A Study of State Income Taxation in Washington

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Attempts to enact a net income tax in the State of Washington have been numerous and unsuccessful. Several statutes have been passed which would have levied net income taxes on individuals, and several other statutes have been passed which would have levied such taxes on corporations. However, all these enactments have been held unconstitutional, either under the United States Constitution or the Washington state constitution. As might be expected, there have been attempts to amend the state constitution to make it permissible to levy a net income tax. These attempts have all met with failure, either in the legislature or at the hands of the voters when the amendments went to them for approval. This Comment will analyze the amendments that have been attempted and will then offer suggestions of methods by which income taxation would be permitted. Complications caused by the federal Constitution will not be considered here.

**Constitutional Limitations**

Article VII of the state constitution, as amended by the fourteenth amendment, is the article under which the court has usually refused in the past, and still refuses, to find a net income tax constitutional. Its pertinent provisions 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 constitute one class: . . . (Italics added.)

The parts of the amendment in italics are the provisions which have

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2. Amendment XIV amended art. VII by striking all of §§ 1, 2, 3, and 4, and inserting a new § 1. Laws 1929, c. 191, § 1, p. 499, approved November 1930. When reference is made to art. VII, § 1, it will be to the amended version unless the citation specifically states it is not.
created the objections in the past. Since these provisions apply only to property taxes, before a tax can be held unconstitutional under these provisions it must be found to be a property tax.\textsuperscript{3}

It is generally considered that there are three types of taxes: property taxes, excise taxes, and poll taxes.\textsuperscript{4} As there has been no contention in this state that a tax on income is a poll tax, it will be discussed only briefly. A poll tax, or capitation tax, is levied on the taxpayer simply because he is a human being subject to the jurisdiction of the taxing power\textsuperscript{5} and is generally levied upon him without regard to his property, employment, or occupation.\textsuperscript{6}

There are very few Washington cases involving a poll tax.\textsuperscript{7} In \textit{Thurston County v. Tenino Stone Quarries},\textsuperscript{8} the court upheld an annual poll tax\textsuperscript{9} of two dollars upon every male inhabitant of the state between the ages of twenty-one and fifty years who lived outside the limits of an incorporated city or town. In upholding the tax, the court said: "In the absence of any constitutional inhibition, it must be conceded that the legislature may provide for the levy and enforcement of a poll tax upon any or all of the citizens of the state, regardless of the question of uniformity."\textsuperscript{10} It also stated: \textsuperscript{11}

\textsuperscript{3} There is some question at the present time whether certain, if any, provisions of the state constitution apply only to property taxes or whether they also apply to other taxes. It has been stated in several cases, both before and after the adoption of amend. XIV, that only taxes mentioned in art. VII or elsewhere in the constitution are property taxes and that, therefore, there are no constitutional limitations on excise taxes in art. XII or elsewhere in the constitution. State v. Sheppard, 79 Wash. 328, 330, 140 Pac. 332 (1914); Gruen v. State Tax Comm'n, 35 Wn.2d 1, 33, 40, 51, 211 P.2d 651 (1949). This appears to be limited to art. VII by Standard Oil Co. v. Graves, 94 Wash. 291, 304, 162 Pac. 558 (1917), \textit{rev'd. on other grounds}, 249 U.S. 389 (1919). In the Gruen case, supra, at 52 and 53, it was held that the first sentence of art. VII, \textsection 1, as amended, was not violated by the excise tax. From the above cases it is difficult to determine the exact extent of constitutional limitations on excise taxes. In State \textit{ex rel. Collier v. Yelle}, 9 Wn.2d 317, 329, 115 P.2d 373 (1941), the court states that the parts of art. VII, \textsection 1, as amended, prohibiting the suspension, surrender, or contracting away of the power of taxation and the requirement of a public purpose for taxation, refer to all taxes. However, this point was suggested for argument by a letter from the chief justice to both parties and was not argued but was assumed or conceded in the briefs. (Briefs were found in File No. 6906 of, and through the courtesy of, the Corporation Counsel's office of Seattle.) The court, in the Gruen case, supra, at 33, said the above statement in the Collier case was dictum.

\textsuperscript{5} Id. at 128.  
\textsuperscript{6} 85 C.J.S., \textit{Taxation}, \textsection 1068 (1954).  
\textsuperscript{7} The authors have found the following: State v. Ide, 35 Wash. 576, 77 Pac. 961 (1904); Thurston County v. Tenino Stone Quarries, 44 Wash. 351, 87 Pac. 634 (1906); Tekoa v. Reilly, 47 Wash. 202, 91 Pac. 769 (1907); State \textit{ex rel. McMannis v. Superior Court}, 92 Wash. 360, 159 Pac. 383 (1916); Nipges v. Thornton, 119 Wash. 464, 206 Pac. 17 (1922).  
\textsuperscript{8} 44 Wash. 351, 87 Pac. 634 (1906).  
\textsuperscript{9} Laws 1905, c. 156, \textsection 1, p. 297.  
\textsuperscript{10} 44 Wash. at 357.  
\textsuperscript{11} Id. at 358.
When the power of taxation is exercised considerations of public policy must dominate; and the only rule of equality in respect to taxation is that the same means and methods shall be applied impartially to all constituents of each class, so that the law shall act equally and uniformly upon all persons in similar circumstances. 8 Cyc. 1071. (Emphasis added.)

In *Tekoa v. Reilly* the court held valid a poll tax on males between the ages of twenty-one and fifty, excluding volunteer firemen. The court recognized that a poll tax need not be uniform upon all persons and held it permissible to exempt minors and women from such a tax, saying: "It must be apparent that a poll tax imposed on minors and females, without regard to property or ability to pay, would be unjust and oppressive in the extreme." (Emphasis added.)

A liberal interpretation of the language in the above two cases would seem to make possible a poll tax upon the residents of the state, with uniform rates upon all persons in similar circumstances as determined by their ability to pay, in turn determined by their net income. However, an income tax has been held not to be a poll tax in other states. Also, by analogy to Washington cases involving a tax on the privilege of doing business measured by net income, it would seem likely that the court would say the dominant measure of tax was net income and the tax was, therefore, a property tax which did not comply with the uniformity clause of the fourteenth amendment, irrespective of the language used by the legislature. And the general definition of a poll tax seems itself to preclude its being construed as an income tax.

While a property tax is a tax assessed directly on all property of a certain class within the jurisdiction of the taxing power and usually imposed in proportion to value, an excise tax can be very broadly defined as a charge imposed upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation. It is also held that "the obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise, 12 13 14 15 16 17 18

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and the element of absolute and unavoidable demand is lacking." 19

The Washington court, in Jensen v. Henneford, 20 has said that "when a tax is, in truth, levied for the exercise of a substantive privilege granted or permitted by the state, the tax may be considered as an excise tax and sustained as such." 21 (Emphasis added.) Relying on this definition of an excise tax, the Washington court held invalid 22 a Bellingham city ordinance 23 levying a tax on the "gross income, revenues, receipts, and commissions, on all persons receiving compensation for services performed within the city," 24 stating a municipality has no power to control the right to work for wages and hence no right to levy an excise tax upon such right. 25 The court further stated, "The right to earn a living by working for wages is not a 'substantive privilege granted or permitted by the state'" but is an inalienable right guaranteed all citizens by federal and state constitutions. 26

If the court adheres to this view, it would seem to preclude the possibility of levying an excise tax on the act of engaging in an occupation for wages. However, upon direct consideration of the question, the court might accept the view of the United States Supreme Court, in Chas. C. Steward Mach. Co. v. Davis, 27 where Justice Cardozo, speaking for the Court upon the power to levy an excise tax upon an inalienable right, said:

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. An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right.

An argument could be made for this view by virtue of the fact that the Washington court has upheld a tax on the privilege of "using" tangible personal property, 28 which is an inherent right of property

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19 Id. at § 33 and cases cited.
23 Ordinance No. 6784.
24 Ibid.
26 Ibid.
27 301 U.S. 548, 580 (1936).
ownership. Whether such arguments would be successful is problematical.

Attention now turns to the various tax statutes that have come before the Washington court and the court’s reasons for holding them valid or invalid. First considered will be the statutes which would have levied or imposed a net income tax.29

**NET INCOME TAX STATUTES**

The first statute30 which the court held to be a tax on net income was passed in 1930 and was an attempt to impose a franchise privilege tax, measured by net income, upon banks and financial corporations. Not graduated, it levied a flat five per cent tax on net income. This tax was challenged in *Aberdeen Sav. & Loan Ass’n v. Chase*31 and also in *Burr, Conrad & Broom v. Chase.*32 In holding the act invalid, the court did not discuss the question of invalidity under the Washington constitution but based its decision upon the equal protection clause of the United States Constitution.33 The court first stated that net income was property34 and then held that this act was an attempt to establish a property tax (on the net income) and not an excise or corporation franchise tax. The tax could not be levied upon a certain class of corporations without being applied to copartnerships or individuals engaged in the same business.35

In 1931 the legislature enacted both personal and corporate net income taxes, which were vetoed by the governor. However, both

29 Although levied as a tax on mining property, the tax (Laws 1921, c. 124, §§ 1-10, pp. 401-06) held invalid in *MacLaren v. Ferry County,* 135 Wash. 517, 238 Pac. 579 (1925), was based upon the net profits of the mine. The tax was alleged to be “violative of §§ 1 and 2, of Art. VII of our state constitution [prior to the amend. XIV], providing that all property shall be taxed in proportion to its value in money and requiring a uniform and equal rate of assessment to that end, in that: (1) It unjustly discriminates in favor of mining property.... (2) It does not provide a uniform and equal rate of taxation according to value, even of such property as may be included within the classification.... (3) It makes an arbitrary, unreasonable and unjust classification, depending upon source of title, not upon the nature of the property.” The court held “We are convinced that chapter 124, Laws of 1921, p. 401, is unconstitutional in many, if not most of the particulars pointed out by the appellants....”

31 157 Wash. 351, 289 Pac. 551 (1930).
32 157 Wash. 393, 289 Pac. 551 (1930).
33 U.S. Const. amend. XIV: “... nor shall any State deny to any person within its jurisdiction the equal protection of the laws.”
34 157 Wash. at 361. It is interesting to note that when this decision came down, amend. XIV was not in the Washington constitution, and there was no definition of property in the constitution. Cf. notes 117 and 129 infra. But all the later cases which have held net income is property under the amend. XIV have cited the Aberdeen case as precedent for their holdings.
35 See denial of rehearing, 157 Wash. 391 (1930).
taxes were approved by popular initiative in 1932.\textsuperscript{38} The act declared the purpose was "to tax all annual income within the state as such, and not as property"\textsuperscript{37} and the tax was to be "assessed . . . and paid annually . . . on all net income . . . by every person."\textsuperscript{38} There were graduated rates, increasing as the amount of taxable income increased. This act was declared unconstitutional in \textit{Culliton v. Chase}\textsuperscript{39} on the ground that it violated the fourteenth amendment of the state constitution. The court held net income was property under the Washington constitution,\textsuperscript{40} no matter what the legislature designated it, and therefore this was a property tax. The majority of the court further held all income to be one class of property and graduation of rates, therefore, violative of the uniformity clause. Judge Mitchell, concurring, said that to classify property (net income) by size was an unreasonable classification.\textsuperscript{41}

The next attempt to enact a graduated net income tax was in 1935.\textsuperscript{42} The act read: "[A tax] shall be . . . paid . . . by every resident . . . for the privilege of receiving income . . . ."\textsuperscript{43} (Emphasis added.) Thus, the act purported to tax "the privilege of receiving income" and not the income itself. In this way the legislature hoped to avoid having the court classify the tax as a property tax and, thus, to avoid application to it of the uniformity clause of the state constitution. But the court, in \textit{Jensen v. Henneford},\textsuperscript{44} said: "[A]n examination of the various provisions of the act shows clearly that the legislature was concerned with the property [income] upon which the amount of the tax was to be levied, not with the mere privilege of the individual to receive the income."\textsuperscript{45} The court then held the tax was in reality upon the income (property) and the surtax was invalid, because it was graduated, thus violating the uniformity clause. The normal tax was held invalid on the same ground because of credits and exemptions allowed, with the court stating: "In other words, 'net income,' which, under the fourteenth amendment, constitutes one class of

\textsuperscript{38} Init. 69, Laws 1933, c. 5, §§ 1-26, pp. 49-101. Approved by the voters 322,919 to 136,983.
\textsuperscript{37} Laws 1933, c. 5, § 1, p. 49.
\textsuperscript{38} \textit{Ibid}.
\textsuperscript{39} 174 Wash. 363, 25 P.2d 81 (1933).
\textsuperscript{40} \textit{Ibid} at 374.
\textsuperscript{41} \textit{Id} at 382. This is the only reason stated in any of the cases for holding that all income is one class of property so that graduated rates are violative of the uniformity clause.
\textsuperscript{42} Laws 1935, c. 178, §§ 1-72, pp. 660-704.
\textsuperscript{43} \textit{Id} at § 2, p. 661.
\textsuperscript{44} 185 Wash. 209, 53 P.2d 607 (1936).
\textsuperscript{45} \textit{Id} at 218.
property, is reclassified or graduated by the act so as to constitute at
least two distinct classes, with the result that, as between the two, the
tax is disproportionate." 46

It was also decided in this case that a tax upon rents from real estate
is a tax upon the real estate itself and thus is a second tax upon such
real estate. As no such tax is levied upon unrented real estate or real
estate owned by nonresidents, a second class of real estate is created,
contrary to the fourteenth amendment, which states "all real estate
shall constitute one class." 47

Petroleum Nav. Co. v. Henneford, 48 another 1935 case, held an
act, 49 passed contemporaneously with the one in the Jensen case,
imposing an annual tax measured by net income upon all national
banks and all other corporations doing business in this state, to be in
violation of the uniformity clause of the fourteenth amendment. This
was because it was a property tax, and, as it was not also imposed
upon individuals and copartners, it could not be imposed upon cor-
porations. However, in the Jensen case, though a statute 50 imposing
a net income tax on individuals was held unconstitutional, 51 the court
noted that the unconstitutionality was not because it did not also
apply to corporations, since it had to be read in pari materia with
another act providing for such a tax—the same act held invalid in the
Petroleum case for the reason it applied only to corporations. 52

The last attempt to impose a net income tax was made in a 1951
act 53 that provided:

Sec. 7.... (a) ... Every bank and corporation ... for the privilege
of exercising its corporate franchise ... shall annually pay ... an excise
tax ... measured by its net income equal to four per cent of such net
income. ...

Sec. 38. ... (h) The amount of tax payable ... shall be reduced by
a credit equal to fifty per cent of the amount of the business and occupa-
tion tax paid. ... (Emphasis added.)

46 Id. at 222. See note 41 supra. However, art. VII, § 1 permits classification of
personal property. Harsch and Shipman, The Constitutional Aspects of Washington's
Fiscal Crisis, 33 WASH. L. Rev. 225, 248. Only real estate is required to be treated as
one class of property. Many cases support variations in rates, exemptions, and credits
under a straight "uniformity" requirement. See Harsch and Shipman, supra, at 233,
n. 7.
47 WASH. CONST. art. VII, § 1.
48 185 Wash. 495, 55 P.2d 1056 (1936).
49 Laws 1935, c. 180, §§ 159-84, pp. 811-29.
50 See note 42 supra.
51 44 Wash. at 217, 224.
52 However, this was after the other act was declared unconstitutional.
Although the act purported to be a privilege, or excise, tax and was computed by a formula based on both net and gross income, the court held it to be a tax on the net income and a property tax which did not comply with the uniformity clause of the state constitution, because it was not imposed upon the property of individuals and copartnerships. The court said it was not an excise tax, as it had no reference to income from the various business activities but taxed almost any income from almost every source and was levied because the corporation had net income, not because it did any business in this state or exercised its corporate franchise.

Consideration will now be given to some tax statutes that have been upheld as excises by the Washington court.

**Excises Upheld**

A 1933 statute imposing a tax measured by gross income for the privilege of engaging in business in this state has been held to be an excise tax. In upholding the statute, the court said:

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.

The court further said:

This being an excise tax, the legislature, under the 14th amendment to our state constitution, has very broad power, and we cannot interfere with that power except for arbitrary action, clear abuse, or constructive fraud appearing on the face of the act or from facts of which we may take judicial knowledge.

In 1935, in *Morrow v. Henneford*, the court upheld a sales tax.

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65 Ibid.
66 But see State ex rel. Nettleton v. Case, 39 Wash. 177, 81 Pac. 554 (1905), where the court held Laws 1903, c. 153, § 1, pp. 290-98, 293, invalid. This act prescribed a scale of fees, based upon the valuation of the estate, to be paid to the clerk of the court upon filing the first papers in probate. A graduate schedule of fees was provided with increased amounts chargeable to estates of $1,000 or more (graduated rates). The court states the statute exacted payments regulated by property valuations alone, and that it was therefore a tax upon property. Although never overruled, later cases seem to have reduced the force of this case, as many taxes now considered excise taxes are regulated by property valuations alone.
69 State ex rel. Stiner v. Yelle, supra note 58, at 407.
70 Ibid.
levied against the purchaser of property at retail. The tax was added to the purchase price of the article bought and was collected by the seller for the state.

Also in 1935 the court upheld another phase of the Revenue Act of 1935, the so-called compensating tax. The act provides that there is "hereby levied . . . a tax or excise for the privilege of using within this state an article of tangible personal property . . . equal to the purchase price paid by the taxpayer multiplied by the rate of 2%." (Emphasis added.) In holding this not to be a property tax, the court simply referred to its decision in Morrow v. Henneford, where it was held that the sales tax involved there was an excise tax and not a property tax.

Another use tax was upheld as an excise in 1937. This imposed an excise tax for the privilege of using any private motor vehicle. The court stated:

That a tax upon the use of personal property is an excise, is no longer open to question in this state. Morrow v. Henneford, 182 Wash. 625, 47 P.2d 1016; Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 P.2d 14; Henneford v. Silas Mason Co., 300 U.S. 577, 575 S.Ct. 524. Being an excise tax, the tax is not objectionable upon the grounds suggested. Unless the exaction is inherently oppressive, or the classification of the persons or objects affected is unreasonable, such a tax is valid. State Board of Tax Commissioners v. Jackson, 283 U.S. 527, 518 S.Ct. 540, 73 A.L.R. 1464.

It can be seen from the court's language in the above cases that the legislature has much greater power in classifying the subjects of taxation when an excise tax is involved than for a property tax. Therefore, if the court should find that a tax on net income is an excise tax,
it should be possible to classify net income by size for the purpose of applying different rates.\textsuperscript{73}

A graduated tax on the privilege of inheriting property has been upheld as an "impost or excise," as the charge is not on the property itself but is on the state-granted privilege of succession to the ownership and enjoyment of property.\textsuperscript{74} However, in the \textit{Culliton} case\textsuperscript{75} the court completely rejected any analogy between a graduated inheritance tax and a graduated net income tax, saying that an inheritance tax is not a tax at all but an impost laid only once, which merely decreases the state-granted privilege to inherit property. This ignores the previous cases\textsuperscript{76} where the court referred to it as an "impost or excise," using these words synonymously, and the general definition of an impost as a tax, duty, or imposition.\textsuperscript{77}

From the foregoing cases, it will be seen that the Washington court has consistently held net income to be "property" as defined by the Washington constitution, and the following types of statutes have been held unconstitutional as property taxes not complying with the uniformity clause of the fourteenth amendment to the state constitution: (1) a graduated net income tax levied directly on income, (2) a graduated tax on the privilege of receiving income measured by net income, (3) a flat tax upon the privilege of doing business as a corporation measured by net income, and (4) a flat tax upon the privilege of doing business as a corporation measured by a formula involving net income and gross income. In addition, a tax levied by a municipality on the gross income of all persons receiving compensation for services performed within the city has been held invalid.

The above cases on excise taxes show that the following types of taxes are valid: (1) a tax on the privilege of doing business measured by gross income, (2) a tax on the purchases of property at retail, and (3) a tax on the use of tangible personal property within the state. A

\textsuperscript{73} See note 41 \textit{supra}. Although there are no Washington cases on a graduated excise tax, other states, which have no specific constitutional provision allowing an income tax, have held income taxes to be excise taxes and graduated rates and exemptions to be reasonable matters to be determined by the legislature. Featherstone \textit{v.} Norman, 170 Ga. 370, 153 S.E. 58 (1930); Green \& Milam \textit{v.} State Revenue Commission, 188 Ga. 442, 4 S.E.2d 144 (1939); Diefendorf \textit{v.} Gollet, 51 Idaho 619, 10 P.2d 307 (1932); \textit{State ex rel. Kux v. Gulf, M. \& N. R. Co., 138 Mo. 70, 104 So. 689 (1925)}; but see \textit{State ex rel. Nettleton v. Case, 39 Wash. 177, 81 Pac. 554 (1905)} (Discussed in note 56 \textit{supra}.).

\textsuperscript{74} \textit{State v. Clark, 30 Wash. 439, 71 Pac. 20 (1902); In re Sherwood's Estate, 122 Wash. 649, 211 Pac. 734 (1922); In re Ellis' Estate, 169 Wash. 581, 14 P.2d 37 (1932).}

\textsuperscript{75} \textit{174 Wash. at 378.}

\textsuperscript{76} \textit{See note 74 \textit{supra}.}

\textsuperscript{77} \textit{BLACK, LAW DICTIONARY (4th ed. 1951); CYCLOPEDIC LAW DICTIONARY (3rd ed. 1940); BALLENTINE, LAW DICTIONARY (1930); 42 C.J.S., \textit{Impost}, p. 409 (1944).}
graduated tax on inheritance has also been held valid as an "impost or excise."

The only sure way to validate a net income tax is to amend the state constitution. This will be treated later in this Comment, but two other possibilities that might make a net income tax possible without amending the constitution will be discussed first. One possibility is that the court might overrule its previous decisions, and the other is a statute drafted to avoid the faults of previous enactments.

**COULD A CONSTITUTIONAL AMENDMENT BE AVOIDED?**

There is always the possibility that the court may reverse a previous position.\(^78\) In *Tekoa v. Reilly*\(^79\) the court overruled *State v. Ide*,\(^80\) stating its reluctance to overrule its own judgments to prevent a state of uncertainty as to the law.\(^81\) But the court pointed out that there is less reluctance where a rule of property is not involved, so that titles have not been acquired in reliance upon it, and no vested rights will be disturbed by any change. In holding that it had a duty to inquire into the matter of whether its previous ruling should be overruled, the court said:\(^82\)

No rule of property is involved, the legislature has reenacted the section nullified in *State v. Ide*, with slight modifications, and if 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.

This would seem to be the exact situation in the case of a net income tax. No rule of property is involved, and the previous holdings of the court restrict the power of the legislature in the important matter of taxation.

Another pertinent case is *State ex rel. Bloedel-Donovan Lumber Mills v. Savidge*,\(^83\) in which the court quoted\(^84\) with approval the following from *The Genesse Chief*\(^85\):

It is the decision in the case of the *Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the

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\(^78\) There has always been a strong dissent in the cases invalidating income tax statutes, with the court split six to three in all but the Culliton case, where the split was five to four.

\(^79\) 47 Wash. 202, 91 Pac. 769 (1907).

\(^80\) 35 Wash. 576, 77 Pac. 961 (1904).

\(^81\) 47 Wash. at 204.

\(^82\) Id. at 205.

\(^83\) 144 Wash. 302, 258 Pac. 1 (1927).

\(^84\) Id. at 310.

\(^85\) 12 U.S. (How.) 443 (1851).
great weight to which it is entitled. But at the same time we are con-
vinced that, if we follow it, we follow an erroneous decision into which
the court fell, when the great importance of the question as it now pre-
sents itself could not be foreseen; and the subject did not therefore
receive that deliberate consideration which at this time would have
been given to it by the eminent men who presided here when that case
was decided.

Although great attention has been given to the constitutionality of an
income tax in past cases, the importance of the matter ever increases
as the financial crisis of the state deepens, and the above case is
authority for further consideration of the problem.

Strong and recent authority for overruling previous decision is found
in the Windust case, superminded in 1958. There the court directly
overruled several cases and said "the doctrine of stare decisis is not
applicable to a case of statutory interpretation." This holding would
have direct applicability to a statute in which a tax was levied on a
privilege measured by net income. The court could reverse its pre-
vious decisions and say the tax was on the privilege and not on the
net income and, therefore, was not in violation of the uniformity
clause of the fourteenth amendment.

Even though the court may not overrule its previous position, a
carefully worded statute can make it possible for the court to uphold
a tax on net income without reversing itself. The only way this can
be done is to make the tax an excise tax and not a property tax. The
court has already eliminated the possibility of an excise tax on the
privilege of receiving income, and its holding in Cary v. Bellingham makes it doubtful whether a tax could be imposed upon the privilege
of working for wages. About the only indirect method of taxing net
income left is a tax on the privilege of using net income. This could
be done in one of two ways: either as a tax on the general use of net
income, similar to the present compensating tax, or a tax on a spe-
cific use of net income, such as the payment of the federal income tax.

A statute taxing the general use of net income could be worded
almost identically to the present use tax statute on tangible personal
property, with only a few changes to adapt it to net income. The

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\(\text{Id. at 5.}\)

\(\text{Jensen v. Henneford, 185 Wash. 209, 53 P.2d 607 (1936).}\)

\(\text{41 Wn.2d 468, 250 P.2d 114 (1952).}\)

\(\text{RCW 82.12.}\)

\(\text{Ibid.}\)

\(\text{The pertinent provisions of the present use tax statute read as follows:}\)
authority for such a tax would be the Washington cases\textsuperscript{93} upholding the validity of the present use tax statute on tangible personal property, while the authority against such a tax would be the cases\textsuperscript{94} holding a privilege tax measured by net income unconstitutional as a tax on property (net income).

Another type of use tax statute would tax a specific use of net income, one suggestion\textsuperscript{95} being that a tax be placed on the use of net income to pay federal income tax. Such a tax would tax only this particular use, and yet in effect it would be a graduated net income tax.\textsuperscript{96} The obstacle to such a tax would be the Washington court’s expressions to the effect\textsuperscript{97} that an excise tax can be laid on only a substantive privilege granted by the state, and the decisions of other courts\textsuperscript{98} that the act on which an excise tax is levied must be a voluntary act, whether the act be a privilege or a right. Authority which would favor such a tax is quoted with approval in \textit{Morrow v. Henneford}\textsuperscript{99} and indicates that a tax imposed upon one of the numerous rights of property would be upheld as an excise tax, while a tax upon the owner merely because he is owner, regardless of the use or disposition made of his property, would be a property tax.\textsuperscript{100}

\textbf{Form of Constitutional Amendment}

The only sure way of validating a net income tax is to amend the state constitution. Such an amendment would require a two-thirds vote of both houses of the legislature and a majority vote at the

\textsuperscript{93} See discussion under the head “Excises Upheld” supra.
\textsuperscript{94} See discussion under the head “Net Income Tax Statutes” supra.
\textsuperscript{96} Alaska now levies a net income tax equal to fourteen per cent of the amount payable in federal income taxes. \textit{Alaska Comp. Laws Ann.}, title 48, c. 10, § 5 (1949).
\textsuperscript{98} 51 Am. Jur., \textit{Taxation}, § 33 (1944).
\textsuperscript{99} 182 Wash. 625, 630, 47 P.2d 1016 (1935).
\textsuperscript{100} For a discussion of other income taxes that might be upheld, i.e. a non-graduated two per cent income tax or a gross income tax, see Harsch and Shipman, \textit{supra} note 46, at p. 279-82.
Although there have been many such attempts over the past thirty years, only four amendments have reached the voters for their acceptance, and all four have been defeated.

A number of amendments to allow an income tax have been proposed in the legislature. The proposals have taken two general approaches to the problem. One type adds new language which would allow the tax without changing or deleting any of the existing constitution. The other type has proposed more or less comprehensive changes in, and possibly additions to, the existing constitution to authorize the tax and make other desired reforms. The many proposed amendments introduced in the legislature have met with varying success there, though, as has been mentioned, none of the four proposals submitted to the voters has been adopted. Some of these proposed amendments will be reviewed and an attempt will

101 Wash. Const. art. XXIII, § 1.
102 H.J. Res. 12, Ex. Sess. (1933). Vote for, 134,908; against, 176,154. S.J. Res. amended 7 (1935). Vote for, 93,598; against, 328,675. S.J. Res. 5 (1937). Vote for, 141,375; against, 285,946. H.J. Res. amended 4 (1941). Vote for, 89,453; against, 176,332. The 1933 and 1935 amendments would have amended art. VII, § 1, and the 1935 amendment also would have amended art. VII, § 9 and repealed art. IX, § 12. The attempted changes in art. VII, § 1, identical except for minor variations in wording, would have left the first sentence unaltered, substituted "subjects" for "property" in the second sentence, and changed the rest of the section to allow any tax exemptions and graduated rates. The 1937 amendment would have added provisions which gave the legislature power to enact a graduated net income tax and exempted any such tax from the limitations on ad valorem property taxes. The 1941 proposal would have added provisions which said "income shall not be construed as property and the legislature shall have the power to lay and collect graduated net income taxes from whatever source derived, and provide exemptions, offsets and deductions."

103 As was proposed by H.J. Res. 17 (1957); 2, Ex. Sess. (1955); 13 and 32 (1955); 7, Ex. Sess. (1953); 14 (1953); 2, 2nd Ex. Sess. (1951); 9 (1951); 9 (1949); 15 (1947); amended 4 (1941); 5 (1937); 10 (1931); S.J. Res. 2 (1955); 20 (1953); 2, 2nd Ex. Sess. (1951); 20 (1949); 2 (1941); 14 (1939); 5 (1937); and 7 (1935).

104 As was proposed by H.J. Res. 9 (1955); 2 (1941); 12 (1939); 7 and 35 (1937); 2 and 19 (1935); 12, Ex. Sess. (1933); 11 and amended 11 (1933); 8 (1931); S.J. Res. 1 and 17 (1935); and 3 (1931) (to change art. VII, § 1); H.J. Res. 9 (1929); H.B. 163 (1927); and 190, Ex. Sess. (1925) (to drop old art. VII, §§ 1-4, and add new § 1); H.J. Res. 8 (1939); and S.J. Res. 10 (1939) (to drop art. XI, § 9, and all of Art. VII and add four new sections); H.J. Res. Substitute 2 (1935); and S.J. Res. amended 7 (1935) (to drop art. XI, § 12, and art. VII, §§ 1 and 9, and add two new sections); House Bills 137 (1923); and 137 (1921) (to drop all art. VII and add four new sections); H.J. Res. 21 (1953) (to drop all art. VII and add six new sections); H.J. Res. 4 (1941); S.J. Res. 15 (1947); and 3 (1941) (to drop all art. VII and add five sections); and H.J. Res. 10 (1929) (to drop old art. VII, §§ 1-4 and 7-9, and add a new section).

105 See notes 103 and 104 supra. H.J. Res. 1, Ex. Sess. (1950); 7, Ex. Sess. (1925); and S.J. Res. 5, Ex. Sess. (1951), could not be found, but it is believed that they do apply to income taxation. Some of the earlier proposed amendments may have been missed in the search.

106 Only four passed both houses; see note 102 supra.

107 Proposals cited in notes 103 and 104 supra.
be made to ascertain their effect, to the end that a satisfactory form of amendment may be suggested.

First, consideration will be given seriatim to the elimination or change of each of the provisions of the fourteenth amendment. Elimination of the provision that “the power of taxation shall never be suspended, surrendered or contracted away,” which probably applies to all taxes, has been suggested. This would have no direct effect on income taxation, but, if income taxation were otherwise achieved, it might cause any exemptions to be less strictly construed and make exemptions for new industries more likely.

Many of the proposals would have eliminated the words “all taxes shall be uniform upon the same class of property . . . .” Others have proposed addition of a statement that “property” does not include income, or have inserted the word “subject” in place of the word “property.” The purpose of these proposals was substantially

109 But see note 3 supra.
110 H.J. Res. 21 (1953); 8 (1931); and 10 (1929). Other closely related constitutional provisions giving analogous protection art. I, § 8 (forbidding irrevocable grants of privileges and immunities); art. I, § 12 (forbidding privileges or immunities not belonging equally to all citizens or corporations); art. II, § 28 (5), (6), and (10) (forbidding special laws relating to the assessing or collecting of taxes, granting of corporate privileges, or releasing or extinguishing of any indebtedness or obligation due the state by a person or corporation); and possibly art. XI, § 9 (forbidding the release, discharge, or commutation from its proportionate share of state taxes of any inhabitant of, or property in, a county).
112 As is done by some other states and Puerto Rico. See Miss. Const. art. VII, §§ 182 and 192.
113 H.J. Res. 21 (1953); 4 (1941); 35 (1937); 19 (1933); 8 (1931); 10 (1929); S.J. Res. 15 (1947); and 3 (1941).
114 Art. VII, § 1. As to the present effect of this provision, see Harsch and Shipman, supra note 46, at 248, and more specifically in relation to income taxes, 252 and 260. Related constitutional provisions are listed in note 110 supra. Also, art. VII, § 9, requires local taxation to be uniform upon persons and property.
115 H.J. Res. 2 (1941), and S.J. Res. 17 (1935). S.J. Res. 3 (1931), would have changed the uniformity clause to make it apply only to ad valorem taxes and then have allowed income taxation to be in lieu of ad valorem property taxation. The effect of this latter proposal is discussed in note 146 infra. (Cf. text relating to note 159 infra.)
116 H.J. Res. 8 (1939); Substitute 2 (1935); 12, Ex. Sess. (1933); 11 and amended 11 (1933); H.B. 137 (1923); 137 (1921); S.J. Res. 10 (1939); and 1, and amended 7 (1935). The two house bills would have left out of the uniformity clause of art. 7, § 1, the requirement that property taxes are to be uniform “within the territorial limits of the authority levying the tax.” None of the states, which have neither income taxes nor a specific constitutional grant of power to tax incomes, have a constitutional requirement of uniformity of taxation on subjects. The following states with the constitutional requirement of uniform taxation of subjects have an income tax even though there is no specific grant in the constitution of power to tax incomes: Del. Const. art. VIII, § 1; Ga. Const. § 2-5403, Featherstone v. Norman, 170 Ga. 370, 153 S.E. 38 (1930), Green & Milam v. State Revenue Commission, 188 Ga. 442, 4 S.E.2d 144 (1939); Idaho Const. art. VII, § 5, Diedendorf v. Gollet, 51 Idaho 619, 10 P.2d 307 (1932); Minn. Const. art. IX, § 1, Reed v. Bjorson, 191 Minn. 254, 253 N.W. 102 (1934); N.M. Const. art. VIII, § 1. But see Pa. Const. art. IX, § 1, Banger's
the same. Each would eliminate the invalidity of an income tax because of graduation in rates,117 except as restricted by other general constitutional provisions.118 However, only the provision that "property" does not include income would remove other property tax restrictions.119 Elimination of the uniformity clause would make the phrase "all real estate shall constitute one class" (article VII, section 1) meaningless, while changing the uniformity clause to apply to "subjects" instead of "property" would create a problem of interpreting these clauses together. Therefore, it is recommended that if either of these changes is made the clause concerning real estate be dropped.

Elimination120 of the provision that "all taxes . . . shall be levied, and collected for public purposes only"121 would have no effect on income taxation.122

Appeal, 109 Pa. 79 (1885) (held non-graduated income tax repugnant to this clause but they do have local income taxation).

117 In the Culliton case, 174 Wash. at 376, the court, speaking of this "uniform on subjects" and also "property shall be classified by law" provisions in the Idaho const. supra note 116, stated, "that court held, as would we, under a similar constitutional provision, that the lawmaking power was absolutely free to define property to be taxed." (Emphasis added.)

118 See notes 110 and 113 supra. Under these provisions the classification powers are less restrictive. In the poll tax cases, discussed under the head "Constitutional Limitations" supra, classification so as to tax only those best able to pay was held permissible. In State ex rel. Northern Pacific R. Co. v. Henneford, 3 Wn.2d 48, 99 P.2d 616 (1940), where the contest was under art. I, § 12 (see note 110 supra), the classification based solely on the size of the claim was upheld, when the need for protest, the statute of limitation, and the administrative remedy available varied between two classes, those with claims of over $200.00 for excess or erroneous tax payments and those with claims of less than that amount. The broader power of classification should circumvent the holding that income is one class of property, and that under art. VII, § 1, classification of property on the basis of size alone is not reasonable as was done in the Culliton case, see note 41 supra.

119 The other property restrictions that still apply are the exemptions listed in art. VII, § 1, and the forty-mill limitations listed in art. VII, § 2. See Harsch and Shipman, supra note 46, at 252 (on the property limitations) and 280 (on the forty-mill limitation).

120 Proposed by H.J. Res. 21 (1953); 4 (1941); 35 (1937); 8 (1931); S.J. Res. 15 (1947); 3 (1941); and 17 (1935). H.B. 137 (1923) and 137 (1921), were proposals made to amend original art. VII which did not include the "public purpose only" provision and they would not have added it.

121 Art. VII, § 1.

122 See note 3 supra, for the taxes covered by this provision. The same protection may be provided by the opening sentence of art. I, § 16, as amended by amend. IX ("Private property shall not be taken for private use, . . . "), unless this provision should be construed to apply solely to eminent domain. Also art. VII, § 5, states that "No tax shall be levied except in pursuance of law . . . ," and art. I, § 3, requires that "No person shall be deprived of life, liberty, or property, without due process of law."

The need for a public purpose for taxation was held to be required both by the definition of taxation and by the requirements of Wash. Const. art. I, § 3, supra, and the "due process clause" of U.S. Const. amend. XIV in State ex rel. Reclamation Board v. Clausen, 110 Wash. 525, 531, 188 Pac. 538 (1920). See State ex rel. Hart v. Clausen, 113 Wash. 570, 572, 574, 194 Pac. 793 (1921).
The broad definition of “property”123 was one of the bases of the holding in the Culliton case124 that income is property, the effect of which is pointed out elsewhere.125 The later cases on income tax were based mainly upon this holding.126 But even if this definition were eliminated,127 the statements in cases128 before enactment of the fourteenth amendment could still be relied upon by the court in holding net income to be property. However, the Culliton case indicates that without the definition the court might be willing to reconsider these earlier holdings.129

Deletion130 of the provision that “all real estate shall constitute one class”131 would eliminate the objection of the Jensen case132 that classification of real estate into income-producing and non-income-producing is unconstitutional133 but would not solve the other problems encountered.

The provision that the legislature may tax mines, mineral resources, and reforestation lands by a yield tax, ad valorem tax, or both134 could be eliminated135 without any direct effect on income taxation in general.136 If the uniformity and classification restrictions are removed

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123 “The word ‘property’ as used herein shall mean and include everything, whether tangible or intangible, subject to ownership.” Art. VII, § 1.
124 See note 39 supra.
125 See note 3 supra; Harsch and Shipman, supra note 46, at 248, 252, 280.
126 See discussion under the head “Net Income Tax Statutes” supra.
127 This was proposed by H.J. Res. 21 (1953); 4 (1941); 8 (1939); 35 (1937); 2 and 19 (1935); 12, Ex. Sess. (1933); 11 and amended 11 (1933); 8 (1931); 9 and 10 (1929); H.B. 163 (1927); 190, Ex. Sess. (1925); 137 (1923); 137 (1921); S.J. Res. 15 (1947); 3 (1941); 10 (1939); 1, 7, and 17 (1935); and 3 (1931). The four house bills were before the provision, see note 123 supra, was included in the constitution by amend. XIV.
128 See notes 34 and 56 supra.
129 In the Culliton case, 174 Wash. at 374 (see discussion in textual referent to note 39 supra), the court stated that decisions from other states have no effect here on this point because of “our peculiarly forceful constitutional definition.” Without this provision outside decisions may be found to have more effect (see note 117 supra). On the same page the court states the “overwhelming weight of authority” classifies income as property. This statement is questioned by the editors in 97 A.L.R. 1488 (1935). The cases on the point are nearly evenly split, but 27 Am. Jur., Income Taxes §§ 2 and 19 (1940) states the “prevailing view” classifies income as not being property. Cases are listed in 11 A.L.R. 313 (1921); 70 A.L.R. 468 (1921); 97 A.L.R. 1488 (1935), and supplements.
130 This was proposed in all proposals cited in note 127 supra, except S.J. Res. 3 (1931), and in addition H.J. Res. 9 (1955) and 12 (1939).
131 Art. VII, § 1.
132 185 Wash. at 222 (see textual referent to note 47 supra).
134 Art. VII, § 2. For the present effect see Harsch and Shipman, supra note 46, at 248.
135 Proposed by proposals cited in notes 127 and 130 supra, with the addition of S.J. Res. 3 (1931). For a discussion of the taxation of these properties without a specific constitutional provision see 126 A.L.R. 1051 (1940).
136 However, it would make an income tax on these items subject to the general
from the constitution, this provision would be surplus.

The remainder of article VII, section 1, lists four exemptions: \(^{137}\) property exempted by general laws, \(^{138}\) property of the various governmental units, \(^{139}\) credits secured by property actually taxed, \(^{140}\) and income tax restrictions. Cf. MacLaren v. Ferry County, 135 Wash. 517, 238 Pac. 579 (1925), discussed in note 29 supra.

\(^{137}\) As to their present effect see Harsch and Shipman, supra note 46, at 249-251.

\(^{138}\) This provision was in the original art. VII, § 2, before amend. XIV. Without such a provision in the constitution, the power to grant exemptions would undoubtedly be considered an inherent legislative power. The provision was not cited by the court in the Jensen case, 185 Wash. at 222 (see textual referent to note 46 supra), when it held that difference in exemptions for married and single individuals was an unconstitutional classification of income. The requirement that general, rather than special, laws be enacted when exemption from taxation is also provided by art. II, § 28 (5), (6), and (10) (see note 110 supra). Cf. Libby, McNeil & Libby v. Ivarson, 19 Wn.2d 723, 729, 144 P.2d 258 (1943).

The proposals have included various provisions in relation to the power to exempt. Removal of all constitutional restrictions on the taxing power obviates need for special exemption provisions [H.J. Res. 8 (1931); and 10 (1929)]. Other proposals would have had the constitution refer solely to income taxes, so that there would have been no other specific constitutional reference to taxation. By specifically allowing income tax exemptions, such proposals ran the risk of being construed as the only constitutionally allowed exemptions [H.J. Res. 21 (1953); 4 (1941); S.J. Res. 15 (1947); and 3 (1941)]. The power to exempt would have been limited to exemption of specific groups, such as charitable, religious, or educational, by some proposals [H.J. Res. 12 (1937); H.B. 137 (1923); and 137 (1921)]. H.J. Res. 35 (1937), would have limited exemptions to those which most fairly distributed the cost of government, which at least would have been a good guide to the legislature when it considered various political pressures.

\(^{139}\) This was not added by amend. XIV but was in the original art. VII, § 2. Its elimination was proposed by H.J. Res. 21 (1953); 4 (1941); 8 (1939); 35 (1937); substitute 2 and 19 (1935); 12, Ex. Sess. (1933); 11 and amended 11 (1933); 8 (1931); 10 (1929); S.J. Res. 15 (1947); 3 (1941); and 10 (1939); and 1, amended 7, and 17 (1935). H.J. Res. 10 (1931), and S.J. Res. 3 (1931), would have limited the exemption to property held for governmental purposes.

If this provision were dropped, the legislature, by general laws, could adapt its tax the present ideas concerning them. Any idea of protecting the United States Government from state taxation was clearly gone with the adoption of amend. XIX (art. VII, § 3). Oppressive taxation of the state by itself does not seem likely. Detailed provisions are made in art. XI as to the relation of state and local governments, and art. XI, § 12, prohibits the state from taxing these local governments for local purposes.

\(^{140}\) This provision would either have been dropped (or not added by those proposals before amend. XIV) by all of the proposed amendments that would have made any changes in the existing constitution (see note 104, supra) except by H.J. Res. 9 (1955) and 2 (1951). This provision may have some reference to the original art. VII, § 2, which allowed a deduction of debts from credits. The 1957 Tax Reference Manual, Tax Commission of the State of Washington (1957), states at 66 that the provision was specifically designed to permit the classification of property. The present confusion caused by this provision is outlined in Harsch and Shipman, supra note 46, at 249. The writers recommend this provision either be dropped or a provision which more clearly states its operation and effect be drafted and included in any constitutional amendments. If this provision is not changed and other changes are made allowing an income tax, then there is the possibility that the court could find that an income tax which included income from such credits was in effect an unconstitutional tax on such credits. That finding would be analogous to the holding in the Jensen case, 185 Wash. at 222 (see textual referent to note 47 supra), that an income tax including rent is in effect a tax on the real estate. This possible difficulty could also be avoided by a specific provision that property tax limitations (see textual referent to note 159 infra) or credit exemptions do not apply to income taxation.
$300.00 of personal property for the head of a family. The first and last are permissive, and the other two are mandatory in language. As long as income is considered property for taxation purposes, they are limitations on the imposition of such a tax.

The proposed amendments have frequently contained provisions that would restrict other forms of taxation, allow coordination with the federal income tax, grant to the legislature specific power to classify certain types of property, or allow the exemption from ad 141

141 The $300.00 personal property exemption seems to overlap the provision allowing exemption by general laws. See Harsch and Shipman, supra note 46, at 251. If this provision was intended as a limitation on the legislative exemption power, it was not followed in RCW 84.36.110, which exempts all household goods, furnishings, and personal effects, as well as the $300.00 of personal property. The 1957 Tax Reference manual, Tax Commission of the State of Washington (1957), states at 64 that its present purpose has been taken over by the above statute. The provision was first introduced into the constitution in 1900 by amend. III, and it must have had reference to the property values of that era. It would have been eliminated by H.J. Res. 21 (1953); 8 (1939); 11 and 35 (1937); substitute 2 and 19 (1935); 12, Ex. Sess. (1933); amended 11 (1933); 8 (1931); 10 (1929); S.J. Res. 10 (1939); 1, amended 7, and 17 (1935); and 3 (1931). H.J. Res. 2 (1941), would have raised the limit to $500.00. H.J. Res. 4 (1941), S.J. Res. 15 (1947), and 3 (1941) would have allowed raising of the personal exemption without limit. A limit of $300.00 on only household goods and furnishings was proposed in H.J. Res. 12 (1939).

142 See note 3 supra and its textual referent.

143 The restrictions that were proposed were: no tax on property [H.J. Res. 21, 2nd Ex. Sess. (1953)], no business, occupation or gross income tax [H.J. Res. 17 (1957); and 32 (1955)], no tax on the privilege of doing business [H.J. Res. 13 (1955)], no tax on gross income [H.J. Res. amended 4 (1941)], no tax on gross income except license fees [S.J. Res. 20 (1953)], no sales tax on food [H.J. Res. 17 (1957)], and sales tax limited to two or three per cent [H.J. Res. 13 (1955); 7, Ex. Sess. (1953); 14 (1935); S.J. Res. 20 (1953); and 2, 2nd Ex. Sess. (1951)]. These types of restrictions are not recommended, as they are apt, under changed circumstances, to cause a recurrence of the same kinds of problems that are presently raised by the forty-mill limitation or by the inability to tax net incomes. No comment is made as to the advisability of the requested tax reliefs, but it would seem much more advisable to have the various groups of taxpayers address their requests to the legislature, rather than to embody such relief in the constitution, so regular and comprehensive adjustments, rather than sporadic and relatively unchangeable provisions, could be used.

144 A provision that "the legislature may or is authorized to coordinate the administration and collection of state income taxes with the income tax laws and procedures of the United States, and may delegate to such state administrators as it may designate the authority to prescribe the means of coordination of states and United States tax laws and methods for the allocation of income for taxing purposes" was proposed by H.J. Res. 17 (1957); 13 (1955); 7, Ex. Sess. (1953); 14 and 21 (1953); 9 (1949); and S.J. Res. 20 (1949). The provision would not have been mandatory on the legislature; so it would not have required the coordination to which it referred. The power was already in the legislature, with the possible exception of a greater ability to delegate authority.

145 These proposals would have allowed the legislature specifically to classify certain types of property as follows: H.J. Res. 2 (1941) (real property, but all petroleum products shall be one class). H.J. Res. 9 (1955); 4 (1941); S.J. Res. 15 (1947); 3 (1941); and 9 (1935) (real and personal property). H.J. Res. 17 (1953) (real estate according to use). The problem of classification according to size being unreasonable (see note 41 and its textual referent supra) and the other problems of an income tax would not be met by these provisions, as the legislature already has the power to classify unless it contravenes the real estate clause or makes an unreasonable classification. H.J. Res. 2 (1935) which would have allowed the legislature to classify property
valorem taxation so as to "otherwise tax." None of these proposals would necessarily allow graduated net income taxation, and the future trouble they might cause would seem to outweigh any advantage that they might have. Three proposals would remove the present constitutional obstacles to the taxation of income, grant special permission to tax income, and include a reservation that there is to be no reduction of the retained powers of the legislature. This is both an awkward phrasing and a source of possible doubt as to the exact extent of the retained power. With the removal of the constitutional obstacles to an income tax, it would be best not to mention the income tax specifically and thereby raise doubts as to whether it constitutionally is to be the exclusive tax.

By far the most prevalent method of providing for an income tax in the proposed amendments is the insertion of a clause that specifically allows a graduated net income tax. Two of these are coupled with a provision that this is to be done notwithstanding anything else in the constitution. As such an amendment would supersede other provisions of the constitution anyway, this would seem to be surplusage, except that it would emphasize the intent to make the specific provision control. However, specific reference to the provisions which are not to apply to income taxation would be preferable. But none of the proposed amendments have done this.

In three of the proposals the grant of power is phrased in a negative fashion: "Nothing in this constitution shall be construed as preventing the legislature from levying a graduated income tax." Although this provision by itself would allow an income tax to be enacted, it would still be possible for the court to find income is property, and

and levy graduated taxes on the classes of property would have come much closer to solving the problems. This would have permitted a graduated income tax, but the exemption restrictions and the forty-mill limitation problem would still have remained.

Proposed by H.J. Res. 10 (1931) and S.J. Res. 3 (1931). These provisions would have created two problems: (1) when levying an income or other tax what types or classes of property have to be exempted and (2) whether all property required to be exempted has in fact been exempted when the attempt is made to levy other taxes against it. S.J. Res. 3 (1953) would also have continued the present exemptions until repealed, altered, or amended.

The proposals are the same as in note 103 supra without H.J. Res. 13 (1955) and adding H.J. Res. 15 (1947); 2 (1941); 8 and 12 (1939); 7 (1937); 12, Ex. Sess. (1933); amended 11 (1933); H.B. 137 (1923); 137 (1921); S.J. Res. 3 (1941); 10 (1939); and I and 5 (1935). H.J. Res. 13 (1955) would have allowed a non-graduated two percent net income tax.


H.J. Res. 15 (1947); 7 (1937); and S.J. Res. 1 (1935). S.J. Res. 2 (1955) and 7 (1935) have both the negative and affirmative wording of the grant of power.

140 Proposed by H.J. Res. 10 (1931) and S.J. Res. 3 (1931). These provisions would have created two problems: (1) when levying an income or other tax what types or classes of property have to be exempted and (2) whether all property required to be exempted has in fact been exempted when the attempt is made to levy other taxes against it. S.J. Res. 3 (1953) would also have continued the present exemptions until repealed, altered, or amended.

147 H.J. Res. 4 (1941); S.J. Res. 15 (1947); and 3 (1941).

148 The proposals are the same as in note 103 supra without H.J. Res. 13 (1955) and adding H.J. Res. 15 (1947); 2 (1941); 8 and 12 (1939); 7 (1937); 12, Ex. Sess. (1933); amended 11 (1933); H.B. 137 (1923); 137 (1921); S.J. Res. 3 (1941); 10 (1939); and I and 5 (1935). H.J. Res. 13 (1955) would have allowed a non-graduated two percent net income tax.

140 H.J. Res. 2 and 32 (1955).

150 H.J. Res. 15 (1947); 7 (1937); and S.J. Res. 1 (1935). S.J. Res. 2 (1955) and 7 (1935) have both the negative and affirmative wording of the grant of power.
therefore the limitations on the taxing of property, other than the graduation feature, would still apply.\textsuperscript{161}

Several proposed amendments\textsuperscript{162} have specifically empowered the legislature to grant exemptions and deductions from income taxation. It would be desirable to include a clause that removed income taxes from the limitations on exemptions in article VII, section 1, for without a specific provision to this effect,\textsuperscript{153} the legislative power would be subject to possible doubt. The court might still find the tax to be a property tax and the mandatory exemptions of article VII to apply. Some of these amendments\textsuperscript{164} have contained provisions for specific exemptions or deductions which should be included only in the taxing statutes themselves. Other such restrictive proposals have contained maximum rates\textsuperscript{165} or limitations on the imposition of other taxes.\textsuperscript{156} Such detailed provisions in a constitution may create later problems under changed circumstances, as have the forty-mill limitation and the constitutional definition of property.

Another provision\textsuperscript{157} suggested is a clause stating that ad valorem tax limitations shall not apply to income taxes. This would probably exempt an income tax from the forty-mill limitation of section 2 of article VII, as a logical interpretation of this section is that it applies only to ad valorem taxes.\textsuperscript{168} However, section 1 of article VII probably applies to all property taxes, and the limitations imposed by that section might still apply.

Proposals\textsuperscript{159} for removing the restrictions of section 1, article VII, which now prevents a graduated net income tax,\textsuperscript{160} as well as for elimi—

\textsuperscript{151} See note 119 \textit{supra}.

\textsuperscript{152} H.J. Res. 17 (1957); 7, Ex. Sess. (1953); 14 and 21 (1953); 9 (1951); 9 (1949); 4 (1941); S.J. Res. 2 (1955); 20 (1953); and 15 (1947) provided for exemptions and deductions. H.J. Res. 12 (1939); S.J. Res. 2, Ex. Sess. (1951); and 3 (1931) provided only for exemptions.

\textsuperscript{153} Exemptions of art. VII, § 1, shall not apply. H.J. Res. 10 (1931). The same effect could be gotten by stating that income taxes are not property taxes.

\textsuperscript{154} Deductions the same as provided for by the United States income tax laws [H.J. Res. 2, Ex. Sess. (1955)]. Deductions and exemptions allowed, but the first $1,000.00 and corporate dividends exempt [H.J. Res. 13 (1955)]. One thousand dollars per individual, $2,000.00 per married couple, and $300.00 per child exempt from income taxation [H.J. Res. 8 (1939); S.J. Res. 10 and 14 (1939)].

\textsuperscript{155} H.J. Res. 32 (1955) and 2 (1949) had an eight per cent maximum rate, and H.J. Res. 8 (1939); S.J. Res. 10 and 14 (1939) had a three per cent limit on the first $3,000.00 of income.

\textsuperscript{156} See note 143 \textit{supra}.

\textsuperscript{157} H.J. Res. 5 (1937); S.J. Res. 5 (1937).

\textsuperscript{158} "[Taxes] upon real and personal property ... shall not exceed forty mills on the assessed valuation ... [when levied by the state or] ... any political subdivision ... authorized ... to levy ... ad valorem taxes on property,..."  

\textsuperscript{159} H.J. Res. amended 4 (1941); 12 (1939); S.J. Res. 20 (1953); and 2, 2nd Ex. Sess. (1951).

\textsuperscript{160} See note 3 and its textual referent \textit{supra}.  


nating the forty-mill limitation, are ones declaring that income is not property for the purpose of taxation. But there still would be a remote possibility that the court would find a tax on income from real estate was not a tax on the income but on the real estate itself, as it did in the Jensen case.\footnote{1} To avoid this, it might be necessary to include a clause that income from any source whatsoever may be taxed and that such a tax is not a property tax. This provision would also avoid the taxing restrictions on property.

The best amendment that could be made to avoid constitutional problems arising from taxation of income would be one that eliminated most of the constitutional provisions in relation to taxation and merely contained a grant of power to tax.\footnote{2} Another solution, of course, would be to eliminate the subject of taxation entirely from the constitution.\footnote{3} This would avoid any of the state constitutional problems in relation to any tax, other than general constitutional restrictions.

If an amendment is to be made to allow a graduated net income tax without changing any of the present provisions of the constitution, the writers suggest one that is short and general, such as the following:

The legislature may impose taxes upon gross or net income, from whatever source derived, with such rates, graduations, exemptions, credits, and deductions as the legislature may provide. Such a tax shall not be a tax upon property, nor shall article VII, sections 1 and 2, apply.

If desired, other sections, such as article XI, section 9, also could be made non-applicable.

\footnote{1} 185 Wash. at 222. See textual referent to note 47 supra.  
\footnote{2} H.J. Res. 35 (1937); 19 (1935); and S.J. Res. 17 (1935), would have had the legislature tax as would best or most fairly distribute the cost of government. H.J. Res. 9 (1931) and 10 (1929) provided that taxes should be levied in the manner provided by law. If these were the only provisions, income taxation would clearly be allowed. Provision that all taxes may be graduated and progressive or that they may be graduated and progressive in each class, as was suggested by H.J. Res. 2 and substitute 2 (1935) and S.J. Res. 7 (1935), would allow graduated income taxation and would remove all the property tax limitations, except that if the forty-mill limit of amend. XVII were not also eliminated, how the two provisions would work together is speculative.  
\footnote{3} Conn. Const. art. X, § 1, merely grants the legislature all the powers of a legislature of a free people. This has been construed to include the power to tax.