

# ARTICLES

## A Washington State Income Tax—Again?

*Hugh D. Spitzer\**

### I. INTRODUCTION

Washington State has twice had a graduated personal net income tax,<sup>1</sup> and at least four times the state has had some form of graduated corporate net income tax.<sup>2</sup> Each of those measures was passed by the Washington State Legislature or by popular initiative between 1929 and 1935. Each time, however, the Washington State Supreme Court declared either that the enactment violated the Fourteenth Amendment to the United States Constitution<sup>3</sup> or that the income tax was a property tax and thus violated the Washington State Constitution's requirement that all taxes be uniform upon the same class of property.<sup>4</sup> Repeated attempts to amend the state constitution

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\* Lecturer, University of Washington School of Law. Partner, Foster Pepper & Shefelman, Seattle, Washington. The Author wishes to thank Professor James L. McIntire of the University of Washington Institute for Public Policy and Management for his helpful comments and assistance on drafts of this Article.

1. A graduated personal net income tax was first enacted in 1932 as Initiative 69 by a vote of 322,919 (70.2%) yes to 136,983 (29.8%) no. 1933 Wash. Laws 5. A second version of a graduated net income tax was approved by the legislature in 1935. 1935 Wash. Laws 178; *see also infra* notes 79-84, 158-65 and accompanying text.

2. A franchise tax on certain banking and financial corporations, measured by net income, was adopted by the legislature in 1929. 1929 Wash. Laws 151. Initiative 69 also provided for a net income tax on corporations, and in 1935 the legislature again attempted to put a corporate income tax into place by enacting 1935 Wash. Laws 180. The last time a corporate franchise tax measured by net income was passed was in 1951. 1951 Wash. Laws 10.

3. In *Aberdeen Savings & Loan Assoc. v. Chase*, 157 Wash. 351, 289 P. 536, *reh'g denied*, 157 Wash. 391, 290 P. 697 (1930), and *Burr, Conrad & Brown, Inc. v. Chase*, 157 Wash. 393, 289 P. 536 (1930), the Washington State Supreme Court ruled 6-3 that the 1929 net income tax on financial institutions violated the Fourteenth Amendment to the U.S. Constitution. *See infra* notes 66-71, 220-47 and accompanying text.

4. Initiative 69 was overturned by a 5-4 decision in *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933). The 1935 personal net income tax was similarly found by the same five justices to violate Article VII, Section 1, of the state constitution in *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936), and the 1935 corporate net income tax

to permit those taxes failed,<sup>5</sup> leaving the state with an unusual tax system that has not changed in basic structure since 1935.

Washington's tax system relies principally on a gross receipts business and occupations tax (the "B&O tax"),<sup>6</sup> on property and leasehold excise taxes,<sup>7</sup> and on retail sales and use taxes.<sup>8</sup> Although Washington State and its local governments are supported by at least fifty-six different taxes,<sup>9</sup> in 1988, 48.1% of Washington state and local tax revenues were from either retail sales or use and B&O taxes (over twice the national average of 23.9%); 28.5% of state and local revenues were from property taxes (compared with a national average of 29.9%); and various other sources made up the difference.<sup>10</sup> Nationwide, income taxes generate over a quarter of state and local tax revenues (26.3% in 1988), but Washington is one of only four states with neither a corporate nor a personal net income tax.<sup>11</sup>

Washington's tax structure is frequently criticized for being regressive,<sup>12</sup> discriminating in favor of the low-volume,

was invalidated in *Petroleum Navigation Co. v. Henneford*, 185 Wash. 495, 55 P.2d 1056 (1936).

5. Unsuccessful attempts to amend the Washington State Constitution to permit the imposition of net income taxes include H.J.R. 32 in 1934 (43.4% of the electorate voting yes, 56.6% voting no); S.J.R. 7 in 1936 (22.2% yes, 77.8% no); S.J.R. 5 in 1938 (33.1% yes, 66.9% no); H.J.R. 4 in 1942 (31.3% yes, 68.7% no); H.J.R. 42 in 1970 (31.5% yes, 68.4% no); and H.J.R. 37 in 1973 (22.1% yes, 77.1% no). Washington State Archives, Olympia, Washington.

6. WASH. REV. CODE ch. 82.04 (1989).

7. *Id.* chs. 84, 82.29A.

8. *Id.* chs. 82.08, 82.12.

9. RESEARCH DIVISION, WASHINGTON STATE DEPARTMENT OF REVENUE, TAX REFERENCE MANUAL (1991).

10. GOVERNOR'S COMMITTEE ON WASHINGTON'S FINANCIAL FUTURE, A FINANCIAL PLAN FOR WASHINGTON 6-7 (1989) [hereinafter GOVERNOR'S REPORT].

11. As of 1988, only Washington, Nevada, Texas, and Wyoming were without any type of state net income tax. JAMES L. MCINTIRE, INTERSTATE COMPARISON OF BUSINESS TAXES: STATE AND LOCAL TAXES WITH AN INITIAL BURDEN ON BUSINESS Table A-2 (University of Washington Institute for Public Policy and Management 1988). See also ROBERT P. STRAUSS, A STUDY OF ALTERNATIVE TAX STRUCTURES FOR THE STATE OF WASHINGTON Tables 3-6 (Carnegie-Mellon University Center for Public Financial Management 1987).

12. The retail sales tax is clearly the most regressive. According to STRAUSS, *supra* note 11, at 51, Washington residents in the lowest fifth by income pay over 7% of their income in state sales taxes, while residents in the highest fifth pay less than 2% of their income in sales taxes. The Washington State Department of Revenue found that in 1988 a family of four earning \$20,000 paid about 8.7% of their income in state and local taxes of all kinds, while a family earning \$125,000 paid 6.9%. GOVERNOR'S REPORT, *supra* note 10, at 6-10. See also CITIZENS FOR TAX JUSTICE, THE SORRY STATE OF STATE TAXES (Jan. 1987), a study which concluded that Washington had the

high profit industries to the detriment of high-volume, low-profit businesses, such as retail enterprises.<sup>13</sup> Washington's tax structure is also criticized for being too volatile and elastic, causing plunges in state tax revenue during recessions.<sup>14</sup> Washington's tax structure costs residents a valuable federal income tax deduction available to people in the forty-three states that levy an income tax.<sup>15</sup> The tax structure encourages Washingtonians to pursue cross-border purchases that evade the state's high retail sales tax.<sup>16</sup> And the state's tax structure

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seventh most regressive tax structure in the country, principally because of the reliance on various types of sales taxes.

13. Because the B&O tax is imposed on the gross receipts of businesses, including receipts from transactions between businesses during the manufacturing process or as products move from resource extraction through manufacturing, wholesale and retail, there is ample opportunity for multiple taxation of the same commodity or portion of a commodity. A smaller portion of the cost of items produced by vertically integrated firms will represent B&O taxes, and those businesses will pay a disproportionately smaller share of that tax. STRAUSS, *supra* note 11, at 49. The GOVERNOR'S REPORT, *supra* note 10, at 6-9, asserts:

Since the [B&O] tax is measured by gross receipts, rather than profits as in most other states, it has been criticized for failing to recognize ability to pay. It favors low volume, high profit firms and adversely burdens high volume, low profit firms. Further, it tends to favor vertically integrated firms, which conduct manufacturing, wholesaling and retailing functions within the same company, because the tax is only imposed on final sales. Approximately one-third of Washington's businesses make no profit, yet these firms pay about 18 percent of the B&O tax.

Washington's heavy reliance on the retail sales tax has led to similar criticism of that source of governmental revenue. See STRAUSS, *supra* note 11, at 46-51; MCINTIRE, *supra* note 11, at 28-30. Those studies also point out that the many exemptions provided from sales and B&O taxes, and the large differences between the B&O tax rates paid by different industries, contribute to the tax burdens that vary significantly among types of businesses. For example, the GOVERNOR'S REPORT, *supra* note 10, at 6-9, states that although the B&O tax has only three principal rates, "the effective tax rates in terms of book income vary widely, from 2.4 percent for restaurants to 39.3 percent for auto dealers."

14. Although the stable nature of the property tax, and Washington's substantial reliance on that tax, has kept governmental revenue generally stable over the long term, "Washington's tax system appears to suffer abnormally during periods of economic recession, mainly due to the fall-off in taxable retail spending." WASHINGTON STATE DEPARTMENT OF REVENUE, TAX BASE GROWTH AND STABILITY: A COMPARATIVE EXAMINATION OF WASHINGTON'S MAJOR TAX SOURCES 1976-1985, 5 (1986); see also MCINTIRE, *supra* note 11, at 33-35.

15. The federal Tax Reform Act of 1986, Pub. L. No. 99-514, § 134(a)(1), abolished the deduction for state and local sales taxes, retaining a deduction for state income taxes. 26 U.S.C. § 164 (1988). The Washington State Department of Revenue estimated in 1989 that the loss of sales tax deductibility costs Washington residents \$120 million per year in increased federal taxes. GOVERNOR'S REPORT, *supra* note 10, at 6-11.

16. The retail sales tax ranges between 7% and 8% in Washington counties bordering on Oregon and Idaho. Oregon has no retail sales tax, and Idaho's is 5%. The GOVERNOR'S REPORT, *supra* note 10, at 6-15, points out that this "situation presents a

is plagued by uncertainty because of the susceptibility of the B&O tax to periodic legal attacks on interstate commerce grounds.<sup>17</sup> Still, some observers maintain that Washington has a fundamentally stable system, a system with taxes that are not particularly high overall,<sup>18</sup> a system where businesses, not individuals, bear a disproportionate share of the initial tax burden,<sup>19</sup> and a system where the status quo tilts toward aerospace, timber, aluminum and other large, integrated industries, which is a positive benefit to the economic well-being of the state's residents.<sup>20</sup>

This Article does not debate whether Washington's existing tax structure is sound or whether an income tax is the right solution to any inadequacies in the state's system of taxation. Instead, this Article shows how, because of changes in key rulings of the United States Supreme Court and in other

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tremendous incentive for Washington residents to evade the sales tax," causing the state tax revenue losses of \$22 million each year and local jurisdiction revenue losses of \$4.7 million annually. Out-of-state purchases also adversely affect the level of local economic activity in border counties. *Id.*

17. The B&O tax provides various credits to prevent its invalidation on the grounds that it interferes with interstate commerce, but out-of-state businesses have from time to time launched assaults on that tax, sometimes successfully. *See, e.g.,* Tyler Pipe Industries Inc. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987), which overruled in part General Motors Corp. v. Washington, 377 U.S. 436 (1964), and caused a modest restructuring of the B&O tax. *See also* Armco Inc. v. Hardesty, 467 U.S. 638 (1984), overturning West Virginia's gross business receipts tax.

18. The studies cited *supra* notes 10, 11, and 14, point out that despite Washington's difficult tax times during recessions, over long periods the state's tax revenues keep up with growth in personal income. In addition, measured as a percentage of personal income, Washington's state and local taxes are not particularly high. For the 1987 fiscal year, Washington's state and local taxes were \$114.99 per \$1,000 of personal income, which was 19th from the highest among all states. The national average state and local tax burden was \$114.79 per \$1,000. GOVERNOR'S REPORT, *supra* note 10, at 6-7; *see also* MCINTIRE, *supra* note 11, at 4 & Table 3.

19. Washington business as a whole appears to carry a disproportionate share of the state's initial tax burden. MCINTIRE, *supra* note 11, at 6, concludes that Washington is "a high business tax state," ranking eighth nationally in the share of total taxes that initially impact business, and seventh in the level of business taxes per \$1,000 of personal income. McIntire found that in 1986 initial payments of taxes by Washington businesses accounted for 43.8% of all state and local revenues, compared with 34.6% nationally. *Id.* Although business taxes in many industries can effectively be passed on to customers, the fact that in most states individuals bear a higher direct tax burden has probably not been lost on Washington voters, who in recent years have rejected fundamental changes in the state's tax structure. *See* notes 5, 157 and accompanying text.

20. McIntire points out that many states' tax systems reflect the needs of their dominant economic activities. He has found some evidence of influence by businesses in the state but concludes that the influence is not dramatic. MCINTIRE, *supra* note 11, at 29.

state court rulings on the character of income taxes, Washington's legislature could now implement a graduated net income tax on both individuals and businesses. The Article concludes that such a net income tax measure could lawfully be enacted by today's legislature without amending the state's constitution.

First, this Article reviews the history of *Culliton v. Chase*<sup>21</sup> and Washington's other key 1930s anti-income tax cases, and describes the social and economic forces that led to the adoption of Washington State income taxes as well as the successful legal attacks on those measures that followed. Second, this Article illuminates the social and legal philosophies underpinning the various opinions in *Culliton* and shows that a key misunderstanding (or misconstruing) of "net income"—as a static asset ("property") rather than a concept measuring an activity or flow—caused the court to eviscerate a new, liberal voter-approved constitutional provision and change it back into a restrictive version. This Article then outlines how since the early 1930s the United States Supreme Court has gradually reversed or altered the cases relied on by the *Culliton* majority, and how other state courts in the country that had a similar view of income as property (inaccurately labeled in *Culliton* as the "overwhelming weight of judicial authority"<sup>22</sup>) have revised their interpretations, leaving only Washington and perhaps one other state<sup>23</sup> with a tax system that has been accurately described as "rather unique."<sup>24</sup>

This evaluation of *Culliton* and its sister decisions is not the first. Indeed, as soon as *Culliton* was handed down it came under sharp academic attack,<sup>25</sup> and that case and its progeny have been critiqued on several other occasions, often persuasively.<sup>26</sup> But changes in the United States Supreme Court's

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21. 174 Wash. 363, 25 P.2d 81 (1983).

22. *Id.* at 374, 25 P.2d at 82.

23. Pennsylvania, with a uniformity-of-taxation constitutional provision different from Washington's, remains the only other state that continues to maintain that personal net income is a form of property and that taxation of that income therefore constitutes a type of property tax. *Amidon v. Kane*, 279 A.2d 53 (Pa. 1971), discussed *infra* notes 321-22 and accompanying text; see also WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 2015-18 (1984).

24. STRAUSS, *supra* note 11, at 5.

25. See, e.g., Harold Hestnes, Comment, *Constitutionality of State Income Taxes*, 8 WASH. L. REV. 81 (1933).

26. See, e.g., J. Thomas Carrato & Richard W. Hemstad, *Income Taxation in Washington: In a Class by Itself*, 1 U. PUGET SOUND L. REV. 255 (1978); Alfred E. Harsch, *The Washington Tax System—How It Grew*, 39 WASH. L. REV. 944 (1965).

view of certain issues that formed the underpinnings of Washington's income tax cases, as well as a change in what now clearly is the "overwhelming weight of judicial authority"<sup>27</sup> in other states, makes the time ripe for a reevaluation of whether a graduated net income tax is currently permissible under Washington's constitution. Such a tax may or may not be good policy, but that is a determination for legislators to make, not judges or scholars.

## II. TAX UNIFORMITY CLAUSES: A CLASH OF ECONOMIC INTERESTS

Taxation is generally viewed as a fundamental, necessary, and sovereign power of government,<sup>28</sup> but there is rarely unanimous agreement on who should bear the taxation burden and how taxation should be applied.<sup>29</sup> Taxes on property, both real and personal, have played a key role in financing state and local government in America since before the American Revolution.<sup>30</sup> When the states were first established, six of them adopted constitutional provisions that, in effect, required every person to carry his "fair share" of the tax burden.<sup>31</sup> Some of those provisions read as though they were lifted directly from John Locke, as perhaps they were.<sup>32</sup> But not all

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[hereinafter Harsch, *Washington Tax System*]; Alfred E. Harsch & George A. Shipman, *The Constitutional Aspects of Washington's Fiscal Crisis*, 33 WASH. L. REV. 225 (1958); James V. O'Conner & Robert E. Schillberg, Comment, *A Study of State Income Taxation in Washington*, 33 WASH. L. REV. 398 (1958).

27. *Culliton v. Chase*, 174 Wash. 363, 374, 25 P.2d 81, 82 (1933).

28. See, e.g., *Lawrence v. State Tax Commission*, 286 U.S. 276, 279 (1931), in which Justice Stone wrote that state taxation is "the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equally among those who enjoy its benefits."

29. One is reminded of the famous observation attributed to former Senator Russell Long: "Don't tax me, don't tax thee, tax the fellow behind the tree." Quoted in Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well? Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 896 (1987) (reviewing JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS AND THE UNLIKELY TRIUMPHS OF TAX REFORM* (1987)). However, as Doernberg and McChesney point out, Senator Long's "axiom summarizes the typical attitude about taxes, except that most taxpayers do not care if the system does tax 'thee,' so long as it does not tax 'me.'" *Id.*

30. NEWHOUSE, *supra* note 23, at 1702 *et seq.*

31. *Id.* at 1702-04.

32. During the eighteenth and early nineteenth centuries, Americans active in government read and relied on the political theories of the liberal English philosopher John Locke (1632-1704). See WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 37 (1977). In TWO TREATISES ON GOVERNMENT 408 (Mentor Books 1965), Locke wrote,

states had constitutional clauses requiring that taxes on property be "uniform" or "equal." In 1834, just nine of twenty-four states (38%) had such provisions, but by the eve of the Civil War, that number had jumped to twenty-three out of thirty-four states (68%).<sup>33</sup> While one commentator has labeled the origin of such provisions "obscure,"<sup>34</sup> the call for uniform taxation clauses appears to have been regularly included among the demands of the Jacksonian democratic movement.<sup>35</sup>

In the United States, the first half of the nineteenth century saw an explosion of manufacturing and transportation, the creation of much new wealth, and an increase in the disparity between rich and poor. This caused a backlash from the small farmers and independent craftspeople who formed a majority of the population, but who saw their lives and welfare challenged by the industrial enterprises; they saw transportation companies and financial institutions dominating the young nation's economy.<sup>36</sup> Along with attacks on licensed monopolies, demands for broadened suffrage, and pressure for universal and inexpensive public education, equal taxation of all property was a typical platform plank of Jacksonian political groups.<sup>37</sup> These groups were critical of tax exemptions and special low tax rates received by canals, railroads, and other key actors in the industrial expansion.<sup>38</sup> A movement for "uniformity and universality" resulted, insisting that *all* property should be taxed, and taxed equally: commercial, industrial, and financial property as well as agricultural land.<sup>39</sup>

Among the many legacies of this political movement was the increase in uniformity-of-taxation clauses throughout the

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"Tis fit everyone who enjoys his share of the protection [of government] should pay out of his estate his proportion for the maintenance of it." This thinking is reflected, for example, in the original 1780 Massachusetts constitution, in which Article X, of Part the First (Declaration of Rights) provided that "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; . . ." *Quoted in NEWHOUSE, supra* note 23, at 608.

33. NEWHOUSE, *supra* note 23, at 1730.

34. William J. Matthews, Jr., *The Function of Constitutional Provisions Requiring Uniformity in Taxation, Part I*, 38 KY. L.J. 31, 49 (1949-50).

35. NEWHOUSE, *supra* note 23, at 1730 *et seq.*, particularly at 1734.

36. SCOTT, *supra* note 32, at 53 *et seq.*

37. NEWHOUSE, *supra* note 23, at 1733-34.

38. *Id.* See also JAMES MACGREGOR BURNS, *THE VINEYARD OF LIBERTY* 276-77, 302-05 (1982).

39. Sumner Benson, *A History of the General Property Tax*, in GEORGE C. S. BENSON ET AL., *THE AMERICAN PROPERTY TAX: ITS HISTORY, ADMINISTRATION AND ECONOMIC IMPACT* 31 (1965); Matthews, *supra* note 34, at 44-45, 520.

American states. By the end of the nineteenth century, forty-one of the forty-five states (91%) had some sort of uniformity clause, including the new state of Washington that entered the union in 1889.<sup>40</sup> There was a wide variety of constitutional uniformity provisions to choose from. Professor Newhouse has identified twelve distinct categories of language requiring uniformity or equality of taxation, which he has labeled Type I through Type XII, roughly in order of their development historically.<sup>41</sup> As discussed below, the differences among these types of uniformity clauses are critical to the proper interpretation of their meaning.<sup>42</sup>

Picking from forms then common among other states, Washington started with a combination Type V clause ("All property shall be taxed in proportion to its value") and a Type X clause ("The legislature shall provide by law for a uniform and equal rate of assessment and taxation").<sup>43</sup> Adopted as part of Washington's constitution in 1889, Article VII, Section 1, stated:

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.<sup>44</sup>

Article VII, Section 2, stated:

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 . . . .<sup>45</sup>

The type of uniformity clause initially chosen by Washington worked well enough for a predominantly agricultural community in which land was the most significant form of property.<sup>46</sup> Article VII, Sections 1 and 2, were modeled on pro-

40. NEWHOUSE, *supra* note 23, at 1716.

41. *Id.* at 1699-1701; see also Benson, *supra* note 39, at 37 *et seq.*

42. See *infra* text accompanying notes 317-22.

43. NEWHOUSE, *supra* note 23, at 1544.

44. WASH. CONST. art. VII, § 1 (amended 1930).

45. WASH. CONST. art. VII, § 2 (repealed 1930).

46. In 1900, six out of ten Washingtonians lived on farms. However, by 1930 only four out of ten lived in rural areas, and just two of ten actually lived on farms. Philip J. Roberts, *Of Rain and Revenue: The Politics of Income Taxation in the State of*

visions passed earlier in the century by predominantly agricultural states.<sup>47</sup> But many Washington taxpayers, along with those in other states, found that as the twentieth century progressed, constitutional strictures requiring that all forms of property be taxed equally and uniformly were hurting asset-based businesses, including farming.<sup>48</sup> At the same time, other types of commerce that might have few assets but high profits did not appear to bear their "fair share" of the tax burden.<sup>49</sup> Furthermore, intangibles were difficult to locate and tax, and it was believed that separate classifications of property would permit intangibles to be taxed at lower rates, thus encouraging payment.<sup>50</sup>

In the century's first tax codes, Washington State and its local governments continued to rely heavily on the property tax during a period when demand for governmental services was growing. As a result, real estate taxes nearly doubled in the decade prior to 1920.<sup>51</sup> Farmers realized that they were paying high taxes on land that in many years was unprofitable, while the financial institutions upon which they relied for annual loans were paying relatively low taxes.<sup>52</sup> This led to a statewide movement that followed a national trend toward liberalization of uniformity clauses so that different classes of

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Washington 1862-1940, at 13, 202 (1990) (unpublished Ph.D. dissertation, University of Washington); Harsch, *Washington Tax System*, *supra* note 26, at 952-56.

47. NEWHOUSE, *supra* note 23, at 1720.

48. Roberts, *supra* note 46, at 146, 188; REPORT OF THE WASHINGTON TAX INVESTIGATION COMMISSION 8, 42-43 (1930) [hereinafter COMMISSION REPORT].

49. Roberts, *supra* note 46, at 156-57.

50. Benson, *supra* note 39, at 64.

51. Roberts, *supra* note 46, at 146.

52. *Id.* at 156-58; Harsch, *Washington Tax System*, *supra* note 26, at 956. For a short but illuminating exposition of the pressures on Washington's tax structure caused by economic changes in the state and the growth of government in the early twentieth century, see Petition for Rehearing of the Tax Advisory Comm'n at 2-3, *Aberdeen Savings & Loan Assoc. v. Chase*, 157 Wash. 351, 289 P. 536 (1930) (No. 22228), *reh'g denied*, 157 Wash. 391, 290 P. 697 (1930), in which the Commission offered the following history and argument:

The tax system of Washington, in the main, was established when the ownership of real and tangible personal property was a fair measure, if not the only measure, of taxpaying ability. This system imposed almost the entire cost of government upon the owners of real and tangible personal property. At the time of the adoption of the state constitution such a tax system equitably spread the burden of taxation over all of the citizens of the state with taxpaying ability as well as any system that then could have been devised, and rightly so, for the functions of government were then confined entirely to the protection of life, liberty and property.

Since statehood the scope of government has expanded beyond bounds that then could have been contemplated. Likewise the forms of wealth of this

property could be taxed in different ways and at different rates.<sup>53</sup> This national movement picked up steam during the Progressive Era and into the Depression; during the period from 1911 to 1937, it was a rare year that did not see one or more states amend their constitutions to overhaul their tax system.<sup>54</sup>

In Washington State, tax reform demands were expressed in several ways: first, for a change in Article VII, Sections 1 and 2; second, for a cap on property taxes; and third, for an implementation of a net income tax. Each of these measures was placed before the voters and was overwhelmingly approved in the following years. In 1929, the Washington State Legislature proposed constitutional Amendment 14,<sup>55</sup> which was approved by the state's voters during the November 1930 election.<sup>56</sup> Amendment 14 struck the first four sections of Article VII and replaced them with a new Section 1 that read as follows:

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 con-

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state have changed along with the expansion and development of the economic life of its citizens. . . .

Many states have met this enormous increased cost of government by providing methods of taxation whereby the tax burden is equalized so that all citizens, including corporate entities, are subject to taxation in proportion to their ability to pay and according to the benefits received. This is conceded by economists as the basic principle of taxation.

See also COMMISSION REPORT, *supra* note 48, at 40-44. That report is discussed *infra* notes 72-75 and accompanying text.

53. NEWHOUSE, *supra* note 23, at 1717 *et seq.*, records that Virginia started the trend in 1902 with a new constitution that contained a Type XI clause permitting the classification of subjects of taxation and requiring uniformity only within each class of subjects. This approach of classifying property so that taxes could be levied differently on various classes was adopted by Minnesota through a 1906 amendment, and it was included in Oklahoma's constitution upon admission in 1907. The movement gained speed with the 1911 adoption of a Type XII clause in North Dakota ("Taxes shall be uniform upon the same class of *property*"), and between 1911 and 1937 at least 24 states altered their constitutions' uniformity of taxation clauses. In the same period, another ten states expressly exempted income taxes from the strictures of their existing uniformity clauses. *Id.*

54. *Id.*

55. Amendment 14, 1929 Wash. Laws 499 (approved Nov. 1930).

56. WASH. CONST. art. VII, § 1 (1988).

stitute 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 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.<sup>57</sup>

Those advocating an express ceiling on property taxes in 1924 coalesced around an organization called the Federation of Taxpayers and began gathering signatures to place on the ballot an initiative limiting property taxes to 40 mills per dollar of assessed valuation.<sup>58</sup> The first attempt was unsuccessful, falling short of the required number of signatures, but a final petition drive placed the proposal on the 1932 ballot, and in that year's general election a 40-mill limit was adopted by passage of Initiative No. 64.<sup>59</sup> Virtually identical ballot measures were repeatedly readopted until 1944, when an amendment entrenched the 40-mill limit in the state's constitution.<sup>60</sup>

In Washington and elsewhere in the country, income taxation was being advocated to ensure that no one avoided his or her "fair share" of the burden. A federal income tax had been briefly instituted during the Civil War but was allowed to expire,<sup>61</sup> and an 1894 federal tax passed by Congress in

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57. Amendment 14, 1929 Wash. Laws 499 (approved Nov. 1930) (*italics in original*) (codified at WASH. CONST. amend. XIV (1988)).

58. Roberts, *supra* note 46, at 148-49. The unsuccessful 1924 initiative, as well as the later successful versions, also required that for tax purposes property would be assessed at 50% of its "true and fair value." Thus, in effect, that property tax ceiling was 20 mills. Harsch, *Washington Tax System*, *supra* note 26, at 958.

59. 1933 Wash. Laws 4.

60. WASH. CONST. amend. XVII (1944) (amended 1972, 1976, 1986). The 1972 amendments (amendment 55 and amendment 59) removed the 40-mill limit and established the principal that property was to be assessed at its full value for tax purposes. WASH. CONST. amend. LV (1972); WASH. CONST. amend. LIX (1972) (amended 1976, 1986).

61. Federal Income Tax Act of 1862, 12 Stat. 432-89 (1862)(reenacted several times until its expiration in 1872).

response to Populist demands (and over the vociferous protests of conservative business interests) was overturned as unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*<sup>62</sup> But finally, after enactment of the Sixteenth Amendment to the U.S. Constitution in 1913, a relatively low rate federal income tax was promptly put into effect.<sup>63</sup>

In Washington State, the Grange and other farm groups were the driving force for a net income tax, arguing that it would reduce property taxes and require profitable urban business and financial interests to contribute their appropriate share of the costs of government.<sup>64</sup> The rural dominated Washington State Senate passed an income tax bill in 1929, but it died in the House during the legislative session's closing hours, angering farmers who believed that the bill had been hijacked by big business interests unwilling to pay reasonable taxes.<sup>65</sup>

The 1929 legislature did adopt a corporate franchise tax measured by net income,<sup>66</sup> but the bill provided liberal exemptions for large urban commercial banks. When the mutual savings banks that served many farmers and other "little people" challenged the franchise tax on federal equal protection grounds, the Washington State Supreme Court overturned it in two six to three decisions: *Aberdeen Savings & Loan Assoc. v. Chase*<sup>67</sup> and *Burr, Conrad & Broom, Inc. v. Chase*.<sup>68</sup> As discussed below in detail,<sup>69</sup> *Aberdeen*, the lead case of the two, raised the question of whether the tax was on property rather than an excise or corporate privilege tax.<sup>70</sup> At that time, the court did not examine the characteristics of "property" and

62. 157 U.S. 429 and 158 U.S. 601 (1894). For background on the 1894 federal income tax, see NEWHOUSE, *supra* note 23, at 1935 *et seq.*

63. Pub. L. No. 63-16, § II, 38 Stat. 113, 166-81 (1913).

64. Roberts, *supra* note 46, at 190-92, 196-97; see *infra* notes 80-85 and accompanying text. Part of a national agricultural movement, the Washington State Grange's first chapter was organized as the "Patrons of Husbandry" in 1873. The Grange was, and remains, an organization devoted to the social and political welfare of farmers. Roberts, *supra* note 46, at 101-02; GUS NORWOOD, WASHINGTON STATE GRANGERS CELEBRATE A CENTURY (1988).

65. Roberts, *supra* note 46, at 158.

66. 1929 Wash. Laws 151.

67. 157 Wash. 351, 289 P. 536, *reh'g denied*, 157 Wash. 391, 290 P. 697 (1930).

68. 157 Wash. 393, 289 P. 551 (1930). The companion cases to *Aberdeen* and *Burr*, *Conrad & Brown, Inc.*, were *Washington Mutual Savings Bank v. Chase*, 157 Wash. 698, 289 P. 555 (1930), and *United Diversified Securities Corp. v. Chase*, 157 Wash. 699, 289 P. 554 (1930).

69. See *infra* text accompanying notes 220-57.

70. *Aberdeen*, 157 Wash. at 361, 289 P. at 541.

"income," but it did conclude that the federal Fourteenth Amendment had been violated, while expressly declining to address whether the measure would be permissible under the uniform taxation provisions of the state constitution then in effect.<sup>71</sup>

The 1929 legislature had also provided for appointment of a "blue ribbon" Tax Advisory Commission to work jointly with the State Tax Commission and make "a thorough and comprehensive investigation and study of the entire subject of taxation."<sup>72</sup> Governor Roland Hartley, who strongly opposed an income tax, nevertheless appointed the group, which included nine members representing agricultural, commercial, and industrial interests.<sup>73</sup> After a "careful and exhaustive investigation of the subject of taxation," including hearings in eighteen cities and towns,<sup>74</sup> the joint commission recommended both a graduated personal income tax and some form of business income tax to provide property tax relief.<sup>75</sup> After powerful Grange lobbying in 1931, both measures quickly passed the overwhelmingly Republican Senate and then gained House approval.<sup>76</sup> Governor Hartley vetoed both bills, labeling them special interest legislation, which he said was "rapidly bringing about confiscation of property by taxation."<sup>77</sup> The Governor's veto, together with an attempt to eliminate the State Tax Commission (all three members of which were fellow Republicans), contributed to already deep splits within the state Republican

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71. *Id.* at 373-74, 391-92, 289 P. at 536, 545; 290 P. at 697-98.

72. 1929 Wash. Laws 127. This statute created an advisory tax commission that was charged with carrying out its work in conjunction with the permanent State Tax Commission. The joint body was known as the "Washington Tax Investigation Commission." *Id.* See generally COMMISSION REPORT, *supra* note 48.

73. Roberts, *supra* note 46, at 160.

74. Petition for Rehearing for the Advisory Tax Comm'n at 3, *Aberdeen Savings & Loan Assoc. v. Chase*, 157 Wash. 351, 289 P. 536 (1930) (No. 22228); see also Roberts, *supra* note 46, at 162; COMMISSION REPORT, *supra* note 48, at 7.

75. COMMISSION REPORT, *supra* note 48, at 12. The Washington Tax Investigation Commission's detailed 76 page report analyzed the tax systems of many other states and noted that 18 had already "turned to income taxation to supplement the property tax and to reach escaping tax-paying ability." *Id.* at 40. The Report made a total of 29 specific recommendations, only two of which related to the proposed new income tax. Other recommendations suggested changes in methods of property assessment, restrictions on exemptions, taxation of municipal utilities, increases in governmental fees for services, and severance and yield taxes on timber and minerals. See generally *id.*

76. Roberts, *supra* note 46, at 182-83.

77. *Id.* at 183 (quoting veto message by Governor Hartley). Governor Hartley also stated in his veto message that the Attorney General had advised him that there were state constitutional infirmities in the income tax measures. *Id.*

party and engendered hostility from farming groups.<sup>78</sup>

The Grange swung into action by launching a statewide initiative campaign to reenact the income tax measures and by helping to replace Hartley with an income tax supporter as the 1932 Republican gubernatorial nominee.<sup>79</sup> Many of the Grange's thirty thousand members gathered signatures to put Initiative 69 on the ballot, and the organization sought and obtained support from urban based labor groups such as the Seattle Central Labor Council and the Washington Federation of Labor.<sup>80</sup> Education organizations also strongly backed the initiative because the Depression and falling property values were endangering property tax based school budgets; the Washington Education Association, the PTA, and the High School Teachers' League all lined up behind the ballot proposition.<sup>81</sup> The income tax initiative was also supported by the real estate industry, which was more interested in the 40-mill limit initiative on the same ballot.<sup>82</sup> But the rest of the urban business community was firmly opposed to an income tax, campaigning both directly and through allies in establishment newspapers.<sup>83</sup> After a highly contentious campaign, the coalition of agriculture, labor, and education interests joined with disgruntled urban property owners to pass the measure with a vote of over seventy percent.<sup>84</sup> But just after the State Tax Commission blanketed the state with forms so that residents could begin preparing their tax returns,<sup>85</sup> the Washington State Supreme Court handed down its decision in *Culliton v. Chase*<sup>86</sup> and stopped the income tax dead in its tracks.

### III. SHIPS PASSING IN THE NIGHT: CLOSE DECISIONS BUT LITTLE COMMUNICATION IN *CULLITON*, *STINER*, AND *JENSEN*

Soon after the voters approved Initiative 69, lawsuits challenging the measure were brought by two groups of Seattle

78. *Id.* at 185-89.

79. *Id.*

80. *Id.* at 194.

81. Roberts, *supra* note 46, at 189-97.

82. *Id.* at 194.

83. *Id.*

84. Results of the 1932 general election (on file with the Office of the Secretary of State, Olympia, Washington; Washington State Archives, Olympia, Washington).

85. Roberts, *supra* note 46, at 232-33.

86. 174 Wash. 363, 25 P.2d 81 (1933).

businessmen.<sup>87</sup> Because of the uncertainty caused by the litigation and by the recent passage of the 40-mill property tax limit, the legislature enacted a B&O tax on gross business receipts on March 9, 1933.<sup>88</sup> The B&O tax was intended to tide the state treasury over until the legal dispute was resolved and income tax collections could begin. Although Initiative 69 provided that the new income tax was to be imposed on 1932 income, there was no machinery in place for collection. Such a system could not be developed until well into 1933.<sup>89</sup>

The challenge to Initiative 69 was argued in Thurston County before Judge D.F. Wright, who handed down an eighteen line opinion on April 6, 1933, declaring with scant explanation that "incomes are 'subject to ownership'" and that Initiative 69's graduated income tax was, therefore, not uniform as required by the state constitution.<sup>90</sup> The Attorney General appealed, and because of the need to resolve the matter quickly so that the state government and residents could prepare for tax collections in 1934, supreme court arguments were set for one week later; those arguments were set "so precipitously," in the words of one lawyer, "as to leave limited time for the preparation of briefs."<sup>91</sup> Oral arguments were held on April 14, 1933, and because of the tight schedule, numerous briefs and supplemental briefs were submitted in typewritten form between April 13 and April 19.<sup>92</sup> But the court had been reduced to eight members because of the illness of Justice Emmett Parker, and it deadlocked.<sup>93</sup> Instead of

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87. Roberts, *supra* note 46, at 228. These lawsuits were consolidated in the superior court and on appeal as *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933).

88. 1933 Wash. Laws 191. Charles Hodde, a Grange organizer for Initiative 69, who later served as Speaker of the House and then as Chairman of the State Tax Commission, states that the B&O tax originally was not intended to serve as a significant source of state government income, but it was passed in the 1933 legislative session because the adoption of the 40-mill property tax limitation so constrained state and school funding that an interim tax had to be implemented. Interview with Charles W. Hodde, Grange organizer for Initiative 69, Olympia, Washington (May 7, 1992) [hereinafter *Hodde Interview*].

89. 1933 Wash. Laws 101; *Hodde Interview*, *supra* note 88; Roberts, *supra* note 46, at 224-25, 232-34.

90. *Culliton v. Chase*, Nos. 14888, 14897 (Thurston Co. Sup. Ct. Mem. Op. Apr. 6, 1933).

91. Respondent McKale's, Inc. Brief at 5, *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933) (No. 24491).

92. See generally Briefs submitted in *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933) (No. 24491).

93. Roberts, *supra* note 46, at 235. See *Culliton v. Chase*, 173 Wash. 309, 22 P.2d 1049 (1933).

upholding the lower court's decision on a tie vote, one of the supreme court justices who supported affirmance of the superior court's ruling<sup>94</sup> nevertheless agreed to delay the case until after newly-elected Democratic Governor Clarence D. Martin appointed a replacement for Justice Parker.<sup>95</sup> Over the strenuous objections of Justices Mitchell, Millard, and Steinert, on June 15, 1933, the court issued an order holding the matter for reargument.<sup>96</sup>

In early August, Governor Martin appointed former Spokane Corporate Counsel James M. Geraghty to the Washington Supreme Court.<sup>97</sup> Mr. Geraghty was a Democratic stalwart and longtime income tax supporter whose appointment was generally viewed as being directly tied to the Governor's desired outcome in the income tax litigation.<sup>98</sup> It was finally time for the Washington Supreme Court to rule on Initiative 69's constitutionality.

Briefs in the case, originally typewritten, were revised, and those of the Attorney General, the plaintiffs, and some of the *amici curiae*, were resubmitted in printed form.<sup>99</sup> The Attorney General's brief was short and rather weak; it emphasized the fact that the tax had been approved by an overwhelming popular majority.<sup>100</sup> The Attorney General's brief then listed, without analysis, various state court cases from around the country that had approved income taxes.<sup>101</sup> Lawyers for Respondent Culliton, who was the owner of a small insurance agency,<sup>102</sup> presented a similarly short brief that attempted to counter the Attorney General's brief point by point.<sup>103</sup> But the attorneys retained by the "downtown" business community,

94. That supreme court justice was probably Justice Main. See *infra* text accompanying notes 106-07; see also Roberts, *supra* note 46, at 236 (indicating that it was either Justice Holcomb or Justice Main).

95. CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT 95-96 (1988) [hereinafter SHELDON, CENTURY OF JUDGING]; Roberts, *supra* note 46, at 235.

96. SHELDON, CENTURY OF JUDGING, *supra* note 95, at 95-96; Roberts, *supra* note 46, at 235; see also Culliton, 173 Wash. at 309, 22 P.2d at 1049.

97. SHELDON, CENTURY OF JUDGING, *supra* note 95, at 96.

98. See *id.*

99. See, e.g., Brief for the Attorney General, Culliton v. Chase, 173 Wash. 309, 22 P.2d 1049 (1933) (No. 24491); Plaintiff's Brief, Culliton (No. 24491).

100. Brief for the Attorney General, Culliton (No. 24491).

101. *Id.*

102. Roberts, *supra* note 46, at 228.

103. Respondent's Brief, Culliton (No. 24491).

led by Preston, Thorgrimson & Turner,<sup>104</sup> provided extensive written arguments that appear to have taken considerable time and money to prepare. Harold Preston asserted that while a flat tax would be permissible in Washington, a graduated net income tax would violate the state constitution's new uniformity provision because "income" was "property" and property was to be taxed uniformly. Additional typewritten *amicus* briefs were submitted by attorneys representing the Grange and other pro-tax organizations. Several of the *amicus* briefs from prominent Seattle law firms were also long and well-written, but the *amicus* submittals from small town Initiative 69 supporters remained cursory and in typewritten form. Eleven briefs in all were presented to the court, and the oral arguments were held again on August 25, 1933.<sup>105</sup>

After hearing oral argument, the court issued its decision on September 8, 1933, voting five to four to reject the state income tax.<sup>106</sup> The lead opinion was written by Justice Oscar Holcomb and was signed only by him and Justice Main; they were the two members of the majority who three months earlier had voted to rehear *Culliton* after the case had deadlocked. A concurring opinion was filed by Justice Mitchell and signed by Justice Millard, and Justice William Steinert submitted his own concurring opinion. A dissenting opinion was issued by Justice Bruce Blake and signed by Chief Justice Beals and Justices Tolman and Geraghty.

Justice Holcomb, who drafted the lead opinion, is generally regarded as the member of the court who had switched sides between June and September.<sup>107</sup> Justice Holcomb wrote that the fact that the income tax had been passed as an initiative was "of no controlling importance"<sup>108</sup> and that decisions from other states lacked significant relevance.<sup>109</sup> He asserted that in *Aberdeen Savings & Loan Assn. v. Chase*,<sup>110</sup> decided three years earlier, it had "been definitely decided in this state that an income tax is a property tax, which should set the

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104. Roberts, *supra* note 46, at 229.

105. *Id.* at 235; Washington State Supreme Court Clerk's files and docket records, Olympia, Washington.

106. *Culliton v. Chase*, 173 Wash. 309, 22 P.2d 1049 (1933).

107. SHELDON, CENTURY OF JUDGING, *supra* note 95, at 97 n.8; ROBERTS, *supra* note 46, at 236.

108. *Culliton*, 174 Wash. at 373, 25 P.2d at 82.

109. *Id.* at 374, 25 P.2d at 82.

110. 157 Wash. 351, 289 P. 536 (1930), *reh'g denied*, 157 Wash. 391, 290 P. 697 (1930).

question at rest here."<sup>111</sup> He also contended that the "overwhelming weight of judicial authority is that 'income' is property and a tax upon income is a tax upon property."<sup>112</sup> Justice Holcomb's lead opinion cited the language of Article VII, Section 1,<sup>113</sup> and recited Amendment 14 to the effect that all taxes must be uniform "upon the same class of property" and that "[t]he word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership."<sup>114</sup> To him it seemed obvious that income was property under the state constitution:

It would certainly defy the ingenuity of the most profound lexicographer to formulate a more comprehensive definition of "property." It is "everything, whether *tangible or intangible*, subject to ownership." Income is either property under [Article VII, Sec. 1], or no one owns it . . . . There being no other classification in our constitution but real and personal property and *intangible* property, incomes necessarily fall within the category of intangible property. No more positive, precise and compelling language could have been used than was used in those words . . . . It needs no technical construction to tell what those words mean.<sup>115</sup>

Justice Holcomb next held that the net income tax was not an excise tax because it was not "for licenses to pursue certain occupations, or upon corporate or business privileges, or for the manufacture, sale or consumption of commodities."<sup>116</sup> As a tax on an activity or event rather than on property, an excise tax would not have been subject to the constitution's uniformity clause.<sup>117</sup> Justice Holcomb also distinguished the existing graduated inheritance tax, which the court had previously approved as not subject to uniformity requirements.<sup>118</sup> Specifically, the opinion said that the tax on inheritances was

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111. *Culliton*, 174 Wash. at 376, 25 P.2d at 83.

112. *Id.* at 374, 25 P.2d at 82.

113. WASH. CONST. art. VII, § 1. See source quoted *supra* text accompanying note 44.

114. *Culliton*, 174 Wash. at 373, 25 P.2d at 82.

115. *Id.* at 374, 25 P.2d at 82.

116. *Id.* at 378, 25 P.2d at 83.

117. See, e.g., *Pacific Tel. & Tel. Co. v. Seattle*, 172 Wash. 649, 21 P.2d 721 (1933).

118. *In re Ellis' Estate*, 169 Wash. 581, 584, 14 P.2d 37, 39 (1932) (stating that "an inheritance tax is not a tax upon property as such. It is an impost or excise levied as a condition precedent to the transmission or transfer of property from the dead to the living"); *State v. Clark*, 30 Wash. 439, 445, 71 P. 20, 22 (1902) (citing *Magoun v. Illinois Trust and Savings Bank*, 170 U.S. 283, 288 (1898), for the proposition that "[a]n inheritance tax is not one on property, but one on the succession").

"really not a tax at all," but rather "an impost laid but one time, and not annually" upon devisees who take not by natural right but rather by sufferance of the state.<sup>119</sup> Significantly, Justice Holcomb also wrote that it "may be possible to frame an income tax law which will assess all incomes uniformly and comply with our constitution,"<sup>120</sup> but that such a law was "not now before us and we need not consider it."<sup>121</sup>

Justice Mitchell's concurring opinion relied almost entirely on *Aberdeen*, reiterating that in that corporate income tax case, the court had decided that income was property, and that therefore an income tax must be uniform, i.e., flat.<sup>122</sup> He asserted that a small amount of income must be taxed at the same rate as a large amount of income: "It might be reasonable . . . 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 band of two thousand horses . . . ." <sup>123</sup>

Justice Steinert's concurrence was similarly veterinary in character. He noted that the court was "not here concerned with an act relating to a uniform income tax," but rather "only with a graduated income tax," and that although "it might not be unwise, or even unfair, to tax the man who owns ten thousand head of cattle at a *rate* different from that on which the owner of a thousand head of cattle is taxed . . . the constitution forbids it."<sup>124</sup>

Justice Blake's dissent, on the other hand, was intense and combative. To him it was *not* obvious, as it had been to Justice Holcomb, that income was property. Justice Blake focused on the economic developments and rising property values that had led both to the 1930 amendment of the state's constitution and to the 1932 adoption of the 40-mill limit and the income tax.<sup>125</sup> Justice Blake predicted fiscal doom from rejection of the tax and said that the court should defer to the legislature and the voters. He wrote that the majority was engaged in "sheer

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119. *Culliton*, 174 Wash. at 378, 25 P.2d at 83.

120. *Id.* at 379, 25 P.2d at 83.

121. *Id.*

122. *Id.* at 380-81, 25 P.2d at 84 (Mitchell, J., concurring).

123. *Id.* at 382, 25 P.2d at 85.

124. *Culliton*, 174 Wash. at 383-84, 25 P.2d at 85 (Steinert, J., concurring) (emphasis in original).

125. *Id.* at 384-401, 25 P.2d at 86-91 (Blake, J., dissenting).

sophistry" when it equated income with property.<sup>126</sup> He argued, first, that because the income tax was levied on the individual person, it was an *in personam* tax, an excise tax rather than a property tax,<sup>127</sup> and second, that if income *was* property, the legislature could classify it in various ways so as to accomplish a graduated income tax.<sup>128</sup>

Justice Blake's dissenting position was not particularly thoughtful. It relied primarily on the idea that because the people had recently passed both an amendment to the uniformity clause and an income tax, they must have intended the constitution to permit that tax.<sup>129</sup> He did not squarely address the positions taken in the majority opinion. But then, there was not very much to address; the majority opinions did not exhibit much analysis either. Instead they engaged in labeling, in postulating that income equaled property without discussing the fundamental nature of either, and in asserting that because the court had already decided the matter three years earlier in *Aberdeen*, it had no reason to revisit the issue.<sup>130</sup> Like ships passing in the night, each of the two sides in *Culliton* took a nonanalytical position and then expounded it without truly engaging the other side.

The lack of careful analysis by either side of the *Culliton* court was underscored by the decision rendered the same day in *State ex rel. Stiner v. Yelle*,<sup>131</sup> a case upholding the B&O tax the legislature had implemented on an emergency basis until the income tax went into effect. *Stiner* was also a five to four decision, but this time Justice Holcomb rejoined the *Culliton* dissenters, colleagues with whom he had voted three months earlier when that case had been held for reargument. In *Stiner*, Justice Tolman wrote for the majority that the new gross business receipts tax was "an excise tax pure and simple."<sup>132</sup> Justice Tolman declined to review the many cases that he said were relevant to this question, asserting that time and space would not permit it.<sup>133</sup> But his argument for the B&O tax reads as though it could have been another dissenting opinion

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126. *Id.* at 389, 25 P.2d at 87.

127. *Id.* at 393, 25 P.2d at 88.

128. *Id.* at 397, 25 P.2d at 90.

129. *Culliton*, 174 Wash. at 388, 25 P.2d at 87.

130. *Id.* at 376, 25 P.2d at 83.

131. 174 Wash. 402, 25 P.2d 91 (1933).

132. *Id.* at 405, 25 P.2d at 93.

133. *Id.* at 406, 25 P.2d at 93.

in *Culliton* if the term "income tax" were substituted for "B&O tax." Justice Tolman conceded that the constitution defined property as "anything subject to ownership" and, he wrote, "in a sense, one's business and its earnings are owned by him, but the privilege of engaging in business and gainful pursuits must and does exist before the business can be established."<sup>134</sup> He drew from Locke in observing that while "[m]an in a state of nature gained his sustenance by his strength or cunning . . . the established state enacted laws for the protection of human rights, the rights of property, and to prevent the weak or the credulous from becoming . . . helpless victims . . . ."<sup>135</sup> Justice Tolman concluded that because the benefits of government enabled the businessperson to be "secure in his property investment, and also in his gains therefrom," this "privilege, far above mere property" was the thing now taxed so that the beneficiary would pay his "fair share of the cost to the state of its creation and continuance."<sup>136</sup> Justice Tolman then proceeded to the core of his argument, which is hard to reconcile with the reasoning in *Culliton* but for the fact that one justice decided to change sides:

Income may be acquired, but only in exceptional cases, such as annuities and the like, is it susceptible of ownership. When acquired, income immediately becomes property in the hands of the acquirer, and it is, of course, taxable with other property of the same class.

This act does not concern itself with income which has been acquired, but only with the privilege of acquiring, and that the amount of the tax is measured by the amount of the income in no way affects the purpose of the act or the principle involved.<sup>137</sup>

Justice Tolman then stated that he was able to "decisively determine" that the B&O tax was an "excise tax" and in accordance with established principles,<sup>138</sup> and that the legisla-

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134. *Id.*

135. *Id.*

136. *Stiner*, 174 Wash. at 406, 25 P. at 93.

137. *Id.* at 407, 25 P.2d at 93.

138. *Id.* Justice Tolman listed the following as authority: *Pacific Tel. & Tel. Co. v. Seattle*, 172 Wash. 649, 21 P. 721 (1933); *Southern Railway Co. v. Watts*, 260 U.S. 519 (1923); *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932); *Puget Sound Power & Light Co. v. Seattle*, 172 Wash. 668, 21 P. 727 (1933); *Bucoda v. Swaney*, 163 Wash. 43, 299 P. 652 (1931); *Sumner v. Ward*, 126 Wash. 75, 217 P. 502 (1923). Interestingly, Justice Tolman did not mention *Spokane & Eastern Trust Co. v. Spokane Co.*, 70 Wash. 48, 126 P. 54 (1912), which likewise upheld an excise tax, but included dicta that

ture could structure excise taxation in virtually any way absent arbitrary action, fraud, or abuse.<sup>139</sup> Further, the legislature could impose an excise tax on different types of activities at different rates, providing various exemptions that made the B&O tax somewhat "graduated" in character. Discussing whether a gubernatorial veto of the B&O tax statute's applicability to agriculture and the professions had been arbitrary, Justice Tolman made some assertions that reflected the great change in the state's economy over the previous sixty years and which might cause some smiles today. He stated that an agricultural exclusion from the tax was proper because "[f]arming is not a commercial pursuit. It is not a business in the sense used in this act. By general knowledge and common consent, farming is classed as a way of life . . . ." <sup>140</sup> He also wrote that the exemption of professional and other services from taxation was reasonable because, while there were "those who commercialize the professions, the rule to the contrary is very strict . . . . A profession is not a money getting business."<sup>141</sup>

Justice Steinert responded with a long and biting dissent. He claimed that the "so-called 'occupation tax' act" was in fact a non-uniform tax on business income, that *Aberdeen* had decided whether any sort of income was property, and that, therefore, a "tax based upon gross income or gross proceeds of sales is a property tax."<sup>142</sup> Justice Steinert found the distinction between "gross income" and "gross proceeds of sales" to be tenuous, and he also challenged the exemption of farmers and professionals from taxation.<sup>143</sup> Justice Mitchell signed Justice Steinert's dissent, and Justices Main and Millard wrote that they concurred with the main thrust of his argument, but that they were uncomfortable with the differential treatment of farmers, doctors, and lawyers.<sup>144</sup>

Consequently, the state was left with a B&O tax and without an income tax, but skirmishing continued within the court between two distinct camps: the four-member *Culliton* minor-

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he would not have found supportive. Justice Steinert *did* cite *Spokane & Eastern* in his dissent.

139. *Stiner*, 174 Wash. at 407-08, 25 P.2d at 93; see *infra* text accompanying notes 234-238.

140. *Stiner*, 174 Wash. at 410, 25 P.2d at 94.

141. *Id.* at 411, 25 P.2d at 95.

142. *Id.* at 418-20, 25 P.2d at 97-99 (Steinert, J., dissenting).

143. *Id.* at 421-424, 25 P.2d at 98-99.

144. *Id.* at 424, 25 P.2d at 99 (Main, Millard, J.J., concurring).

ity on the one hand, and the Steinert, Mitchell, and Millard group on the other, with Justices Holcomb and Main as the swing votes. For example, in *State ex rel. Mason County Logging Co. v. Wiley*,<sup>145</sup> decided in April 1934, the *Culliton* minority plus Justices Holcomb and Main upheld a 1931 law taxing all reforestation lands at the same rate. Challengers had contended that the tax violated the Article VII, Section 1, provision requiring that such property bear either a severance tax or an *ad valorem* levy based on the assessed value of the property taxed.<sup>146</sup> The majority opinion written by Justice Geraghty reflected the continuing debate. He wrote that "[i]t is a matter of common knowledge that the purpose of the fourteenth amendment [the 1930 amendment to Article VII] was to permit a departure from the rigid requirement of uniformity and equality."<sup>147</sup> Because this remedial legislation had been adopted after "well-considered and deliberate" consideration by the legislature, he felt "nothing less than a certain and unequivocal violation of some constitutional inhibition can warrant us in holding it inoperative."<sup>148</sup> Justice Steinert allowed less deference to the legislature. Joined by Justices Mitchell and Millard, Justice Steinert replied acidly that the "constitution is not so elastic or so anaemic that it must bend or bow to the will or direction of the legislature."<sup>149</sup> Justice Steinert also replied that the "legislature well knew what was meant by an *ad valorem* tax,"<sup>150</sup> but that the legislature's "arbitrary announcement" had "imposed a fictitious and invariable value upon all lands."<sup>151</sup>

The court's internal conflict over taxation issues was also reflected in *Supply Laundry v. Jenner*,<sup>152</sup> a follow-up to *Stiner* that further challenged B&O tax distinctions among various professions. Justice Steinert wrote the lead opinion upholding those distinctions based on *Stiner*, but his opinion was so grudging that only Justices Mitchell and Millard joined in it, causing Justices Main and Justice Justice Tolman to concur separately.<sup>153</sup>

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145. 177 Wash. 65, 31 P.2d 539 (1934).

146. *Id.* at 68, 31 P.2d at 541; Respondent's Brief at 27-61 (No. 24601).

147. *Wiley*, 177 Wash. at 70, 31 P.2d at 542.

148. *Id.* at 70-71, 31 P.2d at 542.

149. *Id.* at 77, 31 P.2d at 544 (Steinert, J., dissenting).

150. *Id.* at 78, 31 P.2d at 545.

151. *Id.* at 81, 31 P.2d at 546.

152. 178 Wash. 72, 34 P.2d 363 (1934).

153. Only five justices signed an opinion in *Supply Laundry*, presumably because

While the jousting continued within the court, income tax advocates set out to overturn *Culliton* by taking another constitutional amendment to the people in November 1934.<sup>154</sup> But this time, the Grange's coalition with education and urban labor groups, which has been described as having been on shaky grounds in the first place,<sup>155</sup> seems to have melted away. The 40-mill limit passed in 1932 had significantly lowered property taxes, and the B&O tax appeared to be providing barely enough revenue to keep state government and schools operating.<sup>156</sup> The sense of crisis had passed and, without urban support, the shrinking rural population was insufficient to reapprove the income tax. In one historian's words, the "coalitions among the various interest groups collapsed because economic conditions and tax reforms led some to conclude that the income tax was not as 'necessary' as they originally believed."<sup>157</sup>

Recognizing that the interim B&O tax measure passed in 1933 would not provide for the total cost of state government operations over the long term, the next legislature thoroughly overhauled the tax system with the Revenue Act of 1935,<sup>158</sup> a statute of nearly one hundred-fifty printed pages in which the B&O tax and inheritance tax were reworked, and in which a sales tax, compensating use tax, admissions tax, liquor tax, and nine other new imposts were levied. Despite Governor Martin's veto of three of the new tax measures, the act established the basic state tax structure that remains in place today.

The Revenue Act of 1935 also included a corporate net income tax,<sup>159</sup> and a separate statute reenacted the personal

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the case was heard by a five-member panel, which was common at that time in order to handle the court's workload. "Department One," for the period during which *Supply Laundry* was handed down, included Justices Main, Mitchell, Millard, and Steinert. The Chief Justice could sit on either panel or could assign a judge from one Department to another to provide a five-member panel to hear a case. In *Supply Laundry*, the justices hearing the matter consisted of Department One plus Justice Tolman. For a discussion of the two-department system between 1910 and 1939, see CHARLES SHELDON, *THE WASHINGTON HIGH BENCH: A BIOGRAPHICAL HISTORY OF THE STATE SUPREME COURT, 1889-1991*, at 49-50 (1992) [hereinafter SHELDON, *WASHINGTON HIGH BENCH*].

154. H.J. Res. 12, 23rd Leg., 1933 Wash. Laws Ex. Sess. 230.

155. Roberts, *supra* note 46, at 239.

156. *Id.* at 253-54.

157. *Id.* at 14-15.

158. 1935 Wash. Laws 706; see generally, Harsch, *Washington Tax System*, *supra* note 26, 962-64.

159. Revenue Act of 1935, ch. 180, §§ 159-84, 1935 Wash. Laws 706.

net income tax.<sup>160</sup> In an attempt to avoid their characterization as "property taxes," both income tax measures were cast as "privilege" or "excise" taxes. The corporate income tax was imposed on the "privilege of doing business in [the] state,"<sup>161</sup> and the personal net income tax was levied on every resident "for the privilege of receiving income . . . while enjoying the protection of [the state's] laws."<sup>162</sup> The corporate measure assessed a flat 4% tax,<sup>163</sup> while the personal net income tax assessed a "normal tax" of 3% on income up to \$4,000,<sup>164</sup> a "surtax" on income in excess of \$4,000,<sup>165</sup> and various deductions and credits that made it still more graduated in nature.

Business interests promptly launched attacks on the key components of the Revenue Act of 1935. Various lawsuits focused on the retail sales tax, the use tax, and the personal and corporate income taxes.<sup>166</sup> Challenges to the retail sales tax and use tax were argued before the supreme court in the summer of 1935, and decisions were rendered in August.<sup>167</sup> Both challenges failed.

In *Morrow v. Henneford*,<sup>168</sup> the court unanimously upheld the sales tax. In an opinion by Justice Geraghty, the court ruled that the sales tax was an excise rather than a property tax, that virtually any type of tax would be upheld unless it was "prohibited by express language or by necessary implication in the constitution," and that although merchants were responsible for collecting the sales tax, their property was not the actual subject of the levy.<sup>169</sup> Quoting extensively from a United States Supreme Court opinion upholding a gift transfer tax,<sup>170</sup> Justice Geraghty wrote that although the sales tax was "imposed upon the exercise of one of the numerous rights of property, [it] is distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or dis-

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160. Personal Net Income Tax Act, ch. 178, 1935 Wash. Laws 660.

161. Revenue Act of 1935, ch. 180, § 161, 1935 Wash. Laws 706.

162. Personal Net Income Tax Act, ch. 178, § 2, 1935 Wash. Laws 660.

163. Revenue Act of 1935, ch. 180, §§ 160-61, 1935 Wash. Laws 812-13.

164. Personal Net Income Tax, ch. 178, § 2(a), 1935 Wash. Laws 661-62.

165. *Id.* § 3.

166. *Morrow v. Henneford*, 182 Wash. 625, 47 P.2d 1016 (1935); *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 49 P.2d 14 (1935).

167. *Id.*

168. 182 Wash. 625, 47 P.2d 1016 (1935).

169. *Id.* at 627-28, 47 P.2d at 1017 (citing *Wiseman v. Phillips*, 84 S.W.2d 91, 95-96 (1935)).

170. *Bromley v. McCaughn*, 280 U.S. 124 (1929).

position made of his property."<sup>171</sup>

Similarly, in *Vancouver Oil Co. v. Henneford*,<sup>172</sup> the court sustained the "use" or "compensating" tax levied on products bought outside the state and then imported for use or consumption. Justice Main's majority opinion relied on *Morrow* to the effect that the use tax measure was also an excise tax.<sup>173</sup> Justice Main's opinion held that there was no violation of the U.S. Constitution's Commerce Clause because no tax was collected when another state previously had levied an impost on the same item.<sup>174</sup> Justices Mitchell, Justice Holcomb, and Milard dissented on Commerce Clause grounds.

Although the court left standing the sales and use provisions of the Revenue Act of 1935, the personal and corporate income taxes met less auspicious fates. In January 1936, Justice Steinert wrote an opinion in *Jensen v. Henneford*<sup>175</sup> that not only rejected the personal net income tax, but attempted to hammer nails into the *Culliton* coffin. In his brief, the Attorney General had stressed the recent *Morrow* and *Vancouver Oil* cases, quoting language to the effect that a tax on the use of a piece of property was not a tax on the property itself.<sup>176</sup> But Justice Steinert, in an opinion signed by Justices Main, Mitchell, and Holcomb, reinforced *Culliton's* labeling of income as property and stated that "[i]nasmuch as the majority members of this court, as now constituted, hold the same views as expressed by them in the *Culliton* case, it would serve no useful purpose to enter upon a further discussion of the authorities considered in that case."<sup>177</sup> Without analysis, Justice Steinert dismissed *Stiner*, *Supply Laundry*, *Morrow*, and *Vancouver Oil*, saying that it was "obvious" that nothing in any of those cases meant that the court "had receded from its former emphatic declaration that, under our constitution, income is property, and that an income tax is a property tax."<sup>178</sup> The opinion went on to dismiss the "privilege" and "excise" language in the new statute as an attempt by the legislature to "change the real nature and purpose of an act by

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171. *Morrow*, 182 Wash. at 631, 47 P.2d at 1019 (citing *Bromley*, 280 U.S. at 137).

172. 183 Wash. 317, 49 P.2d 14 (1935).

173. *Id.* at 320-21, 49 P.2d at 16.

174. *Id.* at 323, 49 P.2d at 17.

175. 185 Wash. 209, 53 P.2d 607 (1936).

176. Appellant's Brief at 21-22, *Jensen* (Nos. 25854, 25855).

177. *Jensen*, 185 Wash. at 216, 53 P.2d at 610.

178. *Id.* at 217, 53 P.2d at 610.

giving it a different title or by declaring its nature and purpose to be otherwise.”<sup>179</sup> But then, Justice Steinert appeared to go beyond *Culliton* and, for the first time, offered an explanation for treating income as property:

The right to receive property (income in this instance) is but a necessary element of ownership, and, without such right to receive, the ownership is but an empty thing and of no value whatever. “In common understanding, to hold property is to own it. In order to own or hold, one must acquire.” Conversely, the mere potential privilege of receiving earned income amounts to nothing unless and until the income is received. 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.<sup>180</sup>

Justice Steinert’s opinion also held that under the United States Supreme Court decision in *Pollock v. Farmers’ Loan & Trust Co.*,<sup>181</sup> a tax on rents from real estate was a tax on the real estate itself; hence, the income tax on rental income could not be included in gross income for purposes of income taxation.<sup>182</sup> Justice Millard filed a short concurring opinion, relying on *stare decisis* and citing *Aberdeen* and *Culliton*.<sup>183</sup>

Justice Blake dissented, joined by the *Culliton* minority. He queried how the court could permit the “highly discriminatory” taxation of gross income in *Stiner* without allowing the “least oppressive” graduated taxation of net income in *Jensen*.<sup>184</sup> Justice Blake also argued that the sales tax operated “directly upon specific, tangible property,” while the “tax on net income operate[d] upon an intangible, inchoate right—susceptible, indeed, to ownership, but not susceptible to manual possession.”<sup>185</sup> Justice Blake stated, “I am unable to comprehend the reasoning which underlies the holding, on the one hand, that [the sales tax] is *not* a property tax, and, on the other hand, that a tax on net income *is* a property tax.”<sup>186</sup> Jus-

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179. *Id.*

180. *Id.* at 218-19, 53 P.2d at 611 (citing *McFeely v. Commissioner of Internal Revenue*, 296 U.S. 102 (1935)).

181. 157 U.S. 429 (1894).

182. *Jensen*, 185 Wash. at 222, 53 P.2d at 612.

183. *Id.* at 225, 53 P.2d at 613 (Millard, J., concurring).

184. *Id.* at 226, 53 P.2d at 613-14 (Blake, J., dissenting).

185. *Id.* at 227, 53 P.2d at 614.

186. *Id.*

tice Blake took the position that the four decisions intervening since *Culliton* had caused that case to have "lost its force as completely as if it had been flatly overruled."<sup>187</sup> He was unable, however, to convince the *Culliton* majority that this had occurred, and he had no more success two months later when a brief opinion in *Petroleum Navigation Co. v. Henneford*<sup>188</sup> reiterated the outcome in *Aberdeen* and overturned the corporate income tax provisions of the Revenue Act of 1935.

#### IV. INCOME EQUALS PROPERTY: HOW DISCOMFORTING CONFLICT MADE "EPITHETICAL JURISPRUDENCE" EASIER THAN REASONED DISCOURSE

When *Culliton*, *Jensen*, and *Petroleum Navigation* are closely examined together with *Aberdeen*, it becomes apparent that a sharply divided court, composed of judges with divergent philosophies, effectively avoided a reasoned consideration of the concepts involved in the words "income" and "property." Instead, the majority opinions resorted to a type of "epithetical jurisprudence"; that is, a method of legal thinking that depends on bare labeling, on calling income a form of property, and then, without much in the way of analysis, reiterating that axiom like a mantra using *stare decisis* as a crutch rather than a tool.<sup>189</sup> Apparently, the Washington court was not alone in approaching income tax cases in this epithetical manner. William J. Matthews, who in 1949 published a detailed and thoughtful examination of tax uniformity cases from around the country, observed the following:

[T]he enactment of income tax legislation frequently is the occasion for sharp political clashes among the various segments of the community, and the courts are not immune to these controversies. The constitutionality of many state income tax statutes has been litigated against a background of conflicting economic and political interests at a time when the need for revenue to meet pressing social problems and the demand for a reallocation of the tax burden were critical. The courts are not able in every instance to conceal the influence of this fact on their decisions by drawing nice distinctions as to the nature of the tax.<sup>190</sup>

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187. *Jensen*, 185 Wash. at 227, 53 P.2d at 614 (Blake, J., dissenting).

188. 185 Wash. 495, 55 P.2d 495 (1936).

189. See *Jensen*, 185 Wash. at 217, 53 P.2d at 610.

190. Matthews, *supra* note 34, at 504.

Matthews stated that "the opinions in the income tax cases afford ample opportunity to see the extent to which judicial thinking on constitutional questions regarding taxation is dependent on a conceptualistic and analytical method."<sup>191</sup> But after an extensive review of state income tax cases, he concluded as follows:

As long as the critical features of the statutory scheme are simple, direct and similar to some familiar tax pattern, it is possible to solve the basic legal problem . . . by labeling the tax. But the normal tax statute devised to reach income is sufficiently complex and different to make judicial analysis of it unusually difficult if not impossible.<sup>192</sup>

In his recent state-by-state study of tax uniformity requirements, Professor Newhouse reached similar conclusions with respect to Washington:

Though not explicit, the tone of the principal and concurring opinions for the majority in *Culliton* hinted at a bitter dispute lying close to the surface, but not yet spilling over into the printed opinion. That tension is reflected in the defensive tone of the dissenting opinion, and is explicitly confirmed in 1936, in the *Jensen* case, where the acrimonious debate was not kept in the confines of the conference room

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Having reviewed the taxation provisions of all fifty states and studied virtually all of the court opinions relating to uniformity clauses, Newhouse concluded "that none of the several tests and, often times, bare conclusions offered by the several courts are convincing as absolute."<sup>194</sup> He suggests:

[I]n the final analysis the really decisive questions were: First, how did the judges look upon an income tax from the viewpoint of social policy and fiscal policy? Second, how much discretion was the legislature to be allowed, even though the tax in question might be distasteful to the judges on the court?<sup>195</sup>

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191. *Id.*

192. *Id.*

193. NEWHOUSE, *supra* note 23, at 1986.

194. *Id.* at 2026-27.

195. *Id.* at 2027; see also *id.* at 1961-2011, where Newhouse skillfully contrasts *Culliton* and some of the state cases decided in the same period that reached a similar result (e.g., *Eliasberg Bros. Mercantile Co. v. Grimes*, 86 S. 56 (Ala. 1920); *Bachrach v. Nelson*, 182 N.E. 909 (Ill. 1932); *Kelley v. Kaloden*, 181 A. 598 (Pa. 1935)) with contemporary cases that reached a contrary result and upheld net income taxes (e.g.,

From the perspective of social and fiscal policy, how *did* Washington's justices look upon the income tax? Justice Geraghty's pro-income tax views were well known when he was appointed,<sup>196</sup> but most of the justices were prominent members of the bar for whom neither the "establishment" label nor party label automatically yields an indication of how they personally viewed the income tax.<sup>197</sup> But the *Culliton-Jensen* majority's dependence on labeling in lieu of analysis, and the minority's emphasis on deference to the people and to the legislature rather than logic, suggests that the justices on both sides were voting from the heart, or at least from deep-seated social philosophies.

We can only speculate, but based on the language and the fervor of Justice Steinert's opinions, it is reasonable to suggest that he, Millard, and Mitchell, the core of the *Culliton-Jensen* majority, fell into a conservative school of economic and legal thought that for decades had viewed income taxes and other attempts to separate people from their wealth with extreme distrust.<sup>198</sup> In a recent study of the Washington Supreme Court and its justices, Charles Sheldon asserts that the 1930s court tilted strongly toward the "substantive due process" doctrines developed by the United States Supreme Court during the previous decades.<sup>199</sup> Sheldon attempts to show how certain state and federal constitutional provisions, particularly the due process and equal protection clauses, were used to provide "a

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Stanley v. Gates, 19 S.W.2d 1000 (Ark. 1920); Featherstone v. Norman, 153 S.E. 58 (Ga. 1930); Diefendorf v. Gallet, 10 P.2d 311 (Idaho 1932); Reed v. Bjornson, 253 N.W. 102 (Minn. 1934); State *ex rel.* Knox v. Gulf, M. & N.R. Co., 104 So. 689 (Miss. 1925); Hattiesberg Grocery v. Robertson, 88 So. 4 (Miss. 1921); O'Connell v. State Board of Equalization, 25 P.2d 114 (Mt. 1933)).

196. Roberts, *supra* note 46, at 235; see also SHELDON, CENTURY OF JUDGING, *supra* note 95, at 96.

197. See SHELDON, CENTURY OF JUDGING, *supra* note 95, at 90-104, for a discussion of the processes leading to the appointment of the court that decided *Culliton* and *Jensen*. The *Culliton-Jensen* majority was composed of three Republicans and two Democrats, and the minority had just a single Republican; but one should not place too much stock in partisan labels. Justice Mitchell, one of the most conservative court members, was a Democrat, while Justice Beals was a progressive Republican. ROBERTS, *supra* note 46, at 7, found that until 1932 the parties were "virtually indistinguishable" on state issues. The Republican party was evenly split on the income tax question, and in 1932 the pro-tax Republicans had prevailed. See *supra* note 79 and accompanying text.

198. In his analysis of a variety of decisions over many years, Sheldon has characterized Justices Mitchell and Steinert as "conservative" and Justice Millard as "moderate," tending to the conservative end of the spectrum. SHELDON, CENTURY OF JUDGING, *supra* note 95, at 275, 283.

199. SHELDON, WASHINGTON HIGH BENCH, *supra* note 153, at 17.

conservative court with the . . . tools to strike down legislation threatening private property.”<sup>200</sup> The idea that income taxes could be misused to destroy property and property rights was expressed frequently. An earlier example of this perspective can be found in oral arguments before the United States Supreme Court in *Pollock v. Farmers’ Home & Trust Co.*,<sup>201</sup> a case upon which Justice Steinert heavily relied. In the *Pollock* arguments, which were printed ahead of the Supreme Court’s opinions in the official Supreme Court Reports, and which were therefore likely read by the members of the Washington court, one attorney described the federal income tax proposals “as communistic, socialistic—what shall I call them—populistic as ever have been addressed to any political assembly in the world” and a threat to “one of the fundamental objects of all civilized government . . . the preservation of the rights of private property.”<sup>202</sup> In that same case, Justice Field’s concurring opinion described the income tax as a threat “to the very foundation of the government,” an “assault upon capital” that “will become a war of the poor against the rich.”<sup>203</sup>

Judge Thomas M. Cooley, whose *Treatise on the Law of Taxation* was often quoted in Washington tax case briefs and opinions, wrote in his 1876 first edition that the theory of granting income tax exemptions for lower income people

would also justify a heavier proportionate tax on the thrifty classes in other cases; and the principle once admitted, there is no reason but its own discretion why the legislature should stop short of imposing the whole burden of government on the few who exhibit most energy, enterprise and thrift.<sup>204</sup>

To underscore his disgust for income taxes, Judge Cooley darkly referred to Gibbon’s description of torture used in the Roman Empire and similar methods of gathering taxes from Jews in medieval England.<sup>205</sup> The 1924 edition of Cooley’s treatise, used by advocates in *Culliton* and *Jensen*, relegated Cooley’s anti-income tax views to a footnote.<sup>206</sup> But Cooley’s

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200. *Id.*

201. 157 U.S. 429 (1894), *modified*, 485 U.S. 523 (1988).

202. *Id.* at 532, 534 (quoting plaintiff’s argument by Joseph H. Choate).

203. *Id.* at 607 (Field, J., concurring).

204. THOMAS M. COOLEY, *TREATISE ON THE LAW OF TAXATION* 21 (1876).

205. *Id.*

206. THOMAS M. COOLEY & CLARK A. NICHOLS, *THE LAW OF TAXATION* 20 n.1 (4th ed. 1924). Respondent McKale’s Inc. quoted this very passage from Cooley in its

attitude nevertheless continued to be shared by many who feared that graduated income taxes could lead to confiscation of substantial amounts of property in a nation they believed had been founded on the principle of protection of private property. These beliefs reflected a Lockean thread that ran through American political thought from before the Revolution. The Stamp Act had been opposed in America on the grounds that it violated "natural" rights of property,<sup>207</sup> and, in 1774, George Washington wrote that British tax schemes would dispossess Americans until they became "tame and abject slaves."<sup>208</sup> An influential contemporary jurist, Nathaniel Chipman of Vermont, wrote in 1793 that the right of property was composed first and foremost of the right to acquire it, and second, the right to hold it.<sup>209</sup> He opposed the equalization of wealth and believed that government efforts to do so "would rob the industrious of the fruits of their labor and reward the indolent."<sup>210</sup> James Madison's concept of the Constitution emphasized the protection of the propertied classes from dispossession by the majority, while also protecting that majority from exploitation.<sup>211</sup> Although the rise of industrialism in the nineteenth century was accompanied by widespread acceptance of utilitarian political theories that envisaged more government intervention in the economy and more controls on private property, one commentator has noted that "[n]o group in the United States [was] more faithful to the philosophy of the Founding Fathers than the interpreters of their handiwork, the constitutional lawyers and the judges . . . . Three of the best-known treatises on American Law, the *Commentaries* of Chancellor Kent (1826-30), those of Justice Story (1833), and T.M. Cooley's *Constitutional Limitations* (1868) all expound the same doctrine"<sup>212</sup> that the acquisition as well as the possession of property are natural rights that must be protected by law.<sup>213</sup>

With this background in mind, and taking into account

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Culliton brief. Respondent McKale's Brief at 40, Culliton v. Chase, 174 Wash. 363, 25 P.2d 81 (1933) (No. 24491).

207. RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 172 n.1. (1951).

208. Quoted in SCOTT, *supra* note 32, at 37.

209. *Id.* at 54.

210. *Id.* at 55.

211. *Id.* at 45.

212. SCHLATTER, *supra* note 207, at 194.

213. T.M. Cooley was the same Judge Cooley who expressed such anti-income tax

business community criticisms that the graduated net income tax was a burdensome attempt to increase taxes on all and to extract profits and property from the thrifty,<sup>214</sup> it is easy to comprehend Justice Steinert's views in *Jensen* and *Stiner*. Justice Steinert saw the right to receive and the right to hold property as one and the same thing in both *Jensen*<sup>215</sup> and in his indignant dissent in *Stiner*,<sup>216</sup> the case upholding the B&O tax. Equally apparent is the countervailing utilitarian view in Justice Blake's *Culliton* dissent, in which he emphasized the plight of agricultural land owners, the state government's fiscal predicament, and the need to defer to the public will in enacting the 1930 uniformity amendment and the 1932 net income tax.<sup>217</sup>

Whatever philosophical and political forces influenced the individual justices' views on the income tax,<sup>218</sup> it is clear that the court was divided by fundamental and irreconcilable differences. It is also clear that the terms "property" and "income" were difficult for the justices to define, and that it was much more convenient to look for an easy way out. Justice Holcomb's lead opinion in *Culliton* provided that easy way by concluding that the issue had already been decided. Except for Justice Steinert's short argument in *Jensen* that the right to acquire and the right to hold income are both attributes of property, the majority decisions in *Culliton*, *Jensen*, and *Petroleum Navigation* all avoided a serious analysis of what constitutes property and income. Instead, they claimed that *Aberdeen* had held that an income tax was a property tax, that the "overwhelming weight of judicial authority is that 'income' is property," and, in Justice Holcomb's words, that "should set

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views in his TREATISE ON THE LAW OF TAXATION. See generally COOLEY, *supra* note 204.

214. Roberts, *supra* note 46, at 183-84, 200-02.

215. *Jensen v. Henneford*, 185 Wash. 209, 219, 53 P.2d 607, 611 (1936).

216. *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 419-20, 25 P.2d 91, 98-99 (1933) (Steinert, J., dissenting).

217. *Culliton v. Chase*, 174 Wash. 363, 384-88, 25 P.2d 81, 86-91 (1933).

218. Former Grange organizer, legislator, and tax commissioner Charles Hodde is firmly of the view that the decisive factor in *Culliton*'s outcome was the fact that while the supreme court had that case under advisement, the state insisted on sending out tax return forms to every household, including thousands of people whose incomes were so low they were not subject to tax. Tax return forms were of course mailed to each of the justices. Hodde believes that the public confusion over the forms, which were viewed as rather complicated, caused Justice Holcomb to desert his former pro-tax position. *Hodde Interview*, *supra* note 88. However, as Roberts points out, this is in the realm of "folklore" rather than history. Roberts, *supra* note 46, at 234.

the question at rest."<sup>219</sup>

But *Aberdeen* did not decide that income was a form of property, at least not under the Washington Constitution, and the position taken by the supreme court in *Culliton* did not, even in 1933, reflect the prevailing judicial view nationwide. *Aberdeen* and its companion cases<sup>220</sup> were brought by savings and loan associations for several reasons. First, the cases challenged the large difference between the corporate income tax the savings and loans were to pay and that to be paid by commercial banks.<sup>221</sup> Second, they attacked the legislature's failure to impose a similar tax on investment banking firms that were not corporations.<sup>222</sup> And third, they were brought to block the attempted taxation of interest income from federal securities.<sup>223</sup> In *Aberdeen*, the plaintiffs-appellants' briefs raised the issue of the character of the tax to argue that it was not an excise tax, because then, as now, legislatures were granted substantially more discretion to distinguish among industries and forms of business organization in applying such taxes.<sup>224</sup> The primary thrust of the savings and loans' challenge was that under the United States Supreme Court ruling in *Quaker City Cab Co. v. Pennsylvania*,<sup>225</sup> the differential treatment of corporate and non-corporate businesses violated the U.S. Constitution's Equal Protection Clause. The plaintiffs-appellants also argued that *MacAllen Co. v. Massachusetts*<sup>226</sup> prohibited state taxation of federal bond interest.<sup>227</sup>

The briefs in *Aberdeen* and the related cases were very long by the standards of the day, but the issue of whether the proposed tax violated the state constitution's then-existing uniformity provision appears to have been raised as an after-thought; only ten pages of appellant Aberdeen Savings & Loan Association's one hundred seventy-four page opening brief was

219. *Culliton*, 174 Wash. at 374, 376, 25 P.2d at 82-83.

220. *Burr*, Conrad & Broom, Inc. v. Chase, 157 Wash. 393, 289 P. 551 (1930); *In re Washington Mutual Savings Bank*, 157 Wash. 698, 289 P. 555 (1930); *United Diversified Securities Corp. v. Chase*, 157 Wash. 699, 289 P. 554 (1930).

221. *Aberdeen Savings and Loan Ass'n v. Chase*, 157 Wash. 351, 360-61, 289 P. 536, 541 (1930), *reh'g denied*, 157 Wash. 391, 290 P. 697 (1930).

222. *Burr*, 157 Wash. at 394-95, 289 P. at 552.

223. *Aberdeen*, 157 Wash. at 365, 289 P. at 543.

224. *Id.* at 360-61, 289 P. at 541.

225. 277 U.S. 389 (1928).

226. 279 U.S. 620 (1929).

227. *Aberdeen*, 157 Wash. at 365-67, 289 P. at 543.

devoted to the issue,<sup>228</sup> the Attorney General dedicated just three of his two hundred six pages to the same question,<sup>229</sup> and the appellant's one hundred thirty-five page reply brief spent just one and one-half pages on the matter.<sup>230</sup> The appellants in *Burr, Conrad & Broom, Inc. v. Chase* used just four of their ninety-four pages to discuss the uniformity question.<sup>231</sup> In their discourse on the state constitutional issue, the appellants' briefs relied mainly on *Pollock v. Farmers' Loan & Trust Co.*,<sup>232</sup> the United States Supreme Court decision nullifying the 1894 federal income tax on grounds that it was a direct rather than an indirect levy.<sup>233</sup> But rather than discussing the character of income as property, the appellant's arguments followed *Pollock* and concentrated on whether the tax in question was direct or indirect and whether it was an authentic corporate privilege tax.<sup>234</sup>

In his majority opinion striking down the proposed corporate tax in *Aberdeen*, Justice Beals relied on the United States Supreme Court's equal protection holding in *Quaker City Cab Co.*<sup>235</sup> and the *MacAllen* bar to taxing income from federal securities.<sup>236</sup> Although he noted in a side comment that the Attorney General did "not seriously contend that a tax of like general nature to that which we are now considering can be lawfully levied directly upon appellants' property, which is equivalent to the levy of such a tax upon . . . net income,"<sup>237</sup> he never discussed the issue of whether an income tax was

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228. Appellant Aberdeen Savings & Loan Association's Opening Brief at 161-70, *Aberdeen* (No. 22228).

229. Respondent Attorney General's Brief at 156-59, *Aberdeen* (No. 22228).

230. Appellant Aberdeen Savings & Loan Association's Reply Brief at 126-27, *Aberdeen* (No. 22228).

231. Appellant Burr, Conrad & Broom's Brief at 87-90, *Aberdeen* (No. 22228).

232. 157 U.S. 429 (1894).

233. Appellant Aberdeen Savings & Loan Association's Opening Brief at 165-68, *Aberdeen* (No. 22228); Appellant Burr, Conrad & Broom's Opening Brief at 87, *Aberdeen* (No. 22228). Article I, § 9, of the U.S. Constitution includes a requirement that "direct" taxes be apportioned among the states based on population, while Article I, § 8, permits Congress to impose "duties, imposts and excises" uniformly throughout the United States. Until *Pollock*, "direct taxes" had been limited to capitation taxes and taxes on real estate. *Pollock's* characterization of the income tax as a direct tax made it impracticable: Some states might have relatively fewer but richer people, while others might have a large, poor population, so that apportionment of the tax on a population bases among the states would not work. See NEWHOUSE, *supra* note 23, at 1935.

234. See *Aberdeen*, 157 Wash. at 361, 289 P. at 541.

235. *Id.* at 364, 374, 289 P. at 542, 545.

236. *Id.* at 365-69, 289 P. at 543-44.

237. *Id.* at 361, 289 P. at 541.

equivalent to a property tax. Indeed, Justice Beals rendered the court's decision assuming that the proposed levy *was* a tax on the privilege to engage in business, but held that "in the carrying on of which [business] every person is entitled to the equal protection of the laws in accordance with the mandate of the Federal constitution."<sup>238</sup> Justice Beals, who later voted with the *Culliton* minority to uphold the state income tax,<sup>239</sup> expressly stated in *Aberdeen* that the court's decision being based on the U.S. Constitution "render[ed] unnecessary any discussion of appellants' contention that the act . . . violates the uniform taxation provisions of the constitution of the state of Washington."<sup>240</sup>

Respondents and attorneys for the Advisory Tax Commission of Washington, as *amici curiae*, filed petitions for rehearing of *Aberdeen* and its companion cases. The *amici curiae* argued, in the court's words, that language used in the *Aberdeen* and associated opinions

indicate[d] that the court intended to lay down certain principles of constitutional law which affect other existing laws providing for the raising of revenue, and which may be construed as limiting the power of the state legislature in enacting future legislation providing for . . . other and different species of taxes.<sup>241</sup>

The Advisory Tax Commission, the broad based "blue ribbon" committee established by the 1929 legislature to undertake a comprehensive review of Washington's tax structure,<sup>242</sup> pleaded that the *Aberdeen* decision appeared to preempt the Commission's own review because the case would be read as authority for the following propositions: (1) the question of whether the Equal Protection Clause of the U.S. Constitution was violated would depend on whether the tax was a property tax or an excise tax; (2) a net income tax was a property tax under the U.S. Constitution; (3) a gross receipts tax was not distinguishable from an income tax and is a property tax; and (4) an excise tax in Washington would be limited to a tax on the exercise of the corporate franchise.<sup>243</sup> The Commission

238. *Id.* at 365, 289 P. at 542.

239. *See supra* text accompanying note 106.

240. *Aberdeen*, 157 Wash. at 374, 289 P. at 545.

241. *Id.* at 391, 290 P. at 697-98.

242. *See supra* notes 73-75 and accompanying text.

243. Petition for Rehearing of Arthur G. Cohen and Lester M. Livengood as *Amici Curiae* on Behalf of the Advisory Tax Commission of Washington, July 10, 1930,

also argued that the question of whether the proposed corporate tax was a property tax, an income tax, or an excise tax "was not a necessary or proper issue in determining whether the tax contravened the Equal Protection Clause."<sup>244</sup>

In denying the petitions for rehearing, the court expressly ruled *per curiam* that "the [court's] opinions above cited were rendered with a view to determining the questions presented by the cases at bar, and those questions only."<sup>245</sup> The court also ruled that the levy under consideration would be treated, "under the decisions of the Supreme Court of the United States," as a property rather than an excise or corporate franchise tax for the purpose of holding that the Equal Protection Clause would not permit its being levied differently on corporations, partnerships, and individuals.<sup>246</sup> Both in the main *Aberdeen* opinion and in the opinion denying the petitions for rehearing, the court took pains to emphasize that it was issuing limited rulings based on the U.S. Constitution and was not ruling on the character of the corporate tax under Washington's constitution.<sup>247</sup>

Thus, the majority opinions in *Culliton* and *Jensen* were founded on the mistaken, or perhaps disingenuous, proposition that the *Aberdeen* court had considered and settled the question of whether income constituted a form of property under Article VII of the Washington State Constitution.<sup>248</sup> Once *Aberdeen* was misread into *Culliton*, it was easy for the error to be repeated, to be enshrined in *Jensen*, and then to be compounded whenever something approaching an income tax was attempted by the legislature.<sup>249</sup> One of the peculiarities of this misuse of *Aberdeen* is the fact that Justice Holcomb, who in his

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at 7, *Aberdeen* (No. 22228) [hereinafter Petition of Advisory Tax Commission]. The Attorney General, representing the separate State Tax Commission, also petitioned for rehearing on the grounds that the court's ruling would make it "impossible for the legislature to write a tax upon corporate franchises measured by income of any character which the court would not hold to be a property tax." *Id.* at 2.

244. Petition of Advisory Tax Commission at 9, *Aberdeen* (No. 22228).

245. *Aberdeen*, 157 Wash. at 392, 290 P. at 697.

246. *Id.*

247. *Aberdeen*, 157 Wash. at 374, 289 P. at 545; 157 Wash. at 392, 290 P. at 697.

248. It must be noted that the version of Article VII in effect when *Aberdeen* was decided in June 1930, was the stricter version replaced later that year by the voters. See *supra* notes 55-57 and accompanying text.

249. See, e.g., *Power Inc. v. Huntley*, 39 Wash. 2d 191, 196, 235 P.2d 173, 177 (1951), in which a corporate franchise tax was labeled "a mere property tax 'masquerading as an excise'" and was rejected based on *Culliton* and *Aberdeen* without reviewing the underlying theory in those cases.

*Culliton* opinion had relied so heavily on *Aberdeen*, filed a strong dissent in *Aberdeen*, arguing that the Aberdeen majority misconstrued the United States Supreme Court equal protection cases upon which *Aberdeen* was based.<sup>250</sup> In addition to *Aberdeen* being a weak leg upon which to rest any decision that income is a form of property, the United States Supreme Court cases that provided the other legs upon which *Aberdeen*, *Culliton*, and *Jensen* rested have since been overruled. *Quaker City Cab Co. v. Pennsylvania*,<sup>251</sup> which had prohibited different treatment of corporations and non-corporations for tax purposes, was overturned in 1973 as "a relic of a bygone era."<sup>252</sup> *Pollock v. Farmers' Loan & Trust Co.*,<sup>253</sup> which in 1894 had categorized the federal income tax as a "direct tax," was rendered ineffective by the 1913 enactment of the Sixteenth Amendment and was further weakened by the 1915 case of *Brushaber v. Union Pacific Railroad Co.*,<sup>254</sup> which held as follows:

[T]he conclusion reached in the *Pollock* case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent . . . .<sup>255</sup>

The remainder of *Brushaber* was overruled in 1988,<sup>256</sup> and *MacAllen* has been a dead letter since 1983.<sup>257</sup>

In addition to incorrectly stating *Aberdeen's* holding on income as a form of property, Justice Holcomb's opinion in *Culliton* also mistakenly represented that the "overwhelming weight of judicial authority" supported that view.<sup>258</sup> New-

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250. *Aberdeen*, 157 Wash. at 374-75, 289 P. at 546 (Holcomb, J., dissenting). Specifically, in his *Aberdeen* dissent, Holcomb argued that a substantial difference between the way partnerships, individuals, and corporations carried on financial enterprises provided ample justification for treating them differently for corporate franchise tax purposes.

251. 277 U.S. 389 (1928).

252. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973).

253. 157 U.S. 429 (1894).

254. 240 U.S. 1 (1915).

255. *Id.* at 16-17.

256. *South Carolina v. Baker*, 485 U.S. 505, 522 (1988).

257. *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983); see also *South Carolina v. Baker*, 485 U.S. 505, 526 (1988).

258. *Culliton v. Chase*, 174 Wash. 363, 374, 25 P.2d 81, 82 (1933).

house's study shows that throughout this period the position that income was *not* a form of property was consistently in the majority, and that majority has since grown.<sup>259</sup> He states the following:

Overall, for all the bitter controversy of the 1920's and the 1930's, in the end there were only five state courts which actually ruled negatively on income taxes under the uniformity limitations, with that negative position either abandoned or modified in three of them, leaving only two state courts seemingly standing by their strict uniformity interpretations with respect to income taxes: Washington and Pennsylvania.<sup>260</sup>

As discussed below, Pennsylvania's constitutional provision is stricter than Washington's provision.<sup>261</sup> And despite Justice Holcomb's assertion that Washington's uniformity clause language was idiosyncratic and that other states' interpretations of their uniformity provisions were not useful,<sup>262</sup> Washington was not, and is not, alone among the states with a uniformity provision requiring taxes to be "uniform upon the same class of property."<sup>263</sup> Newhouse reports that, by 1937, this type of language, which he classifies as a Type XII clause, was found in the constitutions of seven states,<sup>264</sup> and the Washington uniformity provision's definition of property is rather close to language ordinarily found in the dictionary.<sup>265</sup>

What is important, however, is not so much that a number of states had similar constitutional terms, or that Washington is one of only two states that still classifies income as property. What is important is the reasoning of many courts, including the United States Supreme Court, which rejects the notion that income is a static asset and is therefore property. Because *Culliton* and *Jensen* were dependent on a misstatement of the holding in *Aberdeen*, and because the United States Supreme Court cases upon which *Aberdeen* relied have been overturned, any future consideration of the nature of a Washington net income tax must be based on reasoned argument rather than the recitation of a mantra to the effect that "income equals

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259. NEWHOUSE, *supra* note 23, at 2019-21.

260. *Id.* at 2021.

261. See *infra* notes 321-22 and accompanying text.

262. *Culliton*, 174 Wash. at 374, 25 P.2d at 82.

263. *Id.* at 371, 25 P.2d at 81 (citing WASH. CONST. amend. XIV).

264. NEWHOUSE, *supra* note 23, at 1720.

265. See *infra* note 268.

property."<sup>266</sup>

## V. THE INCOME TAX AS *SUI GENERIS*

The most sensible view of income, one taken by a number of state courts before and after *Culliton*, adopted by the United States Supreme Court later in the 1930s, and alluded to in Justice Tolman's *Stiner* opinion upholding the B&O tax,<sup>267</sup> is that "income" denotes something in action, something "coming in" to a person but not yet arrived. Conversely, "property" means a static asset that has already arrived and is in a person's possession.<sup>268</sup> Thus, a property tax is a periodic tax on stationary wealth held at the time of assessment, and it may include a tax on money if that money is retained as an asset. In contrast, an income tax is levied against funds that flow to the person taxed, and, like an inheritance tax,<sup>269</sup> it is levied against each

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266. A fresh consideration of the nature of a net income tax under the current Washington State Constitution would almost certainly be provoked by legislative adoption of such a tax. An alternate, though unlikely, approach would be for the Governor to attempt to carry out the provisions of the 1935 personal net income tax, which has never been repealed. Even the 1932 income tax approved by the voters was never expressly repealed, although a blanket repealer in the Revenue Act of 1935 may have revoked at least part of it. 1935 Wash. Laws 178, § 71, states that "[a]ll acts and parts of acts in conflict with the provisions of this act are hereby repealed." The 1935 corporate income tax, 1935 Wash. Laws 180, §§ 159-84, was repealed when the legislature attempted to put a corporate income tax into effect in 1951. 1951 Wash. Laws 10, 1st Ex. Sess., §§ 3-45. While the 1951 graduated corporate income tax was ruled unconstitutional in *Power, Inc. v. Huntley*, 39 Wash. 2d 191, 235 P.2d 173 (1951), the enabling statute itself has never been repealed.

267. See *supra* note 137 and accompanying text.

268. The term income is defined in part by WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1143 (Unabridged 1971), as follows: "1. *archaic*: an act or an instance of coming in: Entrance, Advent, Influx . . . 3: something that comes in as an increment or addition usu. by chance 4a: a gain or recurrent benefit that is usu. measured in money and for a given period of time, . . . b: the value of goods and services received by an individual in a given period of time . . ." Further, ERIC PARTRIDGE, ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH 111 (1959), notes that the term income is derived from the Old English *incumen*, "to income," i.e., to come in.

In contrast with the active nature of income, the term property has traditionally meant something that is already held or possessed. For example, WEBSTER'S, *supra* at 1818, defines property as "2 a: something that is or may be owned or possessed . . . b: the exclusive right to possess, enjoy, and dispose of a thing . . ." The term property comes from the Latin word *proprietas*, which connotes ownership or right of possession and which in turn is derived from the Latin word *proprius*, meaning "[o]ne's own absolutely or in perpetuity," "held apart," "special." OXFORD LATIN DICTIONARY 1495 (1982); JOSEPH T. SHIPLEY, THE ORIGINS OF ENGLISH WORDS 307 (1984); HARPER'S LATIN DICTIONARY 1472 (1898).

269. As Justice Blake made clear in his *Culliton* dissent, there are logical difficulties in placing an inheritance tax on property passed on from generation to generation in the "excise" category, while placing a tax levied once on income earned

dollar only once because that money might not be retained.

Justice Steinert asserted in *Jensen* that "the mere potential privilege of receiving earned income amounts to nothing unless and until the income is received," and he equated the "right to receive, the reception, and the right to hold" property as one and the same thing.<sup>270</sup> It is correct to say that there is a relationship between income and assets, and Justice Steinert intuitively sensed that connection. Indeed, economists, accountants, and tax assessors all recognize that potential income streams can be capitalized in the value of property and that, conversely, the value of an individual's property is at least in part a reflection of its income-producing potential. But the fact that income can be created by property does not mean that income is property any more than the fact that income can be created by labor means that income is labor. The term property connotes a person's relationship to certain objects, a recognized right to use those objects; property also connotes those objects themselves as they stand in relation to a person, for example: "the bed is my property," and "the money in the mattress is my property." But income is not an object; income connotes movement, the movement of money or other things of value coming to a person. From an economist's standpoint, "[t]he concept of income is meaningless unless a time period is specified. Income is a flow over time and will vary in amount with the time period chosen."<sup>271</sup> Income is not property, and, when viewed correctly, an income tax could be characterized as an excise tax or as a tax in a class by itself, but an income tax is certainly not a property tax.

An early recognition of the distinction between income and property is found in *Waring v. Savannah*,<sup>272</sup> which was cited but not discussed in the *Culliton* and *Jensen* briefs. Rejecting the idea that income was a form of property, the Georgia State Supreme Court in that 1878 case held as follows:

[A]re gross earnings and interest, coming in from any source, labor, capital, . . . money loaned—are these things property in the sense of the constitution, and to be taxed as real, genuine property—such as real estate and personal effects,—or

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during the year in the "property tax" category. *Culliton v. Chase*, 174 Wash. 363, 390, 25 P.2d 81, 87 (1933) (Blake, J., dissenting).

270. *Jensen v. Henneford*, 185 Wash. 209, 218-19, 53 P.2d 607, 611 (1936).

271. DAVID N. HYMAN, *PUBLIC FINANCE: A CONTEMPORARY APPLICATION OF THEORY TO PRACTICE* 455 (3d ed. 1990).

272. 60 Ga. 93 (1878).

are these really *income*? Certainly the gross earnings of a laboring man are nothing but his income; so, it would seem, the earnings of a salaried officer are income; and, so, the income from capital employed in a bank, or railroad, or manufactory, would seem to be income only. The net income, after expenses are paid, becomes property when invested, or if it be money lying in a bank, or locked up at home. But, to call it property when it is all consumed as fast as it arises—going on the back, or in the stomach, or in carriages and horses (which are taxed), or in travel and frolic—to call such income, so used, property, would seem a perversion of terms.

The fact is property is a tree; income is the fruit; labor is a tree; income, the fruit; capital, the tree; income the fruit. The fruit, if not consumed as fast as it ripens, will germinate from the seed which it encloses, and will produce other trees, and grow into more property; but so long as it is fruit merely, and plucked to eat, and consumed in the eating, it is no tree, and will produce itself no fruit.<sup>273</sup>

The Massachusetts Supreme Judicial Court similarly held in 1927 that “[i]ncome is something derived from property, labor, skill, ingenuity or sound judgment, or from two or more in combination. It is not commonly thought of as property but as gain derived from property . . . .”<sup>274</sup> These and similar holdings were brought to the attention of Washington readers in a short but tightly reasoned 1931 article by Alfred Harsch, who reversed the Georgia court’s tree-and-fruit metaphor to demonstrate the weakness in equating property with income:

[A 1920 Alabama] decision seems to be based . . . upon the following bit of syllogistic reasoning:

“To summarize: Money or any other thing of value, acquired as gain or profit from capital or labor, is property; in the aggregate, these acquisitions constitute income; and in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property, and therefore is itself property.”

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273. *Id.* at 99-100 (emphasis in original).

274. *Stony Brook R. Corp. v. Boston & M.R.R. Co.*, 157 N.E. 607, 610 (1927). Standard accounting principles also make a basic distinction between income, which is measured over time and reflected on an income statement, and assets, which are measured at one point in time and described on a balance sheet. Income only appears on the balance sheet to the extent that it is not spent or distributed, and it is then treated as “retained earnings” or “changes in capital.” HENRY SELLIN, ATTORNEY’S HANDBOOK OF ACCOUNTING § 1.02, at 1-5 to 1-20 (3d ed. 1991).

An analysis of this bit of deductive logic reveals that there are in the major and minor premise no common factors. In the major premise that which is declared equivalent to property is a thing *in esse*, tangible things *after* their acquisition. In the minor premise that which is income is an act—acquiring. The act of acquiring and the thing acquired are called synonymous. The fallacy of the reasoning employed is best illustrated by paraphrasing. First: Apples and pears picked from trees are fruit. Second: The picking of apples and pears from trees constitutes labor.

Therefore, fruit is labor.<sup>275</sup>

Harsch's article was not cited in any of the pro-income tax briefs in *Culliton*, and his logic was neither addressed nor refuted in any of the majority opinions striking down Washington income taxes. Justice Tolman's *Stiner* opinion sustaining the B&O tax alluded to this approach when he wrote that "[i]ncome may be acquired, but only in exceptional cases . . . is it susceptible of ownership. When acquired, income immediately becomes property in the hands of the acquirer, and it is, of course, taxable with other property of the same class."<sup>276</sup> But the *Culliton* majority refused to apply this rationale when given the opportunity two years later in *Jensen*. The serious analysis of the nature of income and property contained in the cases cited by Harsch, and referred to in the briefs of the Attorney General and various *amici curiae*, was shrugged off as inapplicable because of the "peculiarly forceful" nature of Washington's uniformity provision.<sup>277</sup> As noted above, the court found it easier to assert that the issue had been previously settled in *Aberdeen*.

In addition to the states whose court decisions directly addressed the income-as-property issue, and which were available to the Washington court in 1933 and 1935,<sup>278</sup> several other states subsequently approved income taxes.<sup>279</sup> The most

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275. Alfred E. Harsch, *State Income Taxation as Affected by Property Tax Limitations*, 6 WASH. L. REV. 97, 101 (1931).

276. *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 407, 25 P.2d 91, 93 (1933).

277. *Culliton*, 174 Wash. at 374, 25 P.2d at 82. As stated *supra* in the text accompanying note 264, several states had constitutional provisions quite similar to Washington's. Justice Holcomb also seemed to place great stock in what he thought was a peculiar definition of property in Article VII, Section 1. But the constitutional definition is rather common and has nothing unique about it. See, e.g., *supra* note 268.

278. See generally cases cited in NEWHOUSE, *supra* note 23, at 1923-78.

279. See, e.g., *State ex rel. California Co. v. State of Colorado*, 348 P.2d 382 (Colo. 1959), *dismissed*, 364 U.S. 285 (1960); *Thorpe v. Mahin*, 250 N.E.2d 633 (Ill. 1969); *Vilas v. Iowa State Bd. of Assessment and Review*, 273 N.W. 338 (Iowa 1937); *Reynolds*

important of these post-*Culliton* cases is *Thorpe v. Mahin*.<sup>280</sup> *Thorpe* overruled *Bachrach v. Nelson*,<sup>281</sup> a 1932 *Pollock*-based case upon which anti-income tax briefs in Washington had placed great reliance.<sup>282</sup> In *Thorpe*, the Illinois Supreme Court found that it had incorrectly been led to believe earlier that the "‘overwhelming weight of judicial authority’ holds that an income tax is a property tax."<sup>283</sup> Accordingly, the court adopted the United States Supreme Court’s reasoning in the 1936 case of *New York ex rel. Cohn v. Graves*<sup>284</sup> and held that income was not a form of property.<sup>285</sup> *Graves* involved whether a state had the authority to tax the income received by its residents from land or mortgages outside its borders. In approving such taxation, Justice Stone wrote that a tax

apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicile within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship . . . .

Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source.

Neither analysis of [various] types of taxes, nor consideration of the bases upon which the power to impose them rests, supports the contention that a tax on income is a tax on the land which produces it. The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the sub-

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*Metals Co. v. Martin*, 108 S.W.2d 251 (Ky. 1937); Opinion of the Justices, 178 N.E. 621 (Me. 1935); *Haggert v. Nichols*, 265 N.W. 859 (N.D. 1936); *Oursler v. Towes*, 13 A.2d 763 (Md. App. 1940).

280. 250 N.E.2d 633 (Ill. 1969).

281. 182 N.E. 909 (Ill. 1932).

282. See, e.g., Respondent *Culliton*’s Brief at 7-10, *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933) (No. 24491), and the *amicus* brief submitted by the law firm of Allen, Froude et al. at 9, *Culliton* (No. 24491), which quotes *Bachrach*’s assertion that the "‘overwhelming weight of judicial authority holds" that income is a form of property. *Bachrach*, 182 N.E. at 914. *Bachrach* was the likely source of Justice Holcomb’s mistaken impression that he was following the nationwide majority view.

283. *Thorpe*, 250 N.E.2d at 635-38.

284. 300 U.S. 308 (1936).

285. *Thorpe*, 250 N.E.2d at 635-36.

ject of the other. His income may be taxed, although he owns no property, and his property may be taxed although it produces no income. The two taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently. The tax on each is predicated upon different governmental benefits . . .<sup>286</sup>

The following year in *Hale v. State Bd. of Assessment and Review*,<sup>287</sup> the United States Supreme Court upheld Iowa's inclusion of state and local bond interest in income for tax purposes. In *Hale*, Justice Cardozo's opinion noted that "the question as to the nature of [the income] tax has come up repeatedly under state constitutions requiring taxes upon property to be equal and uniform, or imposing similar restrictions. Many, perhaps most, courts hold that a net income tax is to be classified as an excise."<sup>288</sup> In upholding the Iowa court's ruling, Justice Cardozo wrote that "even more conclusively, decisions of our own court forbid us to stigmatize as unreasonable the classification of a tax upon net income as something different from a property tax, if not substantially an excise."<sup>289</sup> Justice Cardozo then proceeded to discuss in detail three previous cases in which the United States Supreme Court treated income taxes and property taxes as different species: *New York ex rel. Clyde v. Gilchrist*,<sup>290</sup> *New York ex rel. Cohn v. Graves*,<sup>291</sup> and *Brushaber v. Union Pacific R.R. Co.*<sup>292</sup>

Justice Cardozo's description of an income tax as something different from a property tax, while not quite an excise tax, gives us a hint as to why the contemporary *Culliton* court had trouble dealing with the income and property definitions. The confusion and difficulty may well have resulted from both lawyers and judges, in their briefs and opinions, attempting to force the income tax into a convenient and familiar niche. Many people, following Cooley's popular treatise on taxation,<sup>293</sup> saw taxes as neatly divisible into three familiar classes:

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286. *Graves*, 300 U.S. at 308, 313-14.

287. 302 U.S. 95 (1937).

288. *Id.* at 104.

289. *Id.* at 106.

290. 262 U.S. 94 (1923).

291. 300 U.S. 308 (1936).

292. 240 U.S. 1 (1915).

293. COOLEY, *supra* note 204, § 38, at 118.

capitation taxes (also known as "poll" or "head" taxes), property taxes, and excise taxes.<sup>294</sup> Although the Cooley treatise itself had difficulty deciding which class an income tax would fit into,<sup>295</sup> lawyers on both sides in *Culliton* believed it was important to demonstrate that the income tax had to be cubbyholed as either a property tax or an excise tax. The pro-income tax attorneys argued that it was an excise tax, thus facilitating application of the established doctrine granting the legislature great leeway in making distinctions between types of persons subject to, and the rates of, excise taxes.<sup>296</sup> Their opponents struggled to put the measure into the "property tax" box, thus bringing the constitution's uniformity requirements into play. In his opinion, Justice Holcomb felt it necessary to quote from Cooley to the effect that excise taxes were "[t]axes laid upon the manufacture, sale, or consumption of commodities . . . [and] upon licenses . . . and upon corporate privileges."<sup>297</sup> He concluded that the "taxes here in question can in no sense be said to be for licenses to pursue certain occupations, or upon corporate or business privileges, or for the manufacture, sale or consumption of commodities within the state."<sup>298</sup> Because the classification of taxes had been deemed so important, and because the *Culliton* court had rejected one form of net income tax as a non-uniform property tax, the Washington State Legislature unsuccessfully attempted to reenact an income tax two years later by declaring it to be, and structuring it as, an excise or "privilege" tax.<sup>299</sup>

This insistence on labeling, and using the most familiar epithets at that, hindered clear thinking. Professor Robert C.

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294. Poll taxes were a basic source of local government revenue in Washington until 1893, when the county poll tax was omitted from the state's revenue law. 1893 Wash. Laws CXXIV 323. A road poll tax was repealed by 1907 Wash. Laws 246, §§ 3, 680, and a reenacted poll tax for financing state and county government, 1921 Wash. Laws 174, at 674, was halted by a 1922 initiative, 1923 Wash. Laws 1. The property tax was the primary source of state government revenue until the 40-mill limit was enacted, at which point the property tax was turned over to finance schools and local government needs. The inheritance tax appeared in 1901, and several minor excise taxes such as the automobile license tax and a gas tax were implemented in the early 1900s. Hence, all three of these basic classes of taxes were familiar to public officials in Washington. See Harsch, *Washington Tax System*, *supra* note 26, at 952-54; and STATE OF WASHINGTON, FINANCING STATE AND LOCAL GOVERNMENT: REPORT OF THE TAX ADVISORY COUNCIL 99 *et seq.* (1958).

295. COOLEY, *supra* note 204, § 49, at 138-41.

296. See *supra* note 99 and *infra* notes 306-13 and accompanying text.

297. *Culliton*, 174 Wash. at 377, 25 P.2d at 83.

298. *Id.* at 378, 25 P.2d at 83; see also Hestnes, *supra* note 25, at 82.

299. 1935 Wash. Laws 661-62; 1935 Wash. Laws 813.

Brown suggested that "perhaps the simple statement that [the income tax] is a tax upon an act will do as well as any. Following this theory, an income tax might well be regarded as an excise upon the act of earning or receiving the income."<sup>300</sup> But Professor Brown put forward an alternate analysis that, had it been adopted by Washington's court, would have enabled the justices to consider the income tax on its own legal merits. He urged that the income tax be treated as *sui generis*, in a class by itself.<sup>301</sup> This approach, alluded to in a 1925 Arkansas decision,<sup>302</sup> and fully adopted in Indiana<sup>303</sup> and Minnesota<sup>304</sup> in 1934, makes it easier to determine that an income tax is *not* a property tax because it does not need to be fit into an alternate "excise" category. There is no inherent reason why any tax should have to fit into one niche or another. The power of taxation, regardless of the nature of an impost, is, as the United States Supreme Court has held, "the most plenary of sovereign powers, . . . to raise revenue to defray the expenses of government and to distribute its burdens equably."<sup>305</sup> When unconstrained by state constitutional restrictions on the application

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300. Robert C. Brown, *The Nature of the Income Tax*, 17 MINN. L. REV. 127, 139 (1933).

301. *Id.* at 143-45; see also Matthews, *supra* note 34, ch. VIII, at 512.

302. In *Sims v. Ahrens*, 271 S.W. 720, 733 (Ark. 1925), one concurring justice of the Arkansas Supreme Court stated that "of the various forms and kinds of excise taxes, a tax on incomes holds its own place; it falls in its own particular and distinctive class, and must not be confounded with occupation, license, franchise, and business taxes." The Arkansas court thus treated the income tax as *some* sort of excise tax, but recognized that it also possessed unique characteristics.

303. In *Owen v. Fletcher Savings & Trust Co.*, 189 N.E. 173, 177 (Ind. 1934), the Indiana Supreme Court held as follows:

An income tax is distinguished from other forms of taxation, in that it is not levied upon property nor upon the operation of a trade, or business, or subjects employed therein, nor upon the practice of a profession, the pursuit of a trade or calling, but upon the acquisitions of the taxpayer arising from one or more of these sources or from all combined. It is not a tax on property, and a tax on property does not embrace income.

304. In *Reed v. Bjornson*, 253 N.W. 102, 105 (Minn. 1934), Minnesota's supreme court held:

While income as it is received is necessarily property, a tax upon it has many characteristics which differ quite radically from those of a tax levied upon real or invested personal property. Income is a more fleeting or transitory benefit which comes according to present efforts or the wisdom or luck of past accumulations. Many people who own little or no tangible or intangible property have large incomes and enjoy great benefit from the protection which organized society affords. . . . An income tax is calculated to take toll from the flow of this property to the individual through the arteries of organized social life and to cause it to bear a share of the burden of government. In many ways such a tax is *sui generis*.

305. *Lawrence v. State Tax Commission*, 286 U.S. 276, 279 (1931).

of property taxes, legislatures are accorded "very wide discretion" in classifying and applying taxes so long as they are "neither capricious nor arbitrary . . . [and] there is no denial of the equal protection of the law."<sup>306</sup> Washington's court similarly has held that:

[T]he legislature possesses inherently a plenary power in the matter of taxation, except as limited by the constitution. No constitutional grant of the taxing power is needed. The fourteenth amendment [the 1932 amendment to Article VII], like the sections it replaces, is a limitation upon the legislature, rather than a grant.<sup>307</sup>

The legislature is thus accorded "very wide discretion"<sup>308</sup> in imposing virtually any sort of tax it determines is appropriately based on some lawful taxing policy of the state,<sup>309</sup> so long as the measure does not violate the constitution's uniformity provisions when applicable, and so long as it is not arbitrary, capricious, abusive or fraudulent,<sup>310</sup> or "unreasonable, oppressive and confiscatory."<sup>311</sup> When the legislature structures a tax, building in classifications and rates, that enactment "is presumptively valid, and the burden is upon the challenger to prove that the questioned classification does not rest upon a reasonable basis."<sup>312</sup>

The members of the Washington court that formed the

306. *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910); *see also Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 344-45 (1989); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-27 (1959); *Forbes v. Seattle*, 113 Wash. 2d 929, 944-45, 785 P.2d 431, 439 (1990).

307. *State ex rel. Mason County Logging v. Wiley*, 177 Wash. 65, 73, 31 P.2d 539, 543 (1934).

308. *Texas Company v. Cohn*, 8 Wash. 2d 360, 368, 112 P.2d 522, 527 (1941).

309. *Sonitrol Northwest Inc. v. Seattle*, 84 Wash. 2d 588, 591, 528 P.2d 474, 477 (1974); *Boeing Co. v. State*, 74 Wash. 2d 82, 86, 442 P.2d 970, 972-73 (1968).

310. *Texas Company v. Cohn*, 8 Wash. 2d 360, 369, 112 P.2d 522, 534 (1941); *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 72, 34 P.2d 363, 364 (1934); *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 407, 25 P.2d 91, 93 (1933).

311. *Pacific Tel. & Tel. Co. v. Seattle*, 172 Wash. 649, 657, 21 P.2d 721, 724 (1933). The Washington court also noted in *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 174-75, 96 P. 1047, 1049 (1908), that "[n]o method of taxation in its results can fully accomplish all that the constitution declares shall be done. . . . Any method which can be devised by the legislature must necessarily be defective in some particulars and must fail to meet with exactness every standard set by the constitution." Nevertheless, the court was willing in that case to allow the legislature to proceed with a tax scheme that "reasonably comprehend[ed]" the constitution's requirements. *Id.* at 175, 96 P. at 1049.

312. *Boeing Co. v. State*, 74 Wash. 2d 82, 86, 442 P.2d 970, 973 (1968); *see also High Tide Seafoods v. State*, 106 Wash. 2d 695, 698, 725 P.2d 411, 413 (1986), which upheld Washington's tax on food fish and reiterated the principal that "[s]tatutes are

*Culliton-Jensen* majority may have felt compelled to categorize the income tax as a property tax because that was one of the familiar and available niches, and because the measure did not look to them like an excise tax. But the majority also presumably knew that labeling the income tax as a property tax would prevent its implementation. Opponents of the income tax on the court would therefore have recognized that categorizing the tax as a property tax was a necessity. The justices were fully aware of the legislature's broad discretion in the realm of non-property taxes.<sup>313</sup> They also knew that Washington's new uniformity language, having "entirely swept away" an older, restrictive version,<sup>314</sup> now required "nothing less than a certain and unequivocal violation of some constitutional inhibition" to warrant holding a tax inoperative.<sup>315</sup> Additionally, they should have known from their review of the constitutional provisions of other states that several stricter versions still existed in the country.<sup>316</sup> In Newhouse's system of classifying uniformity provisions, Washington's provision was, and is, a Type XII clause, the most flexible.<sup>317</sup> A Newhouse Type XII clause provides that "taxes shall be uniform upon the same class of *property*."<sup>318</sup>

During the period in which *Culliton* and *Jensen* were decided, six other states had Type XII clauses and thirteen states had the somewhat less flexible Type XI version: "Taxes shall be uniform upon the same *class or subjects*."<sup>319</sup> If the

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presumed constitutional and a party challenging a statute has the burden of establishing its invalidity beyond a reasonable doubt . . . ."

313. See, e.g., Justice Steinert's opinion in *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 75, 34 P.2d 363, 364, (1934).

314. State *ex rel.* Atwood v. Wooster, 163 Wash. 659, 662, 2 P.2d 653, 654 (1931).

315. State *ex rel.* Mason County Logging v. Wiley, 177 Wash. 65, 71, 31 P.2d 539, 542 (1934).

316. Justice Holcomb's lead opinion in *Culliton* discussed the language of various other uniformity provisions. *Culliton v. Chase*, 174 Wash. 363, 376-77, 25 P.2d 81, 83 (1983).

317. NEWHOUSE, *supra* note 23, at 1701.

318. *Id.* (emphasis added).

319. *Id.* at 1701, 1720. At the time that Amendment 14 to the Washington State Constitution was being approved, some believed that a Type XI clause referring to "subjects" rather than "property" would have been more flexible. Roberts, *supra* note 46, at 226. This view is difficult to understand given that "property" is a narrower classification than that denoted by the expansive term "subjects." In any event, of the thirteen jurisdictions with Type XI clauses (Delaware, Pennsylvania, Georgia, Louisiana, Missouri, Minnesota, Oregon, Colorado, Montana, Idaho, Oklahoma, New Mexico and Virginia), all today have some form of individual or corporate income tax. The courts in several of those jurisdictions upheld net income taxes under the Type XI

Washington State Constitution had contained a Type XI clause, the court could have determined that income was a "class" or a "subject" of taxation, which would require income to be taxed at a uniform (i.e., flat) rate. But the state had such a liberal provision that in order to block the income tax, the court had to find that income was property, and in making that finding the court converted what was intended to be a progressive clause into one that now, in Newhouse's words, "approaches the strictest end of the spectrum."<sup>320</sup> Pennsylvania, the only other state whose court continues to view income as a form of property, has the less flexible Type XI version,<sup>321</sup> which makes disapproval of the net income tax slightly more tenable.<sup>322</sup> But today, rejection of a net income tax under a Type XII clause such as Washington's is altogether untenable.

#### VI. CONCLUSION: THE ONCE AND FUTURE NET INCOME TAX

In a 1978 commentary on Washington's income tax cases, J. Thomas Carrato and Richard Hemstad offered an alternative approach to Article VII, Section 1.<sup>323</sup> They persuasively argued that even if income were treated as property, the 1932 amendment to Washington's uniformity clause grants the legislature broad powers to classify property, other than real estate, in such a way as to permit a net income tax.<sup>324</sup> Although an attractive approach, it simply is unnecessary to concede that income is property. Furthermore, while Carrato and Hemstad have successfully demonstrated that the *Culliton-Jensen* court failed to recognize the full classification powers that the new Article VII, Section 1, was meant to convey to the legislature, the fact remains that if income is actually classified as property, it might still be difficult for a court to uphold a tax law that treats the first dollar earned differently from the last.

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clauses. Some of those states have seen changes in their uniformity clauses since the 1930s. NEWHOUSE, *supra* note 23, at 1721-26.

320. NEWHOUSE, *supra* note 23, at 1902.

321. PA. CONST. art. VIII, § 1, states as follows: "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

322. *Amidon v. Kane*, 279 A.2d 53 (Pa. 1971). It is interesting to note that Pennsylvania has held only the personal net income tax to violate its uniformity clause. That state's corporate income tax has been upheld as an excise tax for the privilege of doing business, the amount of the tax measured by net income. *Turco Paint and Varnish Co. v. Kalodner*, 184 A. 37 (Pa. 1936).

323. Carrato & Hemstad, *supra* note 26.

324. *Id.* at 272, 278. This classification argument is similar to that proposed by Justice Blake in his *Culliton* dissent.

The state constitution requires that all taxes be uniform upon the same class of property, and while it would not be unreasonable to hold that the legislature is empowered to place different levels of income into different classes, the quadruped analogies posed by Justices Mitchell and Steinert<sup>325</sup> still have some application today:

- A band of one thousand horses is not fundamentally different from a band of two thousand, except in number, and the uniformity language of the state constitution might well require that ten thousand cattle be taxed at the same rate as one thousand cattle.
- Horses and cattle are property when they are owned by a person, and so is money; but *income* flowing to a person is different from *money* held in someone's hands.
- A dollar *earned* is appropriately taxed as income, but just once. When that dollar is placed in a mattress, it is property and can be taxed only by an intangible personal property tax (if the government can find it in the mattress).
- Once the dollar is taken out of the mattress and placed in a bank, only the interest earned is taxed as income, again just once, as income flows to its recipient. Once held, either in a mattress or a bank account, that interest itself becomes static property that can be taxed only by means of a property tax.

As the Georgia court observed in 1878, property is the tree and income is the fruit that can be taxed once and only once: when it is picked.<sup>326</sup>

If the Washington State Legislature makes another attempt to enact an income tax, the correct approach for Washington's court will be to face the issue head on by reversing the two mistaken views that income is property,<sup>327</sup> and that income

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325. See *supra* notes 123-24 and accompanying text.

326. Waring v. Savannah, 60 Ga. 93 (1878). See *supra* note 272 and accompanying text.

327. The Washington court has been willing to reverse itself in the area of taxation. See, e.g., Tekoa v. Reilly, 47 Wash. 202, 205, 91 P. 769, 769-70 (1907) (reversing a prior holding concerning the classification of city residents for purposes of a capitation (poll) tax and stating: "[I]f this court has heretofore erroneously restricted the power of the legislature in the important matter of taxation we deem it our highest duty to correct the error at the first opportunity."); State ex rel. Washington State Finance Committee v. Martin, 62 Wash. 2d 645, 646, 384 P.2d 833, 834 (1963) (overruling, prospectively, an earlier position that bonds backed by a dedicated cigarette tax were not general obligation bonds and stating: "Time is both enemy and friend to a good idea. Thoughts held clearly in the beginning may obscure and lose

from real estate is different from other business income.<sup>328</sup> Then, as Carrato and Hemstad have suggested, the court could defer to the legislature's authority to tax net income differently at different levels so long as the lawmakers do not exercise that power in an arbitrary, abusive or confiscatory manner, or in any other manner that violates the rights of persons.<sup>329</sup>

If the legislature desired to implement a graduated income tax, but did not wish to attempt a net income tax for policy reasons, it could simply adopt a graduated *gross* income tax. Similarly, if the supreme court chose not to discard the fifty-five-year-old labeling of a graduated net income tax as a property tax, it too could adopt a graduated *gross* income tax. The *Culliton* court suggested that it might approve an income tax structured differently than the graduated net income tax before it in that case,<sup>330</sup> and it might be easier for the modern

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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.").

328. In *Apartment Operators Assn. of Seattle v. Schumacher*, 56 Wash. 2d 46, 47, 351 P.2d 124, 125 (1960), the court, without analysis, overturned the extension of the B&O tax to rental income, ruling that "[t]he question is foreclosed by prior decisions of this court," i.e., by *Jensen*. Treating a tax on gross income from property the same as a direct tax on the property itself makes even less sense than categorizing income as property across the board. Almost all locally-earned business income can be said to derive directly or indirectly from real property, because most businesses have a physical *situs*.

329. *Cary v. Bellingham*, 41 Wash. 2d 468, 472, 250 P.2d 114, 117 (1952), held that Washington cities are without authority to impose gross income taxes and stated that employment is "one of those inalienable rights" rather than a privilege, like the privilege to engage in business activity. While that case might be used to argue that the legislature does not have the authority to impose a personal income tax, the *Cary* court did not attempt to make that conceptual leap. It was clear in *Cary* that an attempted city income tax could be barred solely on the grounds that municipalities, as subdivisions of the state, had no express or implied authority to levy income taxes of any sort. A bar against cities or counties imposing a *net* income tax is expressly set forth in statute. WASH. REV. CODE § 36.65.030 (1989). See also *Steward Machine Co. v. Davis*, 301 U.S. 548, 580-81 (1937), which rejected an argument that the social security tax violated some type of "natural right" to employ workers: "We learn that employment for lawful gain is a 'natural' or 'inherent' or 'inalienable' right, and not a 'privilege' at all. But natural rights, so called, are as much subject to taxation as rights of less importance."

330. In his lead opinion in *Culliton*, Justice Holcomb wrote the following: "It may be possible to frame an income tax law which will assess all incomes uniformly and comply with our constitution, which, of course, is not now before us and we need not consider it." *Culliton v. Chase*, 174 Wash. 363, 379, 25 P. 81, 84 (1933). Justice Steinert stated: "We are not here concerned with an act relating to a uniform income tax, nor are we concerned with the wisdom, expediency or desirability of any particular kind of income tax. We are here concerned only with a graduated income tax act and its

court to now approve a gross income tax because to do so would not entail the complete overruling of *Culliton* and *Jensen*.

Moreover, a gross income tax would not necessarily affect businesses differently than the B&O tax, because, like the B&O tax, it would not allow business taxpayers to deduct expenses. Either the B&O tax could be retained as the basic business tax, or a value added tax could be implemented.<sup>331</sup> For individuals, a graduated gross income tax would be a significant change from the current state of affairs. While the difference between an individual taxpayer's adjusted gross and taxable income is important to that person, the difference is not so significant as to prevent a graduated tax on the higher adjusted gross amount from being structured in a tolerably fair manner.

Gross income is even less appropriately labeled property than is net income, because gross income is farther from the point of being a static asset in an owner's hands. One argument for asserting that net income might be property is that before deductions, exemptions, and credits can be applied, money must have come into the taxpayer's hands and remained there, at rest, while the taxpayer's status (i.e., blind

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constitutionality." *Id.* at 383, 25 P.2d at 85 (Steinert, J., concurring). Although Justice Steinert's words can be interpreted to include a graduated gross income tax along with a graduated net income tax, the gross income tax was not before the court in *Culliton* or *Jensen*. Furthermore, in its opinions approving the B&O tax and the differential application of that tax to different classes of businesses, the court has developed a substantial body of law sustaining a levy on gross income.

331. The value added tax is common in western Europe and can be structured in many ways. See STRAUSS, *supra* note 11, at 107 *et seq.* Michigan is currently the only American state with a value added tax. Michigan Single Business Tax Act, MICH. COMP. LAWS § 208 (1986). The basic idea of the value added tax is that each business pays a tax only on the portion of the commodity that represents the increased value that firm has put into it. In doing so, multiple taxation is avoided. Value added taxes can be based on consumption, on net income, or on gross product. Some value added taxes permit a subject business to credit only external payments, such as payments for raw materials or component parts. Other such taxes also allow a business credit for internal costs such as labor, and this type of levy can become, in effect, a type of net income tax. A form of value added tax was introduced in the Washington Legislature in 1985. See H.B. 927, 49th Leg., Reg. Sess. (1985). That proposal was based on gross income and permitted credits only for external costs. *Id.* Under the Washington constitution this would be the conceptual equivalent of, and indeed could be structured as, a gross business receipts tax. The key difference between the 1985 proposed value added tax and Washington's existing B&O tax is that by taxing gross receipts *minus* purchases external to a firm, the tax disparities between vertically-integrated firms and other companies would be eliminated. This approach would be permissible under *Stiner*, and if drafted properly, would not likely encounter problems in the courts.

or sighted, with or without dependents) was determined. This argument for characterizing net income as property may be weak, however, because income is "fruit,"<sup>332</sup> because income of any type does not necessarily remain with the individual, and because gross income is converted to taxable net income only for the purpose of determining *how much* will be taxed. Furthermore, even this weak argument for characterizing net income as property is not available with respect to gross income; the legislature should be free to tax gross income in any manner that is not arbitrary, abusive, or confiscatory. The legislature could even tax gross income in a graduated manner.

If the legislature did not choose to implement a graduated gross income tax, or if the court were unwilling to sustain any type of graduated tax, a flat gross income tax is unquestionably permissible, even when income is equated with property.<sup>333</sup> From a policy standpoint the disadvantage of a flat tax is that, after the \$3,000 exemption available under the state constitution, it might not produce substantial state revenue if any additional exemptions or deductions were permitted. Since 1972, Article VII, Section 2, has barred tax levies on real and personal property from "exceed[ing] one per centum of the true and fair value of such property in money,"<sup>334</sup> but a tax on gross income would be levied on a form of property previously not subject to any level of taxation, so it could be imposed at the full one percent. Still, income would be a form of "personal property"; therefore, Article VII, Section 1, would provide an exemption for the first \$3,000 of earnings.<sup>335</sup> Finally, although *Jensen* rejected a surtax and credit system meant to cushion the effect of an income tax on low and moderate income persons,<sup>336</sup> Article VIII, Section 5, of Washington's constitution would permit the legislature to enact a program of direct grants, rather than credits, to the poor and the infirm,<sup>337</sup> so

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332. See *supra* notes 273-75 and accompanying text.

333. A flat tax clearly would satisfy the *Culliton* requirement that one thousand horses and two thousand horses be taxed alike. See *supra* notes 123-24 and accompanying text.

334. Amendment 59, 1971 House Joint Resolution No. 47 (approved Nov. 1972); Amendment 55, 1971 Senate Joint Resolution No. 1 (approved Nov. 1972). The proposed amendments were submitted to the electors of the state at the same time, with the proviso that they may vote for or against each separately, but if both were approved and ratified, both would become part of the constitution.

335. See current text of WASH. CONST. art. VII, § 1 (1988).

336. *Jensen v. Henneford*, 185 Wash. 209, 220, 53 P.2d 607, 611 (1936).

337. Article VIII, Section 5, bars the state from making gifts or loans. WASH. CONST. art. VIII, § 5. Article VIII, Section 7, prohibits local governments from making

that the tax could be made more graduated in nature. But those grants, like deductions and exemptions, would adversely affect the revenue generating potential of a flat gross income tax.

But the Washington court need not limit the state to a gross income tax, graduated or flat, because a graduated net income tax should be upheld today if the legislature were to deem it an appropriate method for raising revenue. The swing votes (and lead opinion) in the 1933 *Culliton* decision barring the voter-approved net income tax were based on a misconstruing of the earlier ruling in *Aberdeen*. *Aberdeen* barely touched on the question of whether "income" was "property," and the brief extent to which it addressed that issue was in the context of categorizing business income for the purpose of applying federal Equal Protection tests that the Washington court believed were applicable under *Quaker City Cab Co. v. Pennsylvania*.<sup>338</sup> But the United States Supreme Court has now reversed *Quaker City Cab* as well as *MacAllen Co. v. Massachusetts*<sup>339</sup> and *Pollock v. Farmers' Loan & Trust Co.*<sup>340</sup> Those three rulings had provided the underpinnings of *Aberdeen*, *Culliton*, and *Jensen*. Given that Justice Holcomb's lead opinion in *Culliton* was based on a misreading or conscious misrepresentation of *Aberdeen*, and given that in any event the federal props now have been pulled out from underneath *Abderdeen*, Washington's current court would be obliged to approach the constitutionality of a net income tax *de novo*. Today's court should also assume that legislative acts are valid, placing the burden on anyone challenging the constitutionality of a statute. Thus, opponents of a net income tax today would face an uphill battle.

Furthermore, despite Justice Holcomb's assertion to the contrary in *Culliton*, in 1933, a majority of the state courts that had addressed the question had concluded that income was *not* property. Today, that majority has grown so that only Wash-

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gifts or loans to anyone except "the poor and infirm." WASH. CONST. art. VIII, § 7. The Washington court has extended the "poor and infirm" exception to the state as well as its municipalities, and the court has also read the term "poor and infirm" disjunctively, so that grants to offset an income tax could be made available either to low-income persons or those with various infirmities. *Health Care Facilities Auth. v. Ray*, 93 Wash. 2d 108, 115, 605 P.2d 1260, 1263-64 (1980).

338. *Aberdeen Savings & Loan Ass'n v. Chase*, 157 Wash. 851, 358-62, 289 P. 536, 540-41 (1930).

339. See notes 251, 252, 257 and accompanying text.

340. See *supra* note 253-56 and accompanying text.

ington, and Pennsylvania in part,<sup>341</sup> remain with cases on the books that treat income as a form of property. The nearly unanimous view now recognizes that income is something in motion, something that can either cease moving and itself become an income-producing asset (i.e., "property") or that can alternatively be consumed and disappear. When income is converted into an asset, it is then appropriately treated, and taxed, as property. But as a number of court opinions in other states have observed, property is the tree and income is the fruit. Both income and property may be taxed under the appropriate rules, but it is illogical, and today quite rare, to treat them as one and the same.

The decision on how to tax the tree and whether to tax the fruit is appropriately left to the legislative branch. Washington's legislature might be reasonably satisfied with the current structure of taxation in the state, and the mechanisms that have prevailed since 1935 could remain in effect for many years. But if external events, policy shifts, or initiatives challenging current tax methods were to cause legislators to seek a change in the sales and B&O tax-based system, today's lawmakers should consider a graduated net income tax as being solidly among the available approaches.

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341. See *supra* notes 321-22 and accompanying text.