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ARE THE GASOLINE, CIGARETTE, AND SALES TAXES UNCONSTITUTIONAL?

JOHN B. SHOLLEY

The revenue system of this state is based in large part upon three taxes: sales tax, gasoline tax, and cigarette tax. These three taxes respectively produce about \$15,000,000, \$16,000,000 and \$2,000,000 per annum, or a total of \$33,000,000, which is about 43% of the total income of the state government.¹ The sales and cigarette taxes have been in effect since 1935, and the present gasoline tax since 1933.

It is indeed rather surprising to discover that there is a strong possibility that all three of these taxes are unconstitutional in their present statutory forms. But this appears to be the effect of a recent decision of the state supreme court. The case referred to, *State v. Inland Empire Refineries*,² involved the validity of a 1939 statute imposing an excise tax of one-fourth cent per gallon upon the distribution of petroleum products other than motor fuel, lubricants, and medicants.³ The statute was held unconstitutional in its entirety upon three independent grounds. First, the discrimination against vendors and users of fuel oil and in favor of vendors and users of other fuels such as coal or wood, etc. was held to violate the equal protection clause of the United States Constitution and the equal privileges clause of the state constitution. Second, the exemptions from the tax of fuel oil sold to vessels engaged in foreign commerce, of that sold to a gas company and used by it to manufacture gas for distribution to the public, and of that refined within the state, were held to violate the same constitutional provision; and since these exemptions were deemed inseparable, the whole statute was thereby rendered invalid. Third, the provisions requiring distributors to secure a license, pay a fee, and file a surety bond, inasmuch as they applied to distributors who imported petroleum

¹ Tax Commission of State of Washington, Summary of Current Revenues and Expenditures for Year Ending March 31, 1940.

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

³ Wash. Laws 1939, c. 186; REM. REV. STAT. (Supp. 1939) §§ 8370-78a to 8370-80t. The act is entitled "Fuel Oil Tax" and it will usually be so designated in this paper.

products into the state and those who purchased from such importers, were held to impose an improper burden upon interstate commerce in contravention of the commerce clause of the Federal Constitution.

A dissent was filed by Chief Justice Blake, in which Mr. Justice Main concurred, in which he caustically declared that only one ground of attack upon the statute had a "semblance of validity," *i. e.*, the exemption of locally refined fuel oil; and he took the position that this exemption could be properly held inoperative under the broad severability clause in the statute.

Since the court has denied a petition for rehearing,⁴ it appears that the fate of the fuel oil tax is settled for the time being. It is the purpose of this article to examine the implications of this decision upon other tax statutes.

At the outset, one is confronted with the knotty problem of attempting to assay the importance of each of the three grounds of decision. Several alternatives are possible. Each ground might have been regarded as sufficient in itself to support the holding. But if so, why did not the court content itself with a reliance upon that one ground which seemed to it least open to doubt? Why unnecessarily decide important constitutional questions? A few years ago Chief Justice Hughes in dissent criticized his colleagues of the majority for doing just this.⁵

Again, it may be that the court was in so much doubt about each of the grounds that it felt it necessary to accumulate them to overcome the presumptions of constitutionality. If so, a statute suffering from only one—or possibly two—of the defects found in the fuel oil tax act might well be upheld. But this hypothesis would run counter to the proposition that courts should not wink at small violations of a constitution, for to do so would permit the legislature to whittle away constitutional guarantees little by little.⁶

Finally, two of the three grounds of decision might be deemed dicta unnecessary to the holding. But which two? That question could not be answered until the court is called upon in the future to decide a case similar to the fuel oil tax case in respect to one of the defects relied upon in the latter. It would then be free to depart from the ruling in that case on the ground that it was merely dictum. The United States

⁴ A petition for a writ of certiorari has been filed in the United States Supreme Court [(1936) 9 U. S. L. Week 3083] but the presence of a non-federal ground of decision makes its granting doubtful.

⁵ Railroad Retirement Board v. Alton R. Co., 295 U. S. 330, 374-5 (1935). Three weeks later, however, the Chief Justice himself was guilty of the same fault in *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

⁶ See 11 AM. JUR., Const. Law, §§ 88, 89, 95, for authorities in support of this proposition.

Supreme Court did just this in the Wagner Act cases.⁷ When counsel relied on the Guffey Act cases⁸ in support of their contention that the Wagner Act was being applied to situations beyond the reach of Congress' power to regulate interstate commerce, Chief Justice Hughes pointed out that the earlier decision had also been based upon a finding of improper delegation of legislative power and a violation of the due process clause.⁹

Thus the effect of a decision based upon multiple constitutional grounds must remain uncertain, and yet it cannot safely be disregarded. Hence throughout the following discussion it will be assumed that each of the three defects discovered in the fuel oil tax act was regarded by the court as in itself a sufficient basis for the decision that the act was unconstitutional in its entirety.

THE GASOLINE TAX AND THE COMMERCE CLAUSE

The gasoline tax act of 1933,¹⁰ which is that presently in effect, and the fuel oil tax act of 1939,¹¹ which was held unconstitutional in *State v. Inland Empire Refineries*, are strikingly similar in their provisions. Each lays an excise tax upon the "distributor" for each gallon of the respective petroleum products sold, distributed or used within the state.¹² "Distributor" is defined in essentially the same way.¹³ Under each statute a distributor must procure a license upon the payment of a filing fee of ten dollars, the filing of an application and the posting of a substantial bond to secure the payment of taxes and penalties to the state.¹⁴ Each distributor is required to report the extent of his taxable transactions each month, and his default results in the addition of a 10% penalty to his tax for such period.¹⁵ Acting as a distributor without obtaining a license is made "unlawful"¹⁶ and results in the addition of a 100% penalty to the tax.¹⁷ Violation of any provision of

⁷ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).

⁸ *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

⁹ 301 U. S. 1, 41. For a criticism of Chief Justice Hughes for adopting this method of dealing with awkward precedents, see the dissenting opinion in *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U. S. 453 (1938).

¹⁰ Wash. Laws 1933, c. 58, as amended by Wash. Laws 1939, c. 177; REM. REV. STAT. (Supp. 1939) §§ 8327-1 to 8327-27.

¹¹ Wash. Laws 1939, c. 186; REM. REV. STAT. (Supp. 1939) §§ 8370-78a to 8370-80t.

¹² Gasoline tax, REM. REV. STAT. (Supp. 1939) § 8327-5; fuel oil tax, REM. REV. STAT. (Supp. 1939) § 8370-78a.

¹³ The term includes a refiner or importer who sells or uses, etc., and anyone else who acquires a product in this state upon which no tax has been paid. Gasoline tax, REM. REV. STAT. (Supp. 1939) §§ 8327-1(c), 8327-5a; fuel oil tax, REM. REV. STAT. (Supp. 1939) § 8370-79a (a).

¹⁴ Gasoline tax, REM. REV. STAT. (Supp. 1939) § 8327-2; fuel oil tax, REM. REV. STAT. (Supp. 1939) 8370-80a. These two sections and the pairs cited in the next five notes are almost identical. In each the gasoline tax act is cited first.

¹⁵ REM. REV. STAT. (Supp. 1939) § 8327-7; *id.* § 8370-80d.

¹⁶ *Id.* § 8327-3; *id.* § 8370-80b.

¹⁷ *Id.* § 8327-8; *id.* § 8370-80e.

each act is ground for revocation of license¹⁸ and is made a gross misdemeanor punishable by a fine of not less than \$500 or imprisonment, or both.¹⁹ In short, for all essential purposes relevant to the commerce clause restriction upon state legislative power, the two statutes are identical.

If the fuel oil tax statute violates the constitutional immunity of interstate traders in petroleum products, then the gasoline tax act does the same thing to those same traders. A judicial declaration that by necessary implication brands one of the chief sources of state revenue for the past seven years as an illegal exaction is of sufficient importance to warrant critical examination.

On this point the majority opinion of the court, delivered by Mr. Justice Millard, is so brief that it can be quoted in full:

"Chapter 186, Laws of 1939, imposes a tax upon any person who acquires within the state petroleum products from any person importing same into the state, and upon any person who imports into the state and withdraws, sells, distributes, or in any manner uses the products within this state. The statute further requires such persons to pay a fee, file a surety bond, obtain a license, etc., as distributors. Those conditions constitute an unlawful burden on interstate commerce, hence unconstitutional."²⁰ [Citing Cases]

This passage is puzzling. Surely the court did not mean to declare that the imposition of a *tax* upon the distribution or use of imported petroleum products is an unconstitutional burden upon interstate commerce, because the first case cited²¹ squarely held that such a tax is not a forbidden burden, a holding that has been many times reaffirmed.²² Yet, if the passage quoted be taken to refer solely to the licensing and bonding provisions of the taxing statute, its relevance is not clearly apparent, for the principal case was an action by the state to recover the tax, not an action to punish the defendant for, or restrain him from, operating without a license.²³

¹⁸ *Id.* § 8327-14; *id.* § 8370-80k.

¹⁹ *Id.* § 8327-19; *id.* § 8370-80n.

²⁰ 3 Wn. (2d) 651, 663 (1940).

²¹ *Bowman v. Continental Oil Co.*, 256 U. S. 642 (1921).

²² The authorities in support of the type of tax involved are very numerous. *Sonneborn Bros. v. Keeling*, 262 U. S. 506 (1923) (upholding tax on sale in original package by importer); *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249 (1933) (upholding tax on importer's withdrawal from storage for use in operating train in interstate commerce); *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937) (upholding tax on use of imported article by importer); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940) (upholding sales tax on goods delivered to buyer in state from seller's place of business outside state).

²³ The two companion cases, *Great Northern R. Co. v. Cohn*, 3 Wn. (2d) 672, 101 P. (2d) 985 (1940), and *Weyerhaeuser Timber Co. v. Cohn*, 3 Wn. (2d) 730, 101 P. (2d) 984 (1940) were actions to secure declaratory judgments, *inter alia*, that the entire fuel oil tax statute was unconstitutional. In neither was there an attack on the licensing provisions as such.

There are two possible explanations for the inclusion of the quoted paragraph in the opinion. The first is that it is a dictum inserted as a warning to the state administration not to seek to enforce the licensing provisions of the gasoline tax act, and an invitation to taxpayers to resist such enforcement. This explanation accuses the court of violating one of the basic canons of judicial technique in constitutional litigation; *i. e.*, that a court will pass upon constitutional questions only when absolutely necessary.²⁴ The second explanation implies a somewhat less flagrant violation of the same canon; it is that the court regarded the invalidity of the licensing provisions as an additional ground for holding the tax unconstitutional. If so, the unexpressed link in the reasoning of the court must be the conclusion that the licensing provisions of the statute cannot be severed from the taxing provisions, and that both must stand or fall together.

Now this implied conclusion is of doubtful soundness. In the *Bowman* case²⁵ itself, the United States Supreme Court, although it held somewhat similar licensing provisions invalid and enjoined their enforcement, refused to enjoin the collection of the tax upon intrastate sales and uses of gasoline, holding that the statute was separable in this respect. Although it is true that that decision is not controlling upon a state court construing a similar state statute,²⁶ it is at least persuasive; and it would seem that the Washington court might well have set forth the reasons why it was not followed, particularly in view of the strongly worded severability clause in the fuel oil tax statute.²⁷ Furthermore, earlier decisions of the Washington court itself are inconsistent with the result tacitly reached in the instant case. Thus in *State v. McFarland*,²⁸ the court, in considering the validity of a statute providing for the inspection of hotels, declared that the act as a whole would not fall because of the presence of a provision imposing unconstitutional methods for the collection of inspection fees. In *Northern Cedar Co. v. French*,²⁹ the court refused to enjoin the enforcement of a statute providing for the licensing and regulation of commission merchants although the provisions in respect to the revocation of licenses

²⁴ See 16 C. J. S. 207-216 for an extensive citation of authorities. In *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 17, 33, 100 Pac. 179 (1909), the court refused to consider the constitutionality of statutory provisions which were not directly involved in the facts of the case.

²⁵ *Bowman v. Continental Oil Co.*, 256 U. S. 642 (1921).

²⁶ *Dorcy v. Kansas*, 264 U. S. 286 (1924).

²⁷ REM. REV. STAT. (Supp. 1939) § 8370-80s. The clause is quoted below at p. 235. The gasoline tax act contains the following severability clause: "If any section, part or provision of this act shall be adjudged to be invalid or unconstitutional such adjudication shall not affect the validity of the act as a whole, or any section, provision or part thereof not adjudged invalid or unconstitutional." REM. REV. STAT. (Supp. 1939) § 8327-24.

²⁸ 60 Wash. 98, 110 Pac. 792, 140 A. S. R. 909 (1910).

²⁹ 131 Wash. 394, 230 Pac. 837 (1924).

were found to be unconstitutional. The court phrased the rule as to severability of statutes as follows: "An entire act will fall only where the constitutional and unconstitutional provisions are so connected and interdependent in subject-matter, meaning and purpose that it cannot be believed that the legislature would have passed the one without the other, or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish any of the purposes of the legislature."³⁰ Surely it cannot be said that the licensing provisions in the fuel oil tax statute are so necessary that this test is met. Yet the supreme court has spoken and its last word is the law, and presumably, will be the law. Therefore, the licensing provisions of the gasoline tax act of 1933 are not severable, and the whole statute must fall.

But let not gasoline distributors rush gleefully into court to reap the fruits of *Inland Empire Refineries* case; but rather pause and consider, for the United States Supreme Court has the last word in all matters pertaining to the United States Constitution, and it would most certainly be called upon to speak were the state supreme court to apply its ruling in the fuel oil tax case to the gasoline tax. Not long ago, the supreme court of this state was reversed for a too zealous protection of interstate commerce from state regulation.³¹

What then would be the attitude of the United States Supreme Court toward the licensing provisions of the gasoline tax statute? A resort to past decisions does not reveal a clear cut answer, but the general tenor of the cases points definitely to the prediction that those provisions would be held valid.

Turning first to the authorities relied upon in the *Inland Empire Refineries* case in the passage quoted above, it will be found that only the first three are at all in point. The *Gwin, White & Prince*³² and *Paramount Pictures*³³ cases held that excise taxes measured by gross receipts from transactions in interstate commerce were invalid. The *Western Union*³⁴ case held invalid an annual corporate franchise tax measured by total assets within and without the taxing state. The *Graves*³⁵ case held invalid an excise tax upon gasoline withdrawn from

³⁰ *Id.* at 415. See also to much the same effect *State v. Walker*, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257 (1907); *State v. Bonham*, 93 Wash. 489, 161 Pac. 377 (1916). It is to be noted that the problem here under discussion is quite different from that presented by an invalid exemption in a taxing statute. As to the latter see p. 231 below.

³¹ *Kelly v. Washington*, 302 U. S. 1 (1937), reversing *State ex rel. Foss Co., Inc. v. Kelly*, 186 Wash. 589, 59 P. (2d) 373 (1936), which latter case had held a state statute providing for the inspection and regulation of small vessels invalid as a regulation of interstate commerce.

³² *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939).

³³ *Paramount Pictures Distributing Co. v. Henneford*, 184 Wash. 376, 51 P. (2d) 385 (1935).

³⁴ *Western Union Tel. Co. v. Kansas*, 216 U. S. 1 (1910).

³⁵ *Graves v. Texas Co.*, 298 U. S. 393 (1936).

storage for the purpose of delivery to an instrumentality of the United States. It is true that the first three cases cited³⁶ each held invalid statutes licensing persons engaged in interstate commerce, but in each case the license was conditioned upon the payment of an annual license fee imposed for revenue or prohibitive purposes. It was the exaction of the fee that was deemed the improper burden upon interstate commerce.

The question involved in these three cases is readily distinguishable from that raised by the fuel oil and gasoline tax statutes. The fee imposed by the latter two is a ten dollar "filing fee" to be paid at the time of application for a license. It is obviously not great enough to cover the cost of administering the licensing provisions of the acts, and would seem to fall within that class of "inspection fees" which may properly be imposed upon persons engaged in interstate commerce.³⁷ In any event, it is unthinkable that a court would regard such a petty requirement as so essential to the whole statute that it could not be severed.

The decision of the Washington court then is supported by none of the cases expressly relied upon. If it is sustainable at all, it must be upon the ground that the bonding and penalty provisions of the fuel oil tax statute—which, as has been pointed out, are almost identical with those of the gasoline tax statute—are improper burdens to cast upon those taxpayers who are engaged in interstate commerce. As to the bonding requirement, some support can be found for the decision in question in the case of *Di Santo v. Pennsylvania*,³⁸ wherein a statute licensing steamship ticket agents and requiring them to post a bond to protect their patrons was held to impose an improper burden upon persons engaged in foreign commerce. But the authority of this case has been greatly weakened, if not completely destroyed, by two subsequent decisions of the Supreme Court. In the first, *Hartford Accident & Indemnity Co. v. Illinois*,³⁹ a statute licensing persons selling farm produce on commission and requiring them to post bonds to protect their shippers was upheld despite a showing that most of the business done was interstate in character. In the second, *Milk Control Board v. Eisenberg Farm Products*,⁴⁰ a statute requiring milk buyers to pay a fixed minimum price and post a bond to protect the sellers was upheld when applied to a buyer who shipped all of his milk to another state. Under the gasoline and fuel oil tax acts the bond is for the protection of the tax claims of the state, claims which we have seen are

³⁶ *Bowman v. Continental Oil Co.*, 256 U. S. 642 (1921); *State v. Yetter*, 192 S. C. 1, 5 S. E. (2d) 291 (1939); *Crutcher v. Kentucky*, 141 U. S. 47 (1891).

³⁷ See *Great Northern R. Co. v. Washington*, 300 U. S. 154 (1937), for a discussion of the validity of such fees.

³⁸ 273 U. S. 34 (1927).

³⁹ 298 U. S. 155 (1936).

⁴⁰ 306 U. S. 346 (1939).

perfectly proper in themselves. If, as the Supreme Court has so recently held, a state has the power to require interstate traders to post bonds to protect the rights of private persons with whom they deal, it would certainly seem to follow that a state can protect its own just claims in the same way.

Are the penalty provisions of the gasoline and fuel oil tax statutes so drastic that they overpass the power of a state to regulate interstate traders? This very question, arising under similar provisions in an Iowa gasoline tax act, was presented to the Supreme Court in *Monamotor Oil Co. v. Johnson*.⁴¹ The court there found no constitutional objection to the imposition of civil and criminal pecuniary penalties for a failure to pay the required taxes, but it appeared to be in doubt as to the power of the state to prohibit further transaction of interstate business as a penalty for a tax delinquency.⁴² The latter provision was apparently regarded as severable from the rest of the statute,⁴³ a conclusion which seems inescapable there and in regard to the Washington statute as well.

Thus the reliance upon the commerce clause as a ground of decision in the *Inland Empire Refineries* case appears to have been the result of a mistaken reading of the Supreme Court decisions, and the gasoline tax is in all probability still valid despite the strong implication to the contrary found in the recent opinion of the state supreme court.

THE CIGARETTE TAX AND TAX DISCRIMINATIONS AMONG COMPETING PRODUCTS

In its search for new sources of revenue in 1935, the Washington legislature, taking its cue from Congress, hit upon the cigarette, a product very widely used and at the same time vulnerable because of the hold-over of old ideas that it is a luxury, unhealthful and faintly immoral. The original tax⁴⁴ of one cent per pack of twenty worked out so well that it was doubled in 1939.⁴⁵ This tax is a comparatively heavy one, amounting to about 11% of the retail price, and imposes a substantial annual burden upon users. Nevertheless, its validity has apparently never until now been questioned. But in light of the *Inland Empire Refineries* case, the constitutionality of the cigarette tax is in serious doubt.

⁴¹ 292 U. S. 86 (1934).

⁴² The trial court in this case had declared that the state has this power. *Monamotor Oil Co. v. Johnson*, 3 F. Supp. 189 at 202 (D. C. Iowa, 1933).

⁴³ For a similar holding in an analogous situation, see *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179 (1909), wherein the court upheld the validity of an order of the Commission and refused to pass on the validity of the statutory penalties provided for its violation.

⁴⁴ Wash. Laws 1935, c. 180, tit. XII.

⁴⁵ Wash. Laws 1939 c. 225, § 23, REM. REV. STAT. (Supp. 1939) §§ 8370-82 to 8370-95.

As the first ground of its decision in the fuel oil tax case, the court held that that tax violated the equal protection clause⁴⁶ of the United States Constitution and the equal privileges⁴⁷ clause of the state constitution. Mr. Justice Millard reasoned as follows:

"Fuel oil and solid fuels, such as coal, wood, sawdust and coke, together with the mechanical contrivances incidental to their use, such as oil burners, coal stokers and sawdust burners, are marketed in competition with each other . . . No reasonable ground exists for making a distinction between those who fall within the classification of distributors of fuel subject to tax and distributors of fuel not subject to tax. That is, a distributor of fuel oil is required to pay a tax of approximately 11 per cent for the privilege of distributing fuel oil, while there is no comparable tax upon the distributors of coal, wood, sawdust, coke, gas and electricity. All purchasers of fuel oil, as well as purchasers of coal, sawdust, wood and coke, are subjected to a compensating tax for the privilege of using in this state tangible personal property purchased at retail or produced or manufactured for commercial use. The result of the imposition of the fuel oil tax and the compensating tax is that users of fuel oil pay a tax of approximately 13 per cent upon the fuel consumed by them, while users of the other fuels pay only the compensating tax of 2 per cent . . . To impose the compensating tax upon all persons in this state for the privilege of using tangible personal property in the state, and then to single out a particular group (users of fuel oil) and impose an additional tax upon them for the same privilege, is indefensible on constitutional grounds. It is violative of the rule that reasonable ground must exist for making a distinction between those who fall within, and those excluded from, the classification for tax purposes. It is, we repeat, in defiance of the purpose of the privileges and immunities provision of the state constitution and contravenes the equal protection provision of the Federal Constitution."⁴⁸

These remarks could, with one qualification, be applied to the cigarette tax by substituting "cigarettes" for "fuel oil" and "cigars, pipes and tobacco" for "solid fuels." Even the percentages work out approximately the same. The one possible distinction lies in the fact that the distributors of cigarettes are in fact the distributors of the other forms of tobacco as well. How significant this distinction is, is hard to say. In any event, it could always be urged that wholesalers of cigarettes compete for the consumers' dimes with wholesalers of chew-

⁴⁶ "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST., AMEND. XIV, § 1.

⁴⁷ "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 equally belong to all citizens or corporations." WASH. CONST., ART. I, § 12.

⁴⁸ 3 Wn. (2d) 651, 657.

ing gum and candy. Who can say whether this competition is more or less real than that between liquid and solid fuel dealers? Who knows how many former cigarette smokers have, since 1935 or 1939, shifted to confectionery as a more economical avenue to nervous relaxation? To base the validity of a revenue classification upon the absence of competition is to invite dispute, confusion and uncertainty.

Furthermore, it will be noticed that the court put greater stress upon the discrimination among fuel users and apparently regarded this as the truly fatal defect in the statute. If so, the discrimination among tobacco users should be equally fatal to the cigarette tax. Indeed, it is more difficult to justify the latter discrimination than the former. Thus fuel oil users, by and large, are no doubt more affluent than the users of other fuels, hence better able to bear the burden of the tax; but just the reverse relation probably exists as between cigarette and cigar users.

No further example is needed to point out the very serious effect upon the state treasury if the rule applied in the *Inland Empire Refineries* case were invoked against other revenue statutes; and, if this decision represents a proper interpretation of the equal protection clause, similar disasters might befall the treasuries of all other states as well.

The danger of foreign repercussions is very remote, however, since it is almost inconceivable that the United States Supreme Court would subscribe to the interpretation placed on the Federal Constitution by the Washington court.⁴⁹ The former court has passed on similar cases and similar arguments on several occasions, and has invariably held that a tax classification based on *physical* differences between the articles taxed and those exempted does not deny the equal protection of the laws, whether or not such articles are sold in competition with each other.

In *Southwestern Oil Co. v. Texas*,⁵⁰ the Court upheld a special occupation tax upon wholesale dealers in petroleum products amounting to 2 per cent of the value of such products handled. No similar tax was levied on wholesalers of other goods. Thus the case is a strong authority in support of the type of statute held invalid in the *Inland Empire* case.

⁴⁹ The relevant decisions of the Supreme Court are discussed in Sholley, *Equal Protection in Tax Legislation* (1938) 24 VA. L. REV. 229, 388, (1938) 5 Sel. Essays Const. Law 39. The present attitude of the Court is that "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U. S. 83 (1940).

⁵⁰ 217 U. S. 114 (1910).

The leading case on the point is *Heisler v. Thomas Colliery Co.*,⁵¹ decided in 1922. A Pennsylvania statute imposed an excise tax upon the business of preparing anthracite coal for market equal to 1½ per cent of the value of the coal so prepared. No comparable burden was placed upon the competing producers of bituminous coal, and the tax was attacked under the equal protection clause because of this discrimination. This contention was answered by the Court as follows:

"The fact of competition may be accepted. Both coals, being compositions of carbon, are, of course, capable of combustion and may be used as fuel, but under different conditions and manifestations; and the difference determines a choice between them even as fuels. By disregarding that difference and the greater ones which exist, and by dwelling on competition alone, it is easy to erect an argument of strength against the taxation of one and not of the other. But this may not be done. The differences between them are a just basis for their different classification; and the differences are great and important. They differ even as fuels; they differ fundamentally in other particulars. Anthracite coal has no substantial use beyond a fuel; bituminous coal has other uses. Products of utility are obtained from it.* * * They are, therefore, incentives to industries that the State in natural policy might well hesitate to obstruct or burden."⁵²

The pertinence of these remarks to the fuel oil tax statute is obvious. The Washington court, in stressing the fact of competition and excluding other considerations, did what the Supreme Court said "may not be done."

The rule of the *Heisler* case has never been questioned, and since its decision, the validity of a tax classification based upon a physical difference has been taken for granted. Thus in 1934, in a case involving a Washington statute imposing a special sales tax of fifteen cents per pound on butter substitutes,⁵³ the validity of the discrimination in favor of butter and against oleomargarine was said to be so "obvious" that the point was not further discussed.⁵⁴

Moreover, the Supreme Court has many times sustained tax discriminations even among competing dealers in the same products where a difference in the methods of doing business, or in the ultimate aim of the enterprise, can be found. The best-known examples of the former group of cases are those sustaining the very heavy taxation of chain stores;⁵⁵ and a good example of the latter is the decision up-

⁵¹ 260 U. S. 245 (1922).

⁵² *Id.* at 256-7.

⁵³ REM. REV. STAT. § 8358-2.

⁵⁴ *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 43 (1934).

⁵⁵ *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527 (1931); *Fox v. Standard Oil Co.*, 294 U. S. 87 (1935); *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412 (1937). See *Benjamin Franklin Thrift Stores v. Hennessee*, 187 Wash. 472, 60 P. (2d) 86 (1936) for a similar holding.

holding a Seattle ordinance imposing an occupation tax upon privately owned electric utilities while exempting a vigorously competitive municipally owned electric power enterprise.⁵⁶ Thus it is clear that in the view of the United States Supreme Court a tax legislature has great latitude in the matter of classification for tax purposes, a latitude which is not curtailed by the presence of competition between those taxed and those exempted; and it is equally clear that the Washington court fell into error in holding that the equal protection clause forbade the discrimination among fuel dealers and users resulting from the fuel oil tax.

But it will be recalled that the holding on this point in the *Inland Empire* case was also based upon a violation of the equal privileges clause of the state constitution, a ruling not subject to review by the United States Supreme Court, since the highest court in a state has the last word on the interpretation of that state's constitution. Does this reliance on the state constitution mean that the decision is based upon an independent and alternative ground which is not bound up in the—to put it mildly—very questionable interpretation of the equal protection clause? Or does the court mean that the privileges and immunities clause of the state constitution is violated *because* the equal protection clause is violated?

The fact that the two clauses are coupled together throughout the opinion points to the second hypothesis. As the court said in the course of its opinion upholding the gasoline tax of 1921 against an attack based upon the same two constitutional provisions, "We have not deemed it necessary to discuss separately appellant's claims of right under the state and Federal constitutions, being of the opinion that the reason and the result to be reached would necessarily be the same, in view of the manifest identity in substance of the rights guaranteed by the respective provisions thereof."⁵⁷ The adherence to this view by the Washington court is shown by its custom in recent cases involving both clauses, of relying as authority upon its own decisions, those of the United States Supreme Court, and those of other state courts, rather indiscriminately.⁵⁸ If this hypothesis as to the court's attitude

⁵⁶ Puget Sound Power & L. Co. v. Seattle, 291 U. S. 619 (1934).

⁵⁷ State v. Hart, 125 Wash. 520, 525-6, 217 Pac. 45 (1923). See also State v. Pitney, 79 Wash. 608, 610, 140 Pac. 918, Ann. Cas. 1916A, 209 (1914), for a similar statement. Mr. Justice Holcomb apparently did not agree with this proposition. See his concurring opinion in State *ex rel.* Bacich v. Huse, 187 Wash. 75, 87, 59 P. (2d) 1101 (1936).

⁵⁸ See, *e. g.*, Puget Sound Power & L. Co. v. Seattle, 172 Wash. 668, 21 P. (2d) 727 (1933); Supply Laundry Co. v. Jenner, 178 Wash. 72, 34 P. (2d) 363 (1934); Morrow v. Henneford, 182 Wash. 625, 47 P. (2d) 1016 (1935); Benjamin Franklin Thrift Stores v. Henneford, 187 Wash. 472, 60 P. (2d) 86 (1936). Contrast the approach where the clause requiring uniformity in property taxation (WASH. CONST., AMEND. XIV) is involved. Culliton v. Chase, 174 Wash. 363, 25 P. (2d) 81 (1933).

turns out to be correct, the cigarette tax is in no great danger, for it cannot be assumed that the Washington court will persist in applying its peculiar interpretation of the equal protection clause in the face of authoritative decisions to the contrary.

If, however, the court is prepared to strike out on a new tack and take the position that the equal privileges clause of the state constitution imposes greater limitations upon legislative action than does the equal protection clause, the cigarette tax is of more doubtful validity. But even in this event that tax cannot be regarded as doomed. As against the strong language and clear analogy of the fuel oil tax case, there can be set up equally strong language and clear analogies in numerous earlier Washington cases. It is true that the last word of the supreme court is the law usually, but will the court take a second step away from the path trod by its predecessors, a path not expressly repudiated? Will not rather the customary potency of the doctrine of *stare decisis*, reinforced in this instance by the practical necessities of the state treasury, prevail despite a temporary aberration?

Therefore, let us turn to the prior interpretations of the equal privileges clause. Insofar as the *language* of the court is significant, the prevailing attitude of the court has heretofore been that of great reluctance to substitute its ideas of the reasonableness of a tax classification for those of the legislature. In 1909 the court, in passing upon the validity of a statute exempting peddlers of certain articles from a tax falling on other peddlers, said:

“As to the cogency or propriety of either the regulations made, or of the importance of the distinctions, as we have so often said, the courts have little concern. Those subjects rest with the legislature, and only when the court, in the exercise of the utmost deference toward that other branch of the government, is compelled to say that no one in the exercise of human reason and discretion could honestly reach a conclusion that distinctions exist having any relation to the purpose and policy of the legislation, can it deny its validity.”

“The legislature having exempted from the operation of this law peddlers of agricultural and farm products, and vendors of books, periodicals, and newspapers, thus placing them in a different class from other peddlers, we do not think it can be said that such a classification is wholly without reason, and foreign to all legitimate purpose of the legislation. Reasons quite satisfactory to some minds could be advanced for exempting peddlers of farm products from a license law, and the same can be said of vendors of books, periodicals, and newspapers; while on the other hand, there may be room for argument to the contrary. We refer to reasons and arguments relating to some legitimate purpose of the law. The very fact that there is room for honest difference of opinion in this respect shows that it is a question of policy, and not of power

in the legislature to pass the law."⁵⁹

In 1923 the court declared that in passing upon the validity of a tax classification alleged to be arbitrary, "the courts will not enter upon any very exacting inquiry."⁶⁰ Ten years later in a case attacking the validity of the business and occupation tax, the court said:

"This being an excise tax, the legislature has very broad power, and we cannot interfere with that power except for arbitrary action, clear abuse, or constructive fraud appearing on the face of the act or from facts of which we may take judicial knowledge."⁶¹

Obviously, the decision in the *Inland Empire Refineries* case reflects a judicial attitude inconsistent with that expressed in these passages. Moreover, that decision is equally inconsistent with the actual holdings in the earlier cases.

The previous decisions of the Washington court did not impose any serious limitation upon the legislative power to classify for the purpose of *excise taxation*. Cases involving *regulatory statutes*⁶² and *property taxes*⁶³ will not be considered because more rigid limitations upon the power to classify are there applied. Attention will be further confined to cases where competition existed between those taxed and those exempted, since that feature was apparently deemed controlling in the *Inland Empire* case.

⁵⁹ *McKnight v. Hodge*, 55 Wash. 289, 294-5, 104 Pac. 504, 40 L. R. A. (N. S.) 1207 (1909), per Parker, J. The quotation is from *State v. Evans*, 130 Wis. 381, 385, 110 N. W. 241 (1907).

⁶⁰ *Town of Sumner v. Ward*, 126 Wash. 75, 78, 217 Pac. 502 (1923), per Fullerton, J. The court also quoted the language from the Wisconsin case, *supra*, note 59.

⁶¹ *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 407, 25 P. (2d) 91 (1933), per Tolman, J. For other statements to much the same effect, see *State ex rel. Scott v. Superior Court*, 173 Wash. 547, 551, 24 P. (2d) 87 (1933), per Main, J.; *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P. (2d) 1101 (1936), per Steinert, J.

⁶² The court has declared that a classification valid in a revenue measure may be invalid in a police measure. *In re Camp*, 38 Wash. 393, 80 Pac. 547 (1905); *City of Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, 21 L. R. A. (N. S.) 263 (1909); *Town of Sumner v. Ward*, 126 Wash. 75, 217 Pac. 502 (1923). Cf. *Pearson v. Seattle*, 199 Wash. 217, 90 P. (2d) 1020 (1939). The United States Supreme Court has taken the same position. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902); *Madden v. Kentucky*, 309 U. S. 83 (1940). The case most strongly relied upon in the instant case, *State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P. (2d) 1101 (1936), involved a discriminatory *regulation*. A statute of 1935 forbade the use of gill nets in fishing on Puget Sound by any person except one who had held a gill netter's license in 1932 or 1933. This classification was held arbitrary.

⁶³ The constitutional requirement that property taxes be "uniform" (WASH. CONST., AMEND. XIV) is held to limit rather narrowly the legislative power to classify. *Culliton v. Chase*, 174 Wash. 363, 25 P. (2d) 81 (1933); *Jensen v. Henneford*, 185 Wash. 209, 53 P. (2d) 607 (1936). The distinction made in the text above is emphasized in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P. (2d) 91 (1933); *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 34 P. (2d) 363 (1934); and *Morrow v. Henneford*, 182 Wash. 625, 47 P. (2d) 1016 (1935).

Differences in the methods employed in selling the same article have, with a single exception, been held proper bases for classification. Thus peddlers can be subjected to special taxes not falling on other merchants,⁶⁴ and similarly as to auctioneers,⁶⁵ operators of "medicine shows",⁶⁶ and merchants using trading stamps as an inducement to custom.⁶⁷ The exception mentioned, *Seattle v. Dencker*,⁶⁸ is a decision that a city ordinance imposing a license fee upon automatic vending machines violated the equal privileges clause of the state constitution. Apparently the court took the position that a tax classification between persons selling the same article can be sustained only by a showing that the activities of the burdened group are somehow inimical to the public welfare, and thus subject to special regulation or prohibition. As we have seen, this view is inconsistent with the position of the United States Supreme Court and with later decisions of the court of this state.

In 1936 the Washington court held, in *Benjamin Franklin Thrift Stores v. Henneford*,⁶⁹ that an occupation tax could be levied upon the operation of a warehouse serving a "group" of retail stores under the same ownership, although no tax was laid upon the operation of a warehouse to serve a single store. It was held, following the lead of the United States Supreme Court,⁷⁰ that the differences in the method of conducting the business justified the separate classification of chain stores. There was no discussion whatever of the harmful effect, if any, of chain stores.⁷¹

The only prior case other than that of *Dencker* which held an excise tax invalid because of its discrimination between competing business enterprises was *Aberdeen Savings & Loan Association v. Chase*,⁷² wherein it was held that a special net income tax cannot be levied upon private banking corporations where they are in competition with untaxed individuals and partnerships. The authority of this case on the question under discussion has been weakened by two later decisions,

⁶⁴ *In re Garfinkle*, 37 Wash. 650, 80 Pac. 188 (1905); *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504, 40 L. R. A. (n. s.) 1207 (1909); *Town of Sumner v. Ward*, 126 Wash. 75, 217 Pac. 502 (1923).

⁶⁵ *Stull v. DeMattos*, 23 Wash. 71, 62 Pac. 451 (1900).

⁶⁶ *Walla Walla v. Ferdon*, 21 Wash. 308, 57 Pac. 796 (1899).

⁶⁷ *Fleetwood v. Reed*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205 (1899); *Sperry & Hutchinson Co. v. Tacoma*, 68 Wash. 254, 122 Pac. 1060 (1912); *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209 (1914) (prohibitory fee), *aff'd*. 240 U. S. 387 (1916).

⁶⁸ 58 Wash. 501, 108 Pac. 1086, 28 L. R. A. (n. s.) 446 (1910).

⁶⁹ 187 Wash. 472, 60 P. (2d) 86 (1936).

⁷⁰ See the cases cited in note 55 *supra*.

⁷¹ The *Dencker* case was expressly distinguished, and inferentially questioned, in *Austin v. Seattle*, 176 Wash. 654, 30 P. (2d) 646 (1934).

⁷² 157 Wash. 351, 289 Pac. 536, 290 Pac. 697, 71 A. L. R. 232 (1930). This decision was based upon the equal protection clause, following *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 (1928).

however. In *Puget Sound Power & Light Co. v. Seattle*,⁷³ a special gross receipts tax upon a private electric power corporation was upheld despite the exemption of a directly competing publicly owned corporation. And in *Petroleum Navigation Co. v. Henneford*,⁷⁴ holding invalid a general net income tax upon all private corporations on the ground that it violated the uniformity requirement in respect to *property* taxes, the court cited the *Aberdeen* case as a controlling decision, which indicates that the tax held invalid in the earlier case would today be classified as a property rather than an excise tax. If so, the *Aberdeen* case would lend little support to an attack upon an excise tax such as the fuel oil or cigarette tax. In any event, both the *Dencker* and *Aberdeen* cases are readily distinguishable from a case involving a classification based upon a physical difference in the article sold.

Until the instant case, the Washington court had never held invalid a tax classification based upon differences in the article sold or services rendered. Peddlers can be classified according to the goods they sell.⁷⁵ A special tax can be laid upon operators of "jitney busses" not levied upon competing transportation services.⁷⁶ A classification drawn between persons making chattel or salary loans and commercial bankers is valid.⁷⁷

A statutory classification closely analogous to that arising from the fuel oil tax statute was before the court in *Morrow v. Henneford*.⁷⁸ This case was an attack upon the validity of the general sales tax act of 1935,⁷⁹ and one of the grounds was the contention that the exemption of sales of milk, raw fruits and vegetables,⁸⁰ etc., violated the equal protection and equal privileges clauses. The court evidently did not regard this as a very weighty contention as it deemed it a sufficient answer merely to quote the following general language of the Supreme Court:

"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 consideration of dif-

⁷³ 172 Wash. 668, 21 P. (2d) 727 (1933), *aff'd.*, 291 U. S. 619 (1934).

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

⁷⁵ *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504, 40 L. R. A. (n. s.) 1207 (1909) (peddlers of farm products, books, newspapers, and periodicals exempt); *Town of Sumner v. Ward*, 126 Wash. 75, 217 Pac. 502 (1923) (peddlers of specified household articles taxed).

⁷⁶ *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18 (1917).

⁷⁷ *Austin v. Seattle*, 176 Wash. 654, 30 P. (2d) 646 (1934).

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

⁷⁹ Wash. Laws 1935, c. 180, tit. III.

⁸⁰ *Id.* § 19 (g).

ference or policy, there is no denial of the equal protection of the law'.⁸¹

If a tax discrimination against the producers, vendors, and users of canned milk, fruit, and vegetables is valid, why is not a similar discrimination in respect to fuel oil? The opinion in the *Inland Empire Refineries* case does not tell us; it simply ignores all prior decisions which would be difficult, if not impossible, to reconcile. The only case cited in support of the holding on the point under consideration is *Pearson v. Seattle*,⁸² decided in 1939. But this case does not support the proposition for which it is cited, and is readily distinguishable from the cases discussed above. It involved a municipal ordinance imposing an annual license fee upon dealers in solid fuels which returned a sum greatly in excess of the cost of inspection. Because the ordinance recited that it was a police measure, the court refused to treat it as a revenue measure and applied the stricter rules in respect to permissible classifications.⁸³ The opinion intimates that if it had been labelled as a tax, the ordinance would have been upheld despite the discrimination in favor of liquid fuel dealers.

The present standing as authority of *Morrow v. Henneford* and the other cases upholding tax classifications is in doubt. Presumably, the court did not intend to overrule them, yet many of them cannot be reconciled with the decision in the fuel oil tax case. Would a cigarette dealer be well-advised to resist collection of the state cigarette tax? The last opinion of the supreme court indicates that he would, but one has a strong feeling that if the case came before it, the court would re-discover those older cases as precedents to support the cigarette tax. The existence in good standing of inconsistent precedents may be very confusing to legislators and attorneys, but it must often be a comfort to judges.

THE SALES TAX AND THE FATAL EFFECT OF INVALID EXEMPTIONS IN A TAX STATUTE

As we have seen, the sales tax act of 1935 exempted certain articles from its provisions.⁸⁴ Many of the exemptions were abolished in 1939,⁸⁵ but that protecting newspapers was retained.⁸⁶ The loss of revenue resulting from this legislative generosity cannot be great; and whether the sale of newspapers is to be taxed or not would seem to be a matter

⁸¹ 182 Wash. 625, 47 P. (2d) 1016 (1935). The quotation is from *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 573 (1910).

⁸² 199 Wash. 217, 90 P. (2d) 1020 (1939). Justices Main, Blake, and Geraghty dissented.

⁸³ See note 62 *supra*. The court cited and quoted from the first two cases there cited.

⁸⁴ Wash. Laws 1935, c. 180, tit. III, § 19.

⁸⁵ Wash. Laws 1939, c. 225, § 9. The act as amended appears in *REM. REV. STAT.* (Supp. 1939) §§ 8370-16 to 8370-30.

⁸⁶ *REM. REV. STAT.* (Supp. 1939) § 8370-19 (c).

of no vital concern to anyone, except possibly their publishers. Yet a fairly plausible argument can be built upon the *Inland Empire Refineries* case to the effect that this single exemption invalidates the entire sales tax.

As a third ground for holding the fuel oil tax unconstitutional, the court relied upon the presence of three invalid and inseparable exemptions to that tax. These were the sale of petroleum products refined in this state, the sale of fuel oil to vessels engaged in foreign commerce, and the sale of such oil as was converted into illuminating gas by a public service company distributing the latter product to the public.⁸⁷

First, let us consider the reasoning which led the court to hold that each of these exemptions was unconstitutional. As to the one first mentioned, there was no serious contention to the contrary.⁸⁸ It has long been well settled that a state cannot impose a discriminatory tax upon the sale of imported goods *as such*,⁸⁹ and, of course, the exemption of goods produced within the taxing state has precisely the same effect, and is equally within the implied prohibition of the commerce clause. On this point the conclusion of the court is not open to question.

The second exemption was held invalid on the grounds that there was no reasonable basis for discrimination between foreign carriers by water and foreign carriers by rail and highway, and that the commerce clause forbids such discriminations. The latter ground is a novel one which appears to be unsupported by reason⁹⁰ or authority,⁹¹ and which can be dismissed almost as curtly as it was announced,⁹² for this is a point on which the United States Supreme Court has jurisdic-

⁸⁷ REM. REV. STAT. (Supp. 1939) § 8370-80m.

⁸⁸ The principal case was an action by the state to collect the tax from a domestic refinery. The state contended that the exemption was invalid, hence ineffective, and that the general taxing provision applied.

⁸⁹ *Welton v. Missouri*, 91 U. S. 275 (1876); *Walling v. Michigan*, 116 U. S. 446 (1886); *Hale v. Bimco Trading, Inc.*, 306 U. S. 375 (1939).

⁹⁰ A little reflection will disclose the practical undesirability of the announced constitutional rule, for its adoption would to a great extent destroy all legislative power of classification. For example, the special tax on oleomargarine (see note 54 *supra*) would be invalid because of the discriminatory effect upon extrastate producers of oleomargarine as compared with extrastate producers of butter, and the exemption of newspapers from the sales tax mentioned above would fall because of the discrimination against extrastate publishers of magazines in favor of extrastate publishers of newspapers.

⁹¹ On this point the court merely cites a group of Supreme Court cases, most of which declare that a state cannot discriminate against any form of foreign or interstate commerce in favor of intrastate commerce, and none of which supports the proposition for which it was cited.

⁹² The opinion on this point is as follows: "By that exemption subdivision, our legislature attempted to grant a special privilege to foreign commerce by vessel and denied a like privilege to foreign commerce by railroad, by motor carrier, or by other conveyance. States have no such powers respecting interstate commerce." 3 Wn. (2d) 651, 659.

tion to prevent its future application, at least as the sole basis of decision. The former ground is supported by a dogmatic statement that the classification of carriers is without a reasonable basis and the citation of three Washington cases⁹³ presumably in support of the unquestioned rule that an arbitrary and unreasonable classification is forbidden by the equal protection and equal privileges clauses.

We must, however, dig a little deeper in order to ascertain, insofar as we can, the effect of this decision upon the validity of the exemption of newspapers from the sales tax. What "reasons" could the court see to justify the latter exemption that could not be seen in the case of the foreign carriers by vessel? It is difficult to discover any. If it be said that the distribution of newspapers may and should be promoted so that the citizenry will be informed on current affairs, it might also be said that the promotion of the flow of foreign commerce through the ports of this state will be conducive to the general welfare.⁹⁴ If the reply be that all foreign commerce was not being favored by the fuel oil tax exemption, it might equally be urged that all periodicals of news and opinion are not exempted from the sales tax, since the sale of magazines is taxed.

Furthermore, there is a cogent practical reason for limiting the fuel oil tax exemption to vessels engaged in foreign commerce. The operators of such vessels are in a position to avoid the tax by fueling outside the state, whereas the operators of locomotives and trucks, vehicles of more limited fuel storage capacity, cannot entirely escape, nor can the operators of vessels engaged in domestic commerce.⁹⁵ Very probably, then, the legislature believed that this exemption would lose little revenue to the state and might prevent a serious loss of business by local fuel oil merchants. The Supreme Court has found considerations of this nature to be reasonable.⁹⁶

⁹³ State *ex rel.* Bacich v. Huse, 187 Wash. 75, 59 P. (2d) 1101 (1936); Supply Laundry Co. v. Jenner, 178 Wash. 72, 34 P. (2d) 363 (1934); State v. Hart, 125 Wash. 520, 217 Pac. 45 (1923). The latter two cases upheld tax classifications; as to the first case, see note 62 *supra*.

⁹⁴ That such reasons will justify exemptions from taxation, see American Sugar Refining Co. v. Louisiana, 179 U. S. 89 (1900) (exemption of planters from tax on sugar refiners); Louisville Gas & Elec. Co. v. Coleman, 277 U. S. 32 (1928) (exemption of mortgages held by building and loan associations from recordation tax); Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285 (1935) (exemption of carriers of farm produce owned by the producers from motor carriers license fee).

⁹⁵ The failure to exempt vessels engaged in interstate commerce cannot be so readily explained. The court made no point of this, however, probably because the complainant was a railroad company engaged in foreign commerce.

⁹⁶ See Carmichael v. Southern Coal & Coke Co., 301 U. S. 495 (1937) (upholding exemption of employers of seven or less from unemployment compensation tax); Madden v. Kentucky, 309 U. S. 83 (1940) (upholding property tax on deposits in extrastate banks at five times the rate of tax on those in banks within state).

As to the third exemption in the fuel oil tax statute, that applying to oil sold to gas companies, the court was somewhat more explicit and considerably more vehement.⁹⁷ The vice was declared to be the discrimination against other public utility companies, which, as the court pointed out, transformed oil into electrical energy, "transportation," etc., just as gas companies transformed oil into gas. Apparently, the court was impressed with the fact that the legislature had segregated public service businesses apart from other businesses and had imposed an occupation tax upon them in a separate title of the revenue act of 1935;⁹⁸ thus the legislature itself had defined the "class" and all within it must be treated alike in respect to taxation. One wonders if the court was aware that it was condemning the aforesaid occupation tax itself, for that act taxes gas companies at two per cent of gross receipts, and electric power companies at three per cent,⁹⁹ an inequality fully as "glaring" as that in the fuel oil tax act.

As we have seen, the court's position on this point is out of line with all federal and most state authorities, since the businesses of furnishing gas and electricity are obviously different, even though competitive. Nevertheless, we cannot blithely dismiss it, for it reflects the attitude of the Washington supreme court toward such classifications as that resulting from the exemption of newspapers from the sales tax. The latter exemption confers the same type of special privilege upon newspaper publishers as the fuel oil tax act conferred upon gas companies. The parallel is indeed close, for the publication of newspapers, periodicals, and magazines is treated as the same "business" in the business and occupation tax amendments of 1937.¹⁰⁰ How then can the discrimination against publishers and vendors of magazines be sustained? How can the fuel oil tax classification be distinguished? It can be distinguished readily enough, but the trouble is that the distinction points in the wrong direction.

There is a good—good at least in the opinion of the United States Supreme Court¹⁰¹—reason for the exemption of gas companies from

⁹⁷ "The classification is so obviously, glaringly, arbitrary, capricious, and unreasonable that it seems hardly necessary to do more than invoke the equal protection clause of the 14th amendment to the Federal Constitution and the privileges and immunities clause of our State Constitution to strike down this extension of special privilege to one public utility and denial to other public utilities of a like privilege of exemption." 3 Wn. (2d) 651, 661.

⁹⁸ Wash. Laws 1935, c. 180, tit. V; REM. REV. STAT. (Supp. 1939) §§ 8370-36 to 8370-43.

⁹⁹ REM. REV. STAT. (Supp. 1939) § 8370-36.

¹⁰⁰ Wash. Laws 1937, c. 227, § 1; REM. REV. STAT. (Supp. 1939) § 8370-4 (f).

¹⁰¹ The validity of a graduated net income tax has been taken for granted, *Shaffer v. Carter*, 252 U. S. 37 (1920). Such a tax is said to be an "equitable method" of defraying the cost of government, *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 313 (1937). A graduated gross receipts tax was held invalid, but not without a strong dissent, *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550 (1935) (Cardozo, Stone, Brandeis, J. J., dissenting).

the fuel oil tax which cannot be invoked in support of the exemption of newspapers from the sales tax. Persons may be classified in accordance with their respective abilities to pay without disproportionate hardship. Thus a wealthy man may properly be called upon to pay 25% of his net income, while his neighbor of moderate income pays only 4%, because it cannot be said that the hardship imposed thereby upon the former is the greater. By the same token, a man of small income may be exempted from paying any income tax at all. Now it is almost certain that the burden of the fuel oil tax would fall more heavily in proportion to its gross income upon a gas company than upon an electric power company or a railroad, because a larger percentage of the former's total outlays are for oil. Moreover, the gas company could pass the added cost on to the consuming public by increasing its rates only at the risk of weakening its competitive position. Thus an eleven per cent increase in the cost of its oil might well mean the difference between a reasonable profit and a loss, a possibility which would appear to be remote in respect to other public service companies. No similar difference in relative hardship resulting from the sales tax can be found as between the publishers of newspapers and the publishers of magazines; the interest of the state in guarding its citizens and business enterprises from economic distress¹⁰² cannot be invoked in support of the newspaper exemption.

All of this, of course, is not to be taken to mean that the exemption of the sale of newspapers from the sales tax *should* be deemed unconstitutional; but it is intended to show that a court following the reasoning of the *Inland Empire* case *would* so hold.

But suppose such a result is reached, will the entire sales act be invalidated, even in the face of a so-called severability clause in that act? An affirmative answer is dictated by the reasoning of the court in the *Inland Empire* case. Indeed, that reasoning would apply with even greater cogency to the sales tax act, because that act contains a severability clause less explicitly worded¹⁰³ than that of the fuel oil tax statute. The clause in the latter, which is about as emphatic and explicit a statement of legislative intention as could be devised, reads as follows:

"If any section, sub-section, clause, sentence or phrase of this act, including those setting forth any penalty, exemption or definition, is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the re-

¹⁰² That this purpose will justify a discrimination between competitors in the same business, see *Bordens' Farm Products Co. v. Ten Eyck*, 297 U. S. 251 (1936).

¹⁰³ REM. REV. STAT. (Supp. 1939) § 8370-212. This clause is to much the same effect as that in the fuel oil tax act, except that there is no reference to "penalty, exemption, or definition."

maining portions of this act, and the Legislature hereby declares it would have enacted this act if such section, subsection, clause, sentence or phrase were omitted."¹⁰⁴

In spite of this strong language, the court refused to believe that the legislature meant what it said, and stated that if the severability clause were obeyed the result would be contrary to the intention of the legislature. This truly remarkable outcome can be explained in either of two ways.

The court might have completely misinterpreted the motives of the legislature in inserting the severability clause. Those motives seem obvious enough. The fact that the fuel oil tax statute was enacted proves that a majority of the legislature had two purposes: first, to impose a tax upon the sale and use of fuel oil generally, and second, not to impose this burden upon certain limited sales and uses. If the legislature had stopped there, and it should transpire that the courts interpreted the Constitution to prevent the attainment of both objectives simultaneously, it would be open to debate whether the legislature would prefer the one or the other. Much could be said for the proposition that a court should always resolve such doubts in favor of the individual rather than the state. But this was not such a situation.

Let us return to the legislative chambers. Suppose that certain legislators foresaw the possibility that the presence of one or more of the exemptions would render the tax vulnerable to attack on constitutional grounds—a likely supposition in light of the very dubious validity of the exemption of locally refined oil. Three alternatives would be available whereby the wishes of the legislature could be expressed with clarity. First, if the immunity of the suggested exemptees were uppermost in the legislative mind, the taxable class could be defined to exclude them by omission. Second, if the legislature desired both objectives or neither, the whole idea could be dropped. And third, if the desire to levy the tax overrode the desire to exempt the favored group, it could be so stated by indicating that the tax was to be imposed upon all alike if the legislative desire to withhold it as against some could not constitutionally be carried out. The legislature rather obviously sought to achieve this last alternative by use of the severability clause referring explicitly to exemptions—but without success. For the future, the legislature would be well advised to make the exempting clause itself conditional, *e. g.*, "The following are exempt if their exemption will not impair the validity of the tax herein imposed as to any other person," or words of similar effect.

The second explanation of the judicial disregard of the severability clause is that the court felt constrained by the precedents, that is, that the recognized rules as to statutory interpretation deny to courts the

¹⁰⁴ REM. REV. STAT. (Supp. 1939) § 8370-80s.

power to extend the burdensome or restrictive provisions of a statute, regardless of any severability clause. The difficulty with this is that there does not seem to be any such rule. The authorities relied upon in Mr. Justice Millard's majority opinion are not directly in point,¹⁰⁵ whereas those cited in Chief Justice Blake's dissenting opinion, which is devoted solely to this aspect of the case, are both more numerous and more relevant.

The precedents in this state would seem to support the position taken in the dissenting opinion. In two cases invalid partial exemptions were held not to affect the validity of the rest of taxing statutes, despite the absence of a severability clause.¹⁰⁶ In several more recent cases the court has held statutes severable in reliance upon such clauses.¹⁰⁷

The case chiefly relied upon by the majority, *Jensen v. Henneford*,¹⁰⁸ may be readily distinguished, as is made evident by the very passage quoted. The invalid exemption found in that case, which involved the net income tax act of 1935, was the greater credits allowed to married persons and those having dependents. Obviously, neither the whole credit allowed such persons nor all credits to all persons could be stricken by the court. To do the first would create a new discrimination; to do the latter would increase the amount of the tax laid upon all persons. The only other alternative would be for the court to scale down the credits allowed married persons to equal those allowed single persons, which, said the court, would involve a rewriting of the statute, a thing beyond the province of judges.

But in a more recent decision, *Benjamin Franklin Thrift Stores v. Henneford*,¹⁰⁹ the court reached a result that amounted to a virtual re-

¹⁰⁵ Other than the Washington income tax case which is discussed in the text below, the opinion cited and quoted from *Hill v. Wallace*, 259 U. S. 44 (1922); *State v. Gantz*, 124 La. 535, 50 So. 524, 24 L. R. A. (n. s.) 1072 (1909); and 11 AM. JUR. 855. The Hill case was a case wherein the court found that the major part of a statute was invalid and refused to permit the enforcement of certain valid incidental features. Its weight has been lessened by the recent holding in *Electric Bond & Share Co. v. S. E. C.*, 303 U. S. 419 (1938), that such incidentals are severable and enforceable without regard to the validity of the main features of the statute. The Gantz case dealt with a statute which did not contain a severability clause. The statement quoted from American Jurisprudence does not reflect the general tenor of that text, which taken as a whole supports the position of the dissent. See 11 AM. JUR. 846-9, 856.

¹⁰⁶ *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521, 102 A. S. R. 888, 65 L. R. A. 336 (1904); *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 90 Pac. 1047 (1908). *Accord*: *Continental Baking Co. v. Mount Vernon*, 182 Wash. 68, 44 P. (2d) 821 (1935) (severability clause).

¹⁰⁷ *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 175, 196-7, 117 Pac. 1101, 37 L. R. A. (n. s.) 466 (1911) (in case attacking validity of industrial insurance act, severability clause relied on to eliminate necessity of considering any possible violations of equal protection clause in respect to coverage); *State ex rel. King County v. Tax Commission*, 174 Wash. 336, 24 P. (2d) 1094, (1933) (act authorizing reassessment of all property in a described class held severable and valid as to part of such property. See also cases cited in notes 28-30 *supra* and text thereto.

¹⁰⁸185 Wash. 209, 53 P. (2d) 607 (1936). ¹⁰⁹187 Wash. 472, 60 P. (2d) 86 (1936).

writing of the statute. The tax in question was that levied on the business of operating a warehouse to serve chain stores, and the rate of tax was one-half of one per cent of the value of the goods handled, which was twice the rate of the tax on wholesale merchants. In an action to enjoin the collection of any tax the trial court enjoined the collection of any tax at a rate in excess of one-fourth of one per cent. This decree was affirmed by the supreme court, which relied upon a severability clause and upon the strong policy against crippling the revenue system of the state. As to the latter, the court made the following statement:

"In this connection, it must always be remembered that statutes providing for the raising of money by taxation are the corner-stone of the legislative structure of the state. Courts will not hold them unconstitutional and void unless such a ruling is absolutely required. Here we have a most important statute providing for the raising of revenue."¹¹⁰

Apparently the majority of the court in the fuel oil tax cases were as unmoved by these considerations of policy as they were by the weight of the precedents in support of the classifications involved. Nevertheless, he would be rash who would predict a judicial disregard of the severability clause were the sales tax act under constitutional attack, for that is "a most important statute"—it produces nearly twenty times as much revenue as did the fuel oil tax.¹¹¹

To summarize our conclusions, we can say, first, that the attitude and reasoning of the court in *State v. Inland Empire Refineries, Inc.*, if applied to the gasoline, cigarette, and sales tax statutes, would result in decisions that each was unconstitutional; second, that the decision in the *Inland Empire* case is out of line with all the federal precedents and the weight of prior Washington authorities; and third, that the probabilities are strong that the court would not follow the *Inland Empire* case were the gasoline, cigarette, or sales tax statutes to be challenged in litigation.

But as long as the case in question stands unrepudiated, it constitutes a threat to the validity of many statutes, both taxing and regulatory, for it is a rare statute that does not produce discriminations of one sort or another. This threat will hamper the administration of such laws, encourage resistance to their enforcement, and breed litigation; and it will complicate the already difficult legislative task of devising means of filling the state treasury. An explicit and complete repudiation of this ill-advised decision would be a real service to the public, and one which should not be long delayed.

¹¹⁰ *Id.* at 487, per Beals, J.

¹¹¹ Tax Commission of the State of Washington, *Fifth Annual Statistical Report of the Revenue from Excise Taxes (1940)* Part I, Table 2.