon amendment 14's uniformity clause, thus transforming an outdated equal protection principle into an extant uniformity proscription. Since the taxes in both *Petroleum Navigation* and *Power, Inc.* were held to be taxes on property, they were subject to the uniformity clause, which was violated when corporations were taxed differently from other business forms. Neither decision discussed the policy or economic grounds for legislatively recognizing a difference in the character of net income earned in the corporate as opposed to the proprietary or partnership capacity.

In summary, the Washington Supreme Court laid down strict rules governing the classification of *property* for the purposes of taxation in a series of net income tax decisions beginning with *Culliton v. Chase.* Probably the most crucial link in the evolution of the uniformity clause into a system of rules for classification was the *Culliton* determination that property must be classified by generic type: *e.g.,* land, horses, or income. Once the class is established upon which taxation must be uniform, then virtually by the plain meaning of the terms, any further subclassification of the larger class will result in non-uniformity of taxation of the larger class. Hence, the remaining specific uniformity rules of classification flowed naturally, if not necessarily, from that notion.

Culliton and its progeny are devoid of discussion concerning the legislative policies to be furthered by the classifications found impermissible; or of the economic, political, or social differences between the classes created; or of the relation between the legislative lines drawn and the legislative ends to be reached. Rather, the decisions hold income to be property, property to be subject to the uniformity clause, and certain classifications to be therefore impermissible. The only possible interpretation of that logic is that, for the majority of the *Culliton*-era court, the clause embodied a distinct set of principles for legislative classification. Their decisions created a set of strict rules proscribing various methods of classifying property: (1) property cannot be classified

90. *See* text accompanying note 61 *supra.*

by quantity; (2) property cannot be classified by the nature of the owner or recipient; (3) property cannot be exempted based on the status of the owner; and (4) property cannot be classified as the incidental result of taxing another class of property.

V. The "Other" Classification Rules

A. *The Dichotomy*

State ex rel. Stiner v. Yelle, in contrast with the companion *Culliton,* established the rule that taxes on privileges or activities (excises) though measured by gross income,[91] were not subject to

91. Justice Steinert dissented, vigorously arguing that a tax on gross income was no different from a tax on net income, that gross income was also a class of property, and a tax thereon must be uniform, and because the business and occupation tax sustained in *Stiner* exempted the activities of farming and of providing professional services, that the tax was not uniform on the class of gross income. 174 Wash. at 413, 25 P.2d at 95.

Interestingly, Justice Blake relied on essentially the same logic in his last-gasp dissent in Jensen v. Heneford, 185 Wash. 209, 53 P.2d 607 (1936). He argued that since *Culliton,* no less than four decisions had undermined its holding. Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 P.2d 14 (1935); Morrow v. Henneford, 182 Wash. 625, 47 P.2d 1016 (1935); Supply Laundry Co. v. Jenner, 178 Wash. 72, 34 P.2d 363 (1934); State *ex rel.* Stiner v. Yelle, 174 Wash. 402, 25 P.2d 91 (1933). *Stiner* and *Supply Laundry* both sustained the state business and occupation tax which, Justice Blake pointed out, was measured by an unjust measure (gross income) when compared with the net income (profits) measure. Profits, he opined, more accurately reflect the real amount of benefits and privileges enjoyed by a business. To approve an excise tax measured by gross income, he concluded, undermined the holding that an excise on the privilege of receiving income measured by net income, is not an excise.

Morrow, in turn, sustained the state's retail sales tax. Justice Blake argued in his *Jensen* dissent that a sales tax falls on the purchaser and his right to acquire by purchase an item of tangible personal property. This, he argued, was an even more direct tax on property than a tax on the inchoate right to receive income; yet it was sustained as an excise on the activity of selling tangible personal property.

In *Vancouver Oil,* the court sustained the state compensating use tax; a tax designed to fill the gap left in the retail sales tax when items were manufactured by the user within the state, or purchased elsewhere and brought into and used in the state. Justice Blake argued that the incident of using an item is an even greater index of ownership than a mere right to receive income, and hence the taxation of use is closer to a tax on the general incidents of ownership than a tax on income; yet the use tax was sustained as an integral part of the sales tax. Thus, Justice Blake concluded that these four decisions had undermined the *Culliton* rationale, and that they had demonstrated that a tax on net income was in reality a tax on the privilege of earning and receiving that income—an excise.

Compare Justice Blake's conclusion with the majority opinion in *Jensen,* where Justice Steinert stated that those four preceding decisions were irrelevant to and had not discussed or even cited *Culliton.* He further declared: "The right to receive, the reception, and the right to hold, are progressive incidents of ownership and indispensable thereto. To tax any one of these elements is to tax their sum total, namely, ownership, and therefore, the property (income) itself." 185 Wash. at 219, 53 P.2d at 611. Thus, Steinert identified as indices of property the same indices of ownership taxed as privileges in the excise tax cases discussed by Blake.

Ironically, Justice Blake's arguments in his *Jensen* dissent mirrored the positions of the dissents in each of the cases upholding the excise taxes (business and occupation,

the uniformity clause, and therewith perpetuated the pre-amendment 14 dichotomized analysis of property taxes versus excise taxes. Though the *Stiner* rule does not derive express support from the language of amendment 14, it has been consistently upheld.[92] A strong and analytically sound argument could be made, however, that the uniformity requirement ("*all taxes* shall be uniform on the same class of property") does apply to all taxes. The logical conclusion would be that each tax levied should be evaluated to determine initially whether the defined classes of property were reasonable, and then whether the tax imposed fell uniformly upon the elements within each class.

The initial postulate of that argument was rejected in *Gruen v. State Tax Commission.*[93] Because of the strict classification

---

sales, and use). His arguments are most noteworthy, however, in that they highlight the inconsistent and confused reasoning of the income and excise tax cases.

92. Contrary to the rule of *Stiner,* however, State *ex rel.* Collier v. Yelle, 9 Wash. 2d 317, 115 P.2d 373 (1941), held that the proceeds of the motor vehicle excise tax could not be used for the private purpose of reimbursing residents of a street for a street improvements property tax already levied and paid. The court concluded that the second sentence of amendment 14 ("All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only") did in fact apply to all taxes levied in the state. However, it is semantically absurd to suggest that the first clause applies only to property taxes, while the second clause applies to all taxes. Curiously, that reasoning was applied in Gruen v. State Tax Comm'n, 35 Wash. 2d 1, 211 P.2d 651 (1949). *See* note 93, *infra,* and accompanying text.

Apartment Operators Ass'n v. Schumacher, 56 Wash. 2d 46, 351 P.2d 124 (1960), is particularly interesting in this regard. The tax discussed in that case levied a flat rate on the gross income derived from the activity of leasing property, indices which in prior cases resulted in the label of an excise tax. However, the tax was invalidated on the basis that to tax the rents from realty was to tax the realty; and because that created two classes of realty, rented and unrented, the tax was not uniform on the class of realty, clearly an imposition of the uniformity clause. The import of this decision is ambiguous, because it either represents an intrusion of the uniformity clause into excise taxation, a notion the court had rejected in *Gruen*; or it represents a holding that gross income derived from an activity is property and hence subject to the uniformity clause, which is specifically contrary to *Stiner,* and in fact represents the position of the dissent in that case.

93. It is true that, in Collier v. Yelle, . . . it was stated, in referring to the gasoline tax and the [state constitution's] fourteenth amendment: "This, of course, refers to all taxes collected by the state, including property, excise, and all other taxes. The amendment, then, in scope covers all the state's power to levy taxes."

This statement, however, was dicta in that the questions before the [*Collier*] court . . . made no reference whatever to the proposition above stated.

35 Wash. 2d at 33, 211 P.2d at 670.

The *Gruen* court held that a tax imposed on the sales, use and consumption of cigarettes, earmarked for a World War II veterans' bonus fund, was not subject to the strict uniformity requirements the court had imposed on property taxes. The court concluded that such a tax was governed by the more liberal legislative classification limitations for excise taxes imposed by the federal equal protection and state privileges and immunities clauses.

rules it had incorporated into the uniformity clause the court specifically held that the clause applied *only* to property taxes. With its interpretation of the uniformity clause in the income tax cases, the court had created a monster capable of invalidating almost any tax held subject to its strict classification principles. Hence, to validate some of the legislature's efforts to tap new sources of revenue, the court held that excise taxes were not subject to the strict uniformity classification rules, despite the language of amendment 14. The *Gruen* decision fueled a continuing struggle to characterize new taxes (including income taxes) as excises. The struggle has created a conceptual roadblock obscuring the real analytical dilemma: the dichotomized treatment of legislative classifications. If amendment 14 is construed properly, the debate over whether a tax on income is a tax on property or an excise becomes irrelevant, and the issue of a consistent and coherent set of principles for legislative line-drawing can be addressed.

A series of milestone decisions ensued as each of the major excise taxes was challenged. As noted, *State ex rel. Stiner v. Yelle* sustained the state's business and occupation tax,[94] a tax levied at varying rates, measured by various forms of gross proceeds, and imposed upon enumerated commercial activities including wholesaling, manufacturing, and extracting. The tax was sustained even though the governor had vetoed two sections and thereby exempted from the tax agricultural activities and professional services. It was held to be an excise tax, not subject to the uniformity clause, and thus within the legislature's virtually unlimited discretion:

> A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable considerations of difference or policy, there is no denial of equal protection of the law.[95]

Despite this broad language, the *Stiner* court applied a somewhat restrictive equal protection analysis in sustaining the tax. Rather than merely finding some economic difference or policy objective justifying the classification (exempting farmers and professional

94. 1933 Wash. Laws, ch. 191, at 869.

95. 174 Wash. at 407-08, 25 P.2d at 93 (quoting Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910)).

men), the majority went to great lengths to show that farmers and professional men were not engaged in "commercial activities," the object of the tax statute.

The next year *Supply Laundry Co. v. Jenner*[96] found real economic differences sufficient to sustain the challenged classification. An amendment to the business and occupation tax statute reinstated professional services as a taxable activity, but excluded employees or servants from that class.[97] *Supply Laundry* is noteworthy not only for its analysis of the legislative lines drawn, but also because the court dealt with a double taxation issue. Under the amended statute, insurance *agents* were taxed on their sales activities, measured by gross income (commissions calculated as a percentage of premiums on policies they had sold), and insurance *companies* were taxed on their activity of selling insurance, measured by gross premiums. The court found no constitutional infirmity in the double taxation of the premiums, because the business activities of the two separate entities were distinct.[98]

In *Morrow v. Henneford,*[99] the court sustained the retail sales tax. The challenge had focused on the argument that the tax was imposed directly upon property, and that it violated the requirements of uniformity. The court argued at great length that the tax, exacted from the purchaser of tangible personal property was an excise on the right to acquire property and not a property tax. In *Vancouver Oil Co. v. Henneford,*[100] the court sustained the compensating use tax, relying strictly on *Morrow*. Neither decision suggested how either tax would have violated the uniformity criteria had it been found to be a property tax.[101] After finding the

96. 178 Wash. 72, 34 P.2d 363 (1934).

97. 1933 Wash. Laws, Ex. Sess. 157.

98. Compare the strict treatment of double taxation under the uniformity clause, where separate taxation of two factually independent items, rents from real estate, and the rent producing real estate, was prohibited under uniformity clause classification rules because it had the incidental effect of creating, and imposing a second tax upon a subclassification of realty. Jensen v. Henneford, 185 Wash. 209, 53 P.2d 607 (1936). *See* text accompanying note 80, *supra*.

99. 182 Wash. 625, 47 P.2d 1016 (1935).

100. 183 Wash. 317, 49 P.2d 14 (1935).

101. The difficulty in framing the uniformity violation in these excise tax cases is that, even if the tax were found to be a property tax, there would logically be no violation of uniformity principles. The respective classes of property taxed (loosely defined) would be "property purchased at retail" and "property manufactured or brought into and used in the state, and not previously subjected to sales taxation." Upon those classes of property, the flat-rate tax is uniform, even under strict uniformity rules. The potential uniformity issue might be that if such property were subject to an ad valorem personal property tax, there would be double taxation of the property with no corresponding tax

use tax not subject to the uniformity clause, the court, quoting the United States Supreme Court, stated:

> [T]he power of the state to classify for purposes of taxation is of wide range and flexibility, provided that the classification rests upon a substantial difference so that all persons similarly circumstanced will be treated alike. Statutes which tax *one class of property* while exempting another class necessarily result in imposing a greater burden *upon the property* taxed than would be the case if the omitted property were included. But such statutes do not create an inequality in the constitutional sense.[102]

The quoted passage is particularly significant because it demonstrates that the United States Supreme Court, unlike the Washington Supreme Court, does not distinguish between property taxes and excise taxes in applying equal protection criteria.

B. The Current Rules—Broad Discretion

Washington case law demonstrating the broad legislative discretion to classify the subjects of excise taxation in a wide variety of classification issues and methods is legion.[103] The rules limiting that discretion have been judicially developed under federal equal protection and state privileges and immunities principles. Two cases are particularly important to a discussion of the criteria for evaluating the legislative discretion to classify for tax

---

on property not purchased at retail. That can be refuted, however, because the sales tax would be imposed only once, at the instant of sale, prior to any acts of dominion or ownership; and not in addition to an ad valorem property tax, which would fall due only at the close of subsequent assessment periods, based on the exercise of the incidents of ownership.

102. 183 Wash. at 320-21, 49 P.2d at 16 (quoting Hart Refineries v. Harmon, 278 U.S. 499, 502 (1929)).

103. Sonitrol Northwest, Inc. v. City of Seattle, 84 Wash. 2d 588, 528 P.2d 474 (1974) (municipal excise singling out burglar alarm system operator); Commonwealth Title Ins. Co. v. City of Tacoma, 81 Wash. 2d 391, 502 P.2d 1024 (1972) (municipal ordinances taxing title insurance companies as retail businesses for sales and use taxes and as service companies for business and occupation taxes); H & B Communications v. City of Richland, 79 Wash. 2d 312, 484 P.2d 1141 (1971) (municipal business and occupation tax on cable television in a separate class where only one existed in the city); State *ex rel.* Namer Inv. Corp. v. Williams, 73 Wash. 2d 1, 435 P.2d 975 (1968) (classification of lease options as a taxable real estate transaction); Black v. State, 67 Wash. 2d 97, 406 P.2d 761 (1965) (tax on lease of ship as hotel); Hemphill v. Tax Comm'n, 65 Wash. 2d 889, 400 P.2d 297, *appeal dismissed*, 383 U.S. 103 (1965) (bowling singled out for exclusion from admission tax); Bates v. McLeon, 11 Wash. 2d 648, 120 P.2d 472 (1942) (state unemployment compensation contribution taxes); Texas Co. v. Cohn, 8 Wash. 2d 360, 112 P.2d 522 (1941) (excise on fuel oil handlers, none on competing solid fuel handlers).

purposes: *Sonitrol Northwest, Inc. v. City of Seattle*[104] and *Texas Co. v. Cohn.*[105]

In *Sonitrol* the court sustained a municipal excise tax on a burglar alarm system company of seven percent of its total gross income. Companies providing local alarms or foot patrols, however, were taxed at only one-tenth of one percent of gross income. The court found that the functional differences between the two classes of burglar alarm companies justified the legislative decision to tax one at seventy (70) times the rate applied to the other. *Sonitrol* is invaluable because it provides a complete guide[106] for analyzing excise tax classification issues:

> (1) "Legislative bodies have very extensive powers to make classifications for purposes of legislation."[107]
> (2) To comply with the equal protection provision found in Const. Art. 1, Sec. 12, a classification must meet and satisfy three requirements.
> [(a)] First, legislation must apply alike to all persons within a designated class.
> [(b)] Second, there must be reasonable grounds for making distinctions between those who fall within the class and those who do not.

---

104. 84 Wash. 2d 588, 528 P.2d 474 (1974).

105. 8 Wash. 2d 360, 112 P.2d 522 (1941).

106. The Washington cases cited in *Sonitrol* all draw upon Supreme Court decisions which provide the fabric of equal protection analysis. Some of the most frequently cited passages include:

> It is not the function of this court . . . to consider the propriety or justness of the tax . . . . Our duty is to sustain the classifications adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great.

State Bd. of Tax Comm'rs of Ind. v. Jackson, 283 U.S. 527, 537-38 (1930).

> It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions . . . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis if there is any conceivable state of facts which would support it.

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509 (1937).

> Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation . . . . "To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure" . . . .

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-28 (1958).

107. 84 Wash. 2d at 590, 528 P.2d at 476.

> [(c)] Third, the disparity in treatment must be germane to the object of the law in which it appears."[108]

(3) "The test for the purposes of classification is merely whether "any state of facts reasonably can be conceived that would sustain the classification." *Allied Stores v. Bowers*, 358 U.S. 522 . . . ."[109]

(4) "The legislature has even broader discretion and greater power in making classifications for taxation than it has for regulation."[110]

(5) "The fact that the higher tax on [the taxpayer's] business may put him at a competitive disadvantage is of no moment."[111]

Texas Co. v. Cohen, which reversed *State v. Inland Empire Refineries,*[112] is important not only as the consolidation and source of much of the doctrine restated in *Sonitrol,* but also as a particularly appropriate example of the court's willingness to reconsider and correct or modify prior holdings on tax issues. *Inland Empire* had held a 1939 fuel oil tax on distributors invalid because solid fuel distributors were not similarly taxed. Citing *Quaker City Cab Co. v. Pennsylvania,*[113] the court found that distributors of fuel, solid or oil, were in one competitive class, and that there were no reasonable grounds to distinguish between them; therefore, the divisive classification was arbitrary. In the *Texas Co.* decision, the court re-examined *Inland Empire* and, after a detailed and exhaustive discussion of United States Su-

---

108. *Id.* at 589-90, 528 P.2d at 476.

109. *Id.* at 590, 528 P.2d at 476.

110. *Id.* at 591, 528 P.2d at 477.

> The familiar rule that legislative classification, in order to come within constitutional limitations, must bear some reasonable relation to the object of the law in which it appears, originated in cases construing regulatory laws, where it has a natural and logical application. A statute prescribing a regulation in the exercise of the police power has a definite object which concerns the public health, safety, morals, or the like. If such a statute is not universal in its application, but applies only to a particular class, then, in order to satisfy constitutional requirements, the regulation of those within the class, as distinguished from those excluded therefrom, must tend to accomplish the object of the statute. When the rule is applied to a tax law, however, it should be done with due appreciation of the fact that usually the principal object of such a law, and very often the sole object, is to raise revenue for the support of the taxing government. Thus the state may constitutionally tax one class and exempt other classes, if the classification reasonably tends, in some lawful way, to facilitate the raising of revenue.

Id. at 592, 528 P.2d at 477 (quoting Texas Co. v. Cohn, 8 Wash. 2d 360, 376, 112 P.2d 522, 529-30 (1941)).

111. *Id.* at 593, 528 P.2d at 478.

112. 3 Wash. 2d 651, 101 P.2d 975 (1940).

113. 277 U.S. 389 (1928).

preme Court and prior Washington Supreme Court equal protection decisions, reversed its holding, rejected its conclusory statement that such a classification was unreasonable per se, found factual and policy bases for differentiating between distributors of fuel oil and solid fuel, and sustained the tax.

C. Exemption of Property

The power to exempt property from tax is an apparent inconsistency in the requirement of uniformity receiving both constitutional and judical approval. Amendment 14 provides in part: "All taxes shall be uniform on the same class of property . . . . All real estate shall constitute one class . . . . *Such property as the legislature may by general law provide shall be exempt from taxation.*" (emphasis added). Beginning with *State ex rel. Atwood v. Wooster*,[114] the Washington Supreme Court has held the power to exempt to be plenary and complete in itself, subject only to equal protection limitations.

Recent decisions concerning real property such as *Pacific Northwest Annual Conference of the United Methodist Church v. Walla Walla County*[115] (exemption of parsonages) and *Yakima First Baptist Homes v. Gray*[116] (exemption of certain homes for the aged and infirm) reaffirm the broad power of the legislature to classify property for exemption. In *Snow's Mobile Homes, Inc. v. Morgan*,[117] dealers' inventories were exempted from an ad valorem tax otherwise imposed on mobile homes. Some dealers had listed their mobile home inventories on the tax roles prior to the effective date of the exemption and were assessed for property taxes. The court never questioned the propriety of exempting a particular class of mobile homes from property taxation. Instead, it invoked the uniformity clause to find that the exemption operated retroactively to eliminate the arbitrary incidental subclassification of dealers into two groups, those fortuitously listing their mobile homes for taxation and those not, concluding *no dealers* need pay the ad valorem taxes on their inventory. Finally, *Libby, McNeill & Libby v. Ivarson*,[118] citing the substantial changes in the law of exemption fostered by amendment 14, sustained a narrow class exemption from personal property taxes for fish and fish products fit for human consumption stored in the state and

114. 163 Wash. 659, 2 P.2d 653 (1931).
115. 82 Wash. 2d 138, 508 P.2d 1361 (1973).
116. 82 Wash. 2d 295, 510 P.2d 243 (1973).
117. 80 Wash. 2d 283, 494 P.2d 216 (1972).
118. 19 Wash. 2d 723, 144 P.2d 258 (1943).

shipped out of the state on or before April thirtieth.

The cited cases demonstrate the court's approval of legislative decisions exempting various classes of property from taxation for a variety of legislative reasons: fiscal policy (to foster the storage of fish products in the state); the commercial status of the property owner (the mobile home dealers vs. users); and extrinsic criteria unrelated to the nature of the property (shipment out of state prior to assessment day). In *United Methodist Church* and *Yakima First Baptist Homes,* real estate was exempted; real estate which is constitutionally mandated to constitute one class. By contrast, the court had held, even in the absence of an analogous express constitutional mandate declaring net income one class, that considerations such as policy grounds (ability to pay), the commercial or social status of the owner (corporations vs. partnerships; married vs. single), and criteria unrelated to the nature of the property (quantity) are impermissible bases for exempting sub-classes of net income. In so holding, the court has never discussed the rationality of legislative decisions exempting net income on those bases.

VI. Conclusion

As a result of the divergent paths taken in the net income tax cases and the excise tax cases, the Washington Supreme Court has created two sets of rules for classifying the various subjects of state tax laws: the classification of property is subject to the uniformity clause of the state constitution; the classification of all other subjects is governed by the privileges and immunities clause.[119] The time is now at hand for the court to reexamine its position on the relationship of uniformity and classification, especially since the United States Supreme Court decisions which provided the logical underpinnings of several of the restrictive uniformity classification requirements have been overruled, limited to their special facts, or reinterpreted to be inconsistent with

119. The anachronistic and stagnant nature of that analysis compels Washington legislators to characterize most revenue proposals as excises. Those uniformity principles of classification which could be justified by analogy to equal protection doctrine current when the uniformity concepts were developing would now be invalid as principles of equal protection. *See* text accompanying note 64 *supra.* The uniformity principles of classification, however, have not been modified since the income tax cases, primarily because of the court's success in characterizing virtually all other new taxes as excises. As a result, each fresh attack on a new tax helped refine, modernize, and, in fact, liberalize the taxation analysis under the equal protection clause. Each new opinion resolving the validity of an excise tax brought equal protection criteria into sharper resolution, while the classification rules of the uniformity clause remained restrictive and unchanging.

the Washington court's interpretations.

The analytical approach that the court should adopt for all tax measures is two-tiered:

First, test the legislative classifications according to the most current federal equal protection and state privileges and immunities criteria;

Second, determine whether the tax imposed falls uniformly upon each legislatively created class of property subject to the tax.

It may be argued that the court's uniformity doctrine is now so integrally a part of amendment 14 that the court should not, on grounds of *stare decisis,* reconsider *Culliton v. Chase* and its progeny. But surely no rule of law is entitled to continued support unless grounded in persuasive analysis or sound underlying principles. The court has previously reversed its own interpretation of the state constitution in the area of taxation and revenue. In an eloquent and expansive unanimous decision in *State ex rel. Finance Commission v. Martin,*[120] Justice Hale stated:

> Time is both enemy and friend to a good idea. Thoughts held clearly in the beginning may obscure and lose their outline as the present merges with the future and becomes the past again. Conversely, concepts vague in their beginnings may sharpen in form and shape by the passing of years and the force of events. So it is and was with *Gruen v. State Tax Comm.*, 35 Wn.2d 1, 211 P.2d 651. Rising sharply in bold relief from the mists of state financing, this case declared a brave new doctrine in 1949; 14 years later the march of time and events has left us wondering.[121]

The court decided *Martin* in 1963, overruling *Gruen*'s definition of state debt under article 8, sections 1 & 3, of the state constitution. Justice Hale accepted without hesitation the notion that an erroneous interpretation of the constitution could be corrected, and in an extensive discussion justifying the prospective application of the court's new interpretation stated:

> To be uniformly applied, and equally administered, the rules of law should be both just and adaptable to the society they govern. A bad law uniformly administered is equally unjust and uniformly bad. If a rule laid down by the courts proves in time to be a bad one, applying the bad rule evenly does not provide equal justice for all. It may be equal, but it will not be justice. And courts are instituted among men to do justice be-

120. 52 Wash. 2d 645, 384 P.2d 833 (1963) (two justices specially concurring).
121. *Id.* at 646, 384 P.2d at 834.

> tween them, and between men and their government. So, to do justice, courts have devised a means of getting rid of bad rules, yet, at the same time, preserving stare decisis. Rules of law, like governments, should not be changed for light or transient causes; but, when time and events prove the need for a change, changed they must be.
>
> If rights have vested under a faulty rule, *or a constitution misinterpreted,* or a statute misconstrued, or where, as here, subsequent events demonstrate a ruling to be, in error, prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected.[122]

It can be argued that *Martin* is distinguishable in that it did not overrule a holding as venerable and oft cited as *Culliton* and its progeny. That argument is specious, however, because even though the court had not extensively relied on the precise holding in *Gruen* which they overruled in *Martin,*[123] the legislature had done so steadfastly. In fact, when *Martin* was decided over 350 million dollars in bonds issued in reliance on *Gruen* were outstanding[124] and depended for their validity on that decision; hence, the strong incentive for the court to overrule *Gruen* prospectively. In contrast, *Culliton* has been relied upon not to *enable* legislation, but to *prevent* it. Correcting the erroneous holding in *Culliton* will prejudice no existing rights or duties and cannot have retrospective effect, as a net income tax will require new legislation.

The only possible persuasive reason for not adopting our suggested analysis is some reasoned explanation for the court's continued dichotomized treatment of property and excise taxation in the face of the history and language of amendment 14. None is explicitly stated in the court's opinions, but there are several possible explanations.

First, the court may simply have carried into amendment 14 the old criteria of uniformity and equality from the original constitution and their mandatory application to all property. Justice Mitchell stated in his concurring opinion in *Culliton v. Chase*: "This principle of uniformity in taxation has been preserved at all times in our constitution, as appears from article VII, §2, of the constitution, and from the fourteenth amendment."[125] The

122. *Id.* at 665-66, 384 P.2d at 845 (emphasis added).
123. *Id.* at 662-63, 384 P.2d at 843.
124. *Id.* at 650-51, 384 P.2d at 837.
125. 174 Wash. at 382, 25 P.2d at 85.

original constitutional provisions, as discussed earlier applied only to property taxation, probably because the framers had not considered other sources of revenue. Thus, it was *essential* to distinguish capitation and inheritance taxes, which the court validated, from property taxes because those original provisions mandated that property taxes be uniform and equal on all property. There were no express constituional guidelines for taxes levied on other subjects such as activities or privileges.

Justice Mitchell's statement relating uniformity under the original constitution to the uniformity clause was not a reasoned conclusion. As we have demonstrated, amendment 14 dramatically changed the old constitutional tax provisions and, by its express language, applied to "all taxes" and permitted the classification of property. That amendment did not simply carry forward the old dichotomy between property taxes and all other taxes; the significance and meaning of its language was—and is—deserving of a more detailed analysis.

Second, the court may have been influenced by the very existence of a clause requiring uniformity of taxation only upon classes of property, and may have interpreted the existence of such a clause to indicate that the classification of property was to be treated differently. Or the court may have somehow construed the phrase "all taxes shall be uniform upon the same class of property" to subordinate the issue of classification to the issue of uniformity; or attached some special significance to the concept of the "same class." Those notions would explain its refusal to allow subclassification of generic types of property such as net income. Neither of those constructions is suggested by the language of the clause nor the various opinions. The issues of uniformity and classification are distinct. The word "uniform" refers to the taxes imposed, while the word "class" requires a determination of whether the legislative distinctions result in reasonable classifications of property.

One can argue that if the issue of uniformity is subordinated to or analyzed only *after* an analysis of the propriety of legislative classifications, uniformity will be a dead letter if the legislature can create sufficiently precise classes. That argument fails for two reasons: first, any classifications of property or otherwise must satisfy equal protection criteria; and second, amendment 14 mandates that real estate remain one class of property, thereby retaining the full vitality of uniformity principles in that area of taxation. The very fact that the framers of amendment 14 explicitly characterized real estate as a single class suggests they sought

to limit the legislature's power to classify only with respect to this one generic type of property.

Finally, the majority of the court may simply have substituted their personal judgments and philosophies for those of the legislature in their evaluation of the income tax laws, as the following quotes suggest:

Justice Holcomb in *Culliton v. Chase*:

> It needs no argument to demonstrate that the income taxes here levied are wholly lacking in uniformity.[126]

Justice Mitchell in *Culliton*:

> It might be reasonable, under the amendment, to provide that, for taxation purposes, horses be put in a class and bear a rate of taxation different from that of lands devoted to reforestration; but not so with a band of one thousand horses compared with another band of two thousand horses . . . .[127]

Justice Steinert dissenting in *State ex rel. Stiner v. Yelle:*

> As it now stands, the act presents a classification that is unreasonable and arbitrary, discriminatory in its nature, and taking no thought of relative ability to pay, or the relative enjoyment of governmental privileges conferred. . . . I do not believe that either the farmer or the professional man should be exempt from the occupation tax, and certainly not the landlord, the mortgage-loan company, or even the salaried person.[128]

Articulating his concept of the court's power to review legislative acts, Justice Steinert in his vigorous dissent from the permissive interpretation of amendment 14 in *State ex rel. Mason County Logging Co. v. Wiley*:

> It is not the legislative function to interpret the constitution, and certainly the legislature cannot, by passing a statute, thereby declare or determine that it is constitutional; nor can it say that the constitution is to be interpreted according to what the legislature meant in a particular legislative act. The legislature may express its own intent, but whether its act embodying that intent meets the requirements of the constitution, is wholly a judicial question and rests with the courts only.
>
> The constitution is not so elastic or so anemic that it must bend or bow to the will or direction of the legislature. The constitution is the fundamental law of the land, absolute, permanent

126. *Id.* at 378, 25 P.2d at 83.
127. *Id.* at 382, 25 P.2d at 85.
128. 174 Wash. at 422-23, 25 P.2d at 98.

> and unalterable, except by the authority from which it emanates. It has a stability intended to protect against fluctuations of popular opinion or of legislative action.[129]

In context, Justice Steinert's comments demonstrate even more dramatically that he viewed the court's perception of the constitution, rather than the constitution itself, as sacrosanct. To emphasize and clarify the effect of Justice Steinert's views, we juxtapose the comments of the *Wiley* majority concerning the court's role in reviewing the legislative function:

> The act before us is the well-considered and deliberate result of the consideration given to the problem by the legislature. It comes before us with every intendment in its favor, and nothing less than a certain and unequivocal violation of some constitutional inhibition can warrant us in holding it inoperative.[130]

And a recent statement by the court evincing judicial deference to the legislative function:

> We are not a super legislature. "This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."[131]

None of these possible explanations for the court's attempt to distinguish rules of classification for property taxes from rules for excise taxes has a rational basis in the state's constitution. No other explanation is apparent; property possesses no obvious unique trait which would explain its variant treatment. Therefore, the Washington Supreme Court should abandon the property versus excise dichotomy, and apply one consistent and coherent set of classification principles in analyzing all taxes.

---

129. 177 Wash. 65, 76-77, 31 P.2d 539, 544 (1934).

130. *Id.* at 71, 31 P.2d at 542.

131. Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n, 83 Wash. 2d 523, 528, 520 P.2d 162, 166 (1974) (quoting United States v. Butler, 297 U.S. 1, 63 (1936)).