

No. 85556-1

SUPREME COURT
OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Respondent

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Petitioner

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ON PETITION FOR REVIEW FROM DIVISION II
OF THE COURT OF APPEALS

**RESPONDENT'S STATEMENT OF
ADDITIONAL AUTHORITIES**

George C. Mastrodonato
WSBA No. 7483
Michael B. King
WSBA No. 14405
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

*Attorneys for Respondent
Tesoro Refining and Marketing Company*

Under RAP 10.8, Respondent Tesoro Refining and Marketing Company submits the following additional authorities:

1. Legislative choice of language. Regarding the contention of Petitioner Department of Revenue (“DOR”), that when the Legislature uses different terms within the same “legislative act” “courts presume the legislature intends the terms to have different meanings[,]” *see* DOR’s Supplemental Brief at 9, Tesoro submits the following additional authorities:

- RCW 82.04.4295, “Deductions -- Manufacturing activities completed outside the United States” (“In computing tax there may be deducted from the measure of tax *by persons subject to payment of the tax on manufacturers pursuant to RCW 82.04.240...*”) (1980 chap. 37, § 15);

- RCW 82.04.4324, “Deductions -- Artistic or cultural organization -- Deduction for tax under RCW 84.04.240 -- Value of articles for use in displaying art objects or presenting artistic or cultural exhibitions, performances or programs”) (“In computing tax there may be deducted from the measure of tax *by persons subject to payment of the tax on manufacturing under RCW 82.04.240...*”) (1980 chap. 140 § 2).

2. Statement of legislative purpose. Regarding the import of the statement set forth in Clause 2 of the law of Washington enacting the deduction at issue in this case (later codified as RCW 82.04.433(2); *see* DOR’s Supplemental Brief at 8, n.3, citing and quoting 1985 chap. 471 §16(2)), and for purposes of determining the plain meaning of the deduction in the form it was originally enacted in 1985, Tesoro submits the following additional authorities:

- *G-P Gypsum Corp. v. Dept. of Revenue*, 169 Wn.2d 304, 310, 237 P.3d 256 (2010) (“[a]n enacted statement of legislative purpose is included in a plain reading of a statute” (citing *C.J.C. v. Corp. of Catholic Bishops*, 138 Wn.2d 699, 712-14, 985 P.2d 262 (1999) (plurality opinion)) (holding that an enacted statement of legislative purpose “passed as part of the session law” is included in the plain reading of the statute);

- *Helson v. Commonwealth of Kentucky*, 279 U.S. 245, 252, 49 S.Ct. 279, 73 L.Ed. 683 (1929) (state tax on sale of gasoline could not be applied to sales made within the state for fuel to be used in powering a ferryboat engaged in operating on the Ohio River between Kentucky and Illinois) (“[I]s not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce”);

- *Washington Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Comm’n*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 (1937), which had held that stevedores were instrumentalities of interstate and foreign commerce and therefore not subject to Washington’s B&O tax under dormant Commerce Clause principles, in light of changes in dormant Commerce Clause jurisprudence effected by the Court’s decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977)).

3. “[B]ygone era[s] of constitutional jurisprudence”.

Regarding the contention of Petitioner Department of Revenue, that this Court’s decisions in *State v. Pacific Telephone & Telegraph*, 9 Wn.2d 11, 113 P.2d 524 (1941), and *Bates v. McLeod*, 11 Wn.2d 648, 120 P.2d 472 (1941), were “the product of narrow restrictions on economic legislation emanating from ‘an era characterized by exacting review of economic legislation under an approach that has ‘long since been discarded,’ ” see Petitioner’s Supplemental Brief at 18, n.6 (citing and quoting *United States v. Carlton*, 512 U.S. 26, 34, 114 S.Ct. 2018, 129 L.Ed. 2d 22 (1994)), Tesoro submits the following additional authorities:

- *Parrish v. West Coast Hotel Co.*, 185 Wash 581, 55 P.2d 1083 (1936) (upholding the constitutionality of Washington’s regulation of working conditions for women and children) (citing as principal authority the *dissents* of Justice Oliver Wendell Holmes and Chief Justice William Howard Taft in *Adkins v. Children’s Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed 785 (1923), in which the U.S. Supreme Court invalidated a comparable regulation as a violation of the liberty of contract supposedly protected by “substantive” due process, under the authority of decision such as *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed 937 (1905));

- *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed 703 (1937) (affirming the decision of the Washington Supreme Court, and in doing so overruling *Adkins v. Children’s Hospital*)

- B. Solomon, FDR v. The Constitution 156-61 (Walker Pub., N.Y. 2009) (recounting the announcement of the U.S. Supreme

Court's decision in *West Coast Hotel v. Parrish*, and its impact on the ability of the federal and state governments to enact economic legislation (at 160): “[E]verything had changed Suddenly, the ‘no-man’s land’ the president [Franklin D. Roosevelt] had scorned, where neither the state nor the federal government could intervene, had disappeared. At last, it seemed, state legislatures possessed the authority to regulate business to help society’s needy, and presumably the federal government could do the same”).

4. Overruling a decision of this Court *sub silentio*. Regarding the contention of Petitioner Department of Revenue, that this Court in *W.R. Grace & Co. v. Department of Revenue*, 137 Wn.2d 580, 973 P.2d 1011 (1999) “implicitly” (i.e., *sub silentio*) overruled *State v. Pacific Telephone & Telegraph*, 9 Wn.2d 11, 113 P.2d 542 (1941) and *Bates v. McLeod*, 11 Wn.2d 648, 120 P.2d 472 (1941), see Department of Revenue’s Reply to Amici Curiae at 11, Tesoro submits the following additional authorities:

- *Lunsford v. Saberhagen*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (refusing to treat prior decision as overruled *sub silentio*) (“Where we have expressed a clear rule of law ... we will not -- and should not -- overrule it *sub silentio*” (citation omitted));
- *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999) (refusing to treat prior decision as overruled *sub silentio*) (“We will not overrule...binding precedent *sub silentio*”).

Copies of the cited authorities are attached for the Court’s convenience.

RESPECTFULLY SUBMITTED this 5th day of September,
2011.



George C. Mastrodonato

WSBA No. 7483

Michael B. King

WSBA No. 14405

Attorneys for Respondent

Tesoro Refining and Marketing Company

DECLARATION OF SERVICE

I certify that I served a copy of the foregoing *Answer to Motion to Strike Portions of Respondent's Supplemental Brief* on the date set forth below by electronic mail (email) and by U.S. Mail, postage prepaid, on the Respondent's counsel of record, as follows:

Donald F. Cofer
Senior Counsel
Attorney General/Revenue Division
PO Box 40123
Olympia, WA 98504-0123
<mailto:DonaldC@atg.wa.gov>

Jeffrey T. Even
Deputy Solicitor General
PO Box 40100
Olympia, WA 98504-0123
<mailto:JeffE@atg.wa.gov>

Norman J. Bruns
Michelle DeLappe
Garvey Schubert Barer
1191 Second Avenue, Ste. 1800
Seattle, WA 98101-2939
nbruns@gsblaw.com
mdelappe@gsblaw.com

Robert L. Mahon
Gregg D. Barton
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
rmahon@perkinscoie.com
gbarton@perkinscoie.com

Kristopher I. Tefft
Assoc. of Washington Business
1414 Cherry Street SE
Olympia, WA 98507
<mailto:krist@awb.org>

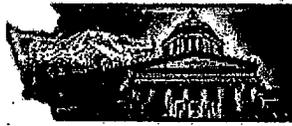
Dirk Giseburt
Michele Radosevich
Davis Wright Tremaine LLP
1201 Third Avenue, Ste. 2200
Seattle, WA 98101-3045
dirkgiseburt@dwt.com
micheleradosevich@dwt.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of September, 2011 at Seattle, Washington.


Patti Saiden, Legal Assistant

DECLARATION OF SERVICE



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[RCWs](#) > [Title 82](#) > [Chapter 82.04](#) > [Section 82.04.4295](#)

[82.04.4294](#) << [82.04.4295](#) >> [82.04.4296](#)

RCW 82.04.4295

Deductions — Manufacturing activities completed outside the United States.

In computing tax there may be deducted from the measure of tax by persons subject to payment of the tax on manufacturers pursuant to RCW [82.04.240](#), the value of articles to the extent of manufacturing activities completed outside the United States, if:

- (1) Any additional processing of such articles in this state consists of minor final assembly only; and
- (2) In the case of domestic manufacture of such articles, can be and normally is done at the place of initial manufacture; and
- (3) The total cost of the minor final assembly does not exceed two percent of the value of the articles; and
- (4) The articles are sold and shipped outside the state.

[1980 c 37 § 15. Formerly RCW [82.04.430\(14\)](#).]

Notes:

Intent -- 1980 c 37: See note following RCW [82.04.4281](#).





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[RCWs](#) > [Title 82](#) > [Chapter 82.04](#) > [Section 82.04.4324](#)

[82.04.4322](#) << [82.04.4324](#) >> [82.04.4326](#)

RCW 82.04.4324

Deductions — Artistic or cultural organization — Deduction for tax under RCW 82.04.240 — Value of articles for use in displaying art objects or presenting artistic or cultural exhibitions, performances, or programs.

In computing tax there may be deducted from the measure of tax by persons subject to payment of the tax on manufacturing under RCW [82.04.240](#), the value of articles to the extent manufacturing activities are undertaken by an artistic or cultural organization solely for the purpose of manufacturing articles for use by the organization in displaying art objects or presenting artistic or cultural exhibitions, performances, or programs for attendance or viewing by the general public.

[1981 c 140 § 2.]

Notes:

"Artistic or cultural organization" defined: RCW [82.04.4328](#).



Westlaw.

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Supreme Court of Washington,
 En Banc.
 G-P GYPSUM CORPORATION, Respondent,
 v.
 STATE of Washington, DEPARTMENT OF REV-
 ENUE, Petitioner.

No. 81995-5.
 Argued Nov. 17, 2009.
 Decided July 29, 2010.

Background: Taxpayer, a manufacturer, brought action seeking a refund of city use taxes it paid for its use of natural gas in city. The Superior Court, Thurston County, Richard A. Strophy, J., denied the refund, and taxpayer appealed. The Court of Appeals, 144 Wash.App. 664, 671, 183 P.3d 1109, reversed and remanded. Department of Revenue petitioned for review.

Holding: The Supreme Court, Stephens, J., held that taxpayer's consumption of natural gas within city limits was a use of gas subjecting it to the local gas use tax.

Reversed.

Sanders, J., dissented and filed opinion.

West Headnotes

[1] Appeal and Error 30 ⇨ 893(1)

30 Appeal and Error
 30XVI Review
 30XVI(F) Trial De Novo
 30k892 Trial De Novo
 30k893 Cases Triable in Appellate
 Court
 30k893(1) k. In general, Most Cited
 Cases
 The meaning of a statute is a question of law

reviewed de novo.

[2] Statutes 361 ⇨ 181(1)

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k180 Intention of Legislature
 361k181 In General
 361k181(1) k. In general, Most
 Cited Cases

Statutes 361 ⇨ 188

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k187 Meaning of Language
 361k188 k. In general, Most Cited
 In any question of statutory construction, the Supreme Court strives to ascertain the intention of the legislature by first examining a statute's plain meaning.

[3] Statutes 361 ⇨ 206

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k204 Statute as a Whole, and Intrinsic
 Aids to Construction
 361k206 k. Giving effect to entire statute, Most Cited Cases
 Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.

[4] Taxation 371 ⇨ 3641

371 Taxation
 371IX Sales, Use, Service, and Gross Receipts
 Taxes
 371IX(C) Transactions Taxable in General
 371k3641 k. Place of transfer or use, Most

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Cited Cases

Taxpayer's consumption of natural gas within city limits in its manufacturing plant was a use of gas subjecting it to the local gas use tax, even though taxpayer first took possession of the gas outside city limits; statutory definition of "use," for purposes of state use tax, as the first act within the state by which a taxpayer takes or assumes dominion or control over the article of tangible personal property, was not applicable to local gas use tax statute because definition contemplated a taxable event that did not relate to municipality's taxing authority, which was necessarily limited to uses within its jurisdiction. West's RCWA 82.14.230(1).

****257** Peter B. Gonick, Office of the Attorney General, Olympia, WA, for Petitioner.

Franklin G. Dinces, The Dinces Law Firm, Gig Harbor, WA, Geoffrey P. Knudsen, Attorney at Law, Seattle, WA, for Respondent.

Sheila Marie Gall, Olympia, WA, amicus counsel for Association of Washington Cities.

Kent Charles Meyer, Seattle City Attorney's Office, Seattle, WA, amicus counsel for City of Seattle.

Elizabeth Ann Pauli, Debra Ellen Casparian, Tacoma City Attorney's Office, Tacoma, WA, amicus counsel for City of Tacoma.

Judith Martha Zeider, Vancouver City Attorneys Office, Vancouver, WA, amicus counsel for Washington State Association of Municipal Attorneys.

STEPHENS, J.

***306** ¶ 1 This case presents an issue of statutory construction requiring us to determine whether G-P Gypsum Corporation (Gypsum) "uses" natural gas for the purpose of a local use tax statute. We reverse the Court of Appeals and hold that Gypsum does "use" natural gas within Tacoma city limits and is therefore subject to Tacoma's local use tax.

FACTS AND PROCEDURAL HISTORY

¶ 2 Gypsum manufactures wallboard at its Tacoma plant. In its operations, it consumes natural gas within Tacoma city limits. Gypsum purchases its natural gas from various brokers, taking delivery at two points: a pipeline hub outside the city of Sumas in Whatcom County and a pipeline hub outside the city of Sumner in unincorporated Pierce County. Gypsum exercises dominion and control over the gas when it reaches the stations. From the stations, the gas Gypsum anticipates needing for manufacturing activities is transported to its Tacoma plant; excess gas might be sold to third parties with delivery to those parties occurring at one of the stations. Gas that is transported to Gypsum's Tacoma plant is burned in the production of wallboard.

¶ 3 For several years, Tacoma assessed a brokered natural gas (BNG) tax against Gypsum for use of natural gas within city limits, pursuant to RCW 82.14.230. Gypsum claimed a refund of the tax for the period January 1, 1996 to December 31, 2001. It argued that under former ***307**RCW 82.12.010(2) (1994), "use" means the first instance of dominion and control in the state, and because Gypsum initially takes dominion and control of the gas outside Tacoma city limits, Tacoma has no taxing authority over it.

¶ 4 Gypsum's refund request was directed to the Department of Revenue (Department) because the Department administers the local BNG tax for municipalities. The Department denied the refund request.

¶ 5 After exhausting its administrative remedies, Gypsum filed a complaint for a tax refund in Thurston County Superior Court. At a bench trial, the superior court held in favor of the Department, reasoning that the definition of "use" under chapter 82.12 RCW, governing state use taxes, did not apply for the purposes of local use tax under chapter 82.14 RCW. Gypsum appealed. Division Two of the Court of Appeals reversed, concluding that the plain language of the statutes at issue resolves the

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case in Gypsum's favor, *G-P Gypsum Corp. v. Dep't of Revenue*, 144 Wash.App. 664, 671, 183 P.3d 1109 (2008). The Department petitioned for review by this court, which we granted. **258G-P *Gypsum Corp. v. Dep't of Revenue*, 165 Wash.2d 1023, 203 P.3d 380 (2009). The Department is supported by amici city of Seattle, Association of Washington Cities, city of Tacoma, and the Washington State Association of Municipal Attorneys.

ANALYSIS

¶ 6 We begin with the texts of the relevant statutes. Under chapter 82.14 RCW, municipalities may impose a BNG use tax:

The governing body of any city, while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes authorized by this chapter, fix and impose on every person a use tax for the privilege of using natural gas or manufactured gas *in the city* as a consumer.

RCW 82.14.230(1) (emphasis added). "Use" is not defined in chapter 82.14 RCW, which deals with local retail and use *308 taxes. However, "use" is defined in chapter 82.12 RCW, which deals with state use taxes:

"Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act *within this state* by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state.

Former RCW 82.12.010(2) (emphasis added). By statute, the definitions in chapter 82.12 RCW are made applicable to chapter 82.14 RCW, but this incorporation of definitions is limited:

The meaning ascribed to words and phrases in chapter[] ... 82.12 RCW, as now or hereafter amended, *insofar as applicable*, shall have full force and effect with respect to taxes imposed

under authority of this chapter.

Former RCW 82.14.020(7) (1983) (emphasis added).

¶ 7 The question here is what part of the definition of "use" in former RCW 82.12.010(2), if any, is applicable to chapter 82.14 RCW. Gypsum focuses on the language defining "use" as the first act of dominion and control. While Gypsum does not dispute that it consumes natural gas within Tacoma city limits, Clerk's Papers at 84, it claims that the use tax authorized under RCW 82.14.230(1) does not apply to it because its "use" of the gas as defined by former RCW 82.12.010(2) occurs before the gas is brought within the city limits. It reads "use" as restricted to the first act of exercising dominion and control over the gas within the state. Because Gypsum first takes possession of the gas in Whatcom County or unincorporated Pierce County, it argues no use (i.e., first act) occurs in Tacoma subjecting it to the city's use tax.

¶ 8 The Department counters that the definition of "use" under former RCW 82.12.010(2) must be read in harmony with former RCW 82.14.020(7), which states that the definitions under chapter 82.12 RCW apply to chapter 82.14 *309 RCW only insofar as they are applicable. The phrase "in the state" in the definitional statute is not applicable to a local use tax, which is concerned only with use that occurs within the municipality. Further, the Department argues, the definition of "use" in former RCW 82.12.010(2) includes the ordinary meaning of use as well as the "dominion and control" provision upon which Gypsum relies. The ordinary meaning of "use" includes consumption, and Gypsum indisputably consumes the gas. Thus, contends the Department, the only applicable definition of "use" under RCW 82.12.010(2) for the purposes of chapter 82.14 RCW is its ordinary meaning; consumption. In support of its reading of the statutes at issue, the Department offers an overview of the legislative purpose behind the local gas use tax. Suppl. Br. of Pet'r at 5-9; Br. of Resp't at 8-11, 15-18.

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[1][2][3] ¶ 9 "The meaning of a statute is a question of law reviewed de novo." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002). In any question of statutory construction, we strive to ascertain the intention of the legislature by first examining a statute's **plain meaning**. *Id.* at 9-10, 43 P.3d 4. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." " **259 *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wash.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996))).

[4] ¶ 10 Turning first to the question of the **purpose** of the local BNG tax, the Court of Appeals declined to consider any expression of legislative intent, stating that it could not "resort to extrinsic sources in interpreting a statute unless we find more than one reasonable interpretation of the statutory language." *Gypsum*, 144 Wash.App. at 670, 183 P.3d 1109. We have previously criticized such a crabbed notion of statutory interpretation, holding instead that a statute's **plain meaning** should be "discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *310 *Campbell*, 146 Wash.2d at 11, 43 P.3d 4. Moreover, an enacted **statement of legislative purpose** is included in a **plain** reading of a statute. *C.J.C. v. Corp. of Catholic Bishop*, 138 Wash.2d 699, 712-14, 985 P.2d 262 (1999) (plurality opinion) (relying upon legislature's adopted finding and intent provision in construing definitional statute).^{FN1}

FN1. Four justices signed the lead opinion in *C.J.C.* Justice Madsen's concurrence/dissent did not take issue with the lead opinion's construction of the definitional statute. *C.J.C.*, 138 Wash.2d at 729-30, 985 P.2d 262 (Madsen, J., concurring/dissenting).

¶ 11 Here, we have the benefit of an enacted **statement of legislative purpose** passed as part of the session law that became RCW 82.14.230(1). LAWS OF 1989, ch. 384, § 1. This **statement** makes it clear the legislature intended to grant cities the authority to impose a use tax on entities that purchase natural gas outside city limits but consume it within city limits.

Due to a change in the federal regulations governing the sale of brokered natural gas, cities have lost significant revenues from the utility tax on natural gas. It is therefore the intent of the legislature to adjust the utility and use tax authority of the state and cities to maintain this revenue source for the municipalities and provide equality of taxation between intrastate and interstate transactions.

LAWS OF 1989, ch. 384, § 1. The change in federal regulations to which the provision refers was deregulation of the mechanism of sale for natural gas. As the Department explains, after deregulation, consumers began to purchase gas directly from producers instead of local distribution companies. Suppl. Br. of Pet'r at 6. That meant localities lost revenue on gas sales because when gas was purchased from a local distribution company, the sales were subject to a state public utility tax and, for sales of gas within a city, to a local public utility tax. *Id.* When consumers stopped buying gas from local distributors, their purchases were no longer subject to the state or local public utility tax. *Id.*

¶ 12 In order to remedy this situation, the legislature gave cities the authority under RCW 82.14.230(1) to tax the *311 use of natural gas rather than its sale, thereby allowing them to obtain tax revenues even when a gas user purchases gas from an entity other than a local distributor or public utility. The Department is correct that this case presents the factual situation the legislature sought to address: a manufacturer, which before deregulation would have purchased natural gas from a local distribution company, instead purchases gas from

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an out-of-state broker, thus avoiding the local utility tax. Suppl. Br. of Pet'r at 8-9. The Court of Appeals erred when it ignored the enacted **statement of legislative purpose** behind RCW 82.14.230(1).

¶ 13 When we properly consider the legislative purpose behind the local BNG tax in construing the plain meaning of the statutes at issue, it is clear that the local BNG gas tax holds a special position within the universe of Washington's use tax provisions. It is a tax that is designed to mimic a locality's public utility tax. See former WAC 458-20-17902(2) (1990).^{FN2} By its nature, then, the ****260** taxing authority granted by RCW 82.14.230(1) must contemplate a taxable event that occurs *within the locality*.

FN2. Former WAC 458-20-17902(2) reads:

The distribution and sale of natural gas in this state is generally taxed under the state and city public utility taxes. With changing conditions and federal regulations, it is now possible to have natural gas brokered from out of the state and sold directly to the consumer. If this occurs and the public utility taxes have not been paid, RCW 82.12.022 (state) and RCW 82.14.230 (city) impose a use tax on the brokered natural gas at the same rate as the state and city public utility taxes.

This regulation was in effect during the tax period at issue here. The language quoted appears in the current version of WAC 458-20-17902, but at subsection (3) instead of subsection (2).

¶ 14 The definition of "use" contained in former RCW 82.12.010(2) is relevant to the local BNG tax only "insofar as applicable." Former RCW 82.14.020(7). We have previously found the language "insofar as applicable" restricts the application of a definitional statute from one tax

chapter to another. *312 *St. Paul & Tacoma Lumber Co. v. State*, 40 Wash.2d 347, 353, 243 P.2d 474 (1952).^{FN3} The portion of the "use" definition that confounded the Court of Appeals—"the first act within this state by which the taxpayer takes or assumes dominion or control"—plainly has limited application: it is addressed to the *State's* taxing authority insofar as it speaks to the first act of dominion and control "within the state." Former RCW 82.12.010(2). This definition is not applicable to RCW 82.14.230(1) because it contemplates a taxable event that does not relate to a *municipality's* taxing authority, which is necessarily limited to uses within its jurisdiction.

FN3. *St. Paul* considered the applicability of a statutory definition of "consumer" in the business and occupation (B & O) tax chapter with respect to a provision in the use tax chapter. *St. Paul*, 40 Wash.2d at 352-53, 243 P.2d 474. The Court of Appeals rejected the Department's reliance on *St. Paul* because in addition to the words "'in so far as applicable'" in the use tax chapter, the definitional statute at issue there contained the phrase "'unless otherwise required by the context.'" *Gypsum*, 144 Wash.App. at 669-70, 183 P.3d 1109 (quoting Rem.Rev.Stat. § 8370-35(e) (Supp.1949) and Laws of 1949, ch. 228, § 2). The Court of Appeals found that the absence of these words in the statutes here was determinative. *Id.* But this overlooks the fact that *St. Paul* set forth two distinct reasons for declining to apply the B & O tax definition of consumer to the use tax provision in question, one premised on the "unless otherwise required by the context" language and the other premised on the "in so far as applicable" language. *St. Paul*, 40 Wash.2d at 352-53, 243 P.2d 474. Moreover, the phrase "in so far as applicable" by itself requires an examination of the contexts of the relevant statutes.

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¶ 15 Instead, we look to the ordinary meaning of "use," a definitional basis also recognized in former RCW 82.12.010(2). "Use" ordinarily means to "consume." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2523-24 (2002). Gypsum does not dispute that it consumes natural gas in its manufacturing process; therefore, it uses natural gas in the city of Tacoma as the term "use" is ordinarily understood. We hold that the tax levied against Gypsum under RCW 82.14.230(1) was proper.

¶ 16 In so holding, we recognize that it is unusual for corresponding state and local taxes to be triggered by different taxable events.^{FN4} But that is exactly what the *313 legislature intended here, assuming Gypsum is correct that the taxable event for the purposes of the state BNG tax is the point at which the taxpayer first takes dominion and control of the gas in the state.^{FN5} In any case, it is clear that the legislature created the local BNG tax to stand in for a local public utility tax when an industrial user purchases its gas from a broker outside the city where it does business. The statute authorizing the **261 tax must be construed to give effect to this purpose. If we were to apply the disputed portion of the definitional statute to Gypsum's activities, then every purchaser of natural gas could simply avoid a local tax by purchasing gas in an unincorporated area of the state, rendering RCW 82.14.230(1) ineffective to accomplish its purpose. We cannot endorse an interpretation of the statutes at issue that leads to this absurd result. *J.P.*, 149 Wash.2d at 450, 69 P.3d 318.^{FN6}

FN4. The Court of Appeals ruled against the Department in part because it concluded that the tax at issue here must occur simultaneously with a taxpayer's "first [use] within the state" under former RCW 82.12.010(2) pursuant to the local sales and use tax uniformity provision, former RCW 82.14.070 (1970). This provision mandates "that state and local sales and use taxes are to be uniform and collected

at the same time and place." *Gypsum*, 144 Wash.App. at 671, 183 P.3d 1109. The Court of Appeals was mistaken however in concluding that former RCW 82.14.070 applies here. The local sales and use tax and local BNG tax are entirely separate tax schemes that serve different purposes from one another, complement different taxes, impose different rates, contain different deductions and credits, and are imposed by unrelated taxing authorities. Suppl. Br. of Pet'r at 17, comparing RCW 82.14.230 with RCW 82.14.030. Thus, it is not necessary, nor even reasonably possible, for the local sales and use tax uniformity provision to dictate the timing of the local BNG tax.

FN5. In point of fact, we take no position on what constitutes a taxable event under the state BNG tax. That question was not litigated below and it is not before us now. Suppl. Br. of Pet'r at 15 n. 8.

FN6. The dissent claims that our opinion sets up a tension between localities that levy the local BNG tax, asking how this case is to be resolved under our holding if the gas were first used in Sumner or Sumas. Dissent at 262-63. There is no such tension under our holding that requires the ordinary meaning of "use" be applied to a local BNG tax. Because the ordinary meaning of "use" includes burning or consuming the gas, gas use will be taxed only once because gas can be burned or consumed only once. Contrary to the dissent's fears, the locality in which the gas is consumed or burned will be the only locality that receives the benefit of the tax.

CONCLUSION

¶ 17 The legislature expressed its clear purpose to authorize municipalities to tax entities for the use of natural gas within city limits. In light of this stated purpose, the *314 ordinary meaning of

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"use" is the part of the definition of "use" in former RCW 82.12.010(2) that is applicable to the local BNG tax. Applying the ordinary meaning of "use," Gypsum's consumption of natural gas within Tacoma city limits was a use of gas subjecting it to the local gas use tax. Accordingly, Gypsum is not entitled to a refund for the tax period at issue, and we reverse the Court of Appeals.

WE CONCUR: BARBARA A. MADSEN, Chief Justice, TOM CHAMBERS, SUSAN OWENS and MARY E. FAIRHURST, Justices.

SANDERS, J. (dissenting).

¶ 18 Between 1996 and 2000, the city of Tacoma collected \$853,722.55 in natural gas use taxes from G-P Gypsum Corporation (Gypsum), a corporation that manufactures wallboard within the city limits. The question before us is whether Tacoma's local tax for natural gas use applies to Gypsum, even though Gypsum first used its natural gas outside the city's boundaries. Because the plain language of the tax statutes compels us to affirm the Court of Appeals, I dissent. See *G-P Gypsum Corp. v. Dep't of Revenue*, 144 Wash.App. 664, 183 P.3d 1109 (2008), review granted, 165 Wash.2d 1023, 203 P.3d 380 (2009).

¶ 19 This matter turns on statutory construction. Our "fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wash.2d 359, 367, 89 P.3d 217 (2004). We first look to the plain language of a statute. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007). If the plain language is subject to only one interpretation, our inquiry is at an end. *Id.* When a "statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Tingey v. Haisch*, 159 Wash.2d 652, 657, 152 P.3d 1020 (2007) (quoting *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005)). If the statute remains subject to multiple interpretations after analyzing the plain *315 language, it is ambiguous. *Armendariz*, 160 Wash.2d at 110, 156 P.3d 201. "A

statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." *Burton v. Lehman*, 153 Wash.2d 416, 423, 103 P.3d 1230 (2005). Only if a statute is ambiguous may we look to the legislative history and the circumstances surrounding the statute's enactment to discern legislative intent. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003).

¶ 20 Cities may "fix and impose on every person a use tax for the privilege of using natural gas or manufactured gas in the city as a consumer." RCW 82.14.230(1). Here the legislature defined "use" as follows:

"Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal **262 from storage, or any other act preparatory to subsequent actual use or consumption within this state.

Former RCW 82.12.010(2) (1994) (emphasis added). Former RCW 82.14.020(7) (1983), in turn, suggests that "[t]he meaning ascribed to words and phrases in ... 82.12 RCW, as now or hereafter amended, insofar as applicable, shall have full force and effect with respect to taxes imposed under authority of this chapter."

¶ 21 The majority notes that Gypsum first uses gas at points outside the city of Sumner or Sumas, where it imports the gas from out of state. Majority at 258. "Gypsum exercises dominion and control over the gas [i.e., uses the gas] when it reaches the stations." *Id.* The majority nonetheless asserts that the definition of former RCW 82.12.010(2) does not apply. It tries to reconcile the problems with this position by misconstruing three words in former RCW 82.14.020(7): "insofar as applicable." Majority at 258. The majority latches onto this

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phrase the same *316 way a drowning sailor latches onto even the smallest piece of flotsam—desperately.

¶ 22 Unfortunately, these three words do not impact the analysis. They are a distraction only. The dictionary defines “applicable” to mean “capable of being applied: having relevance” and “fit, suitable, or right to be applied: appropriate.” Webster’s Third New International Dictionary 105 (2002). It is synonymous with “relevant.” *Id.*

¶ 23 Accordingly the phrase “insofar as applicable” means the use statute has “full force and effect” if the “words and phrases” are “relevant” to the subject matter. Former RCW 82.14.020(7). Former RCW 82.12.010(2) is squarely relevant here. It is undisputed that Gypsum’s first act of dominion or control over the natural gas within Washington occurs near Sumner or Sumas. By the plain meaning of the statute, then, Gypsum’s first act of using natural gas within the state occurs outside Tacoma’s boundaries.

¶ 24 The plain language of the statute leaves no wiggle room. It certainly does not permit the gaping breach created by the majority today. The majority rewrites the statutes to meet its interpretation of legislative intent but, in doing so, alters the statutes so drastically that they no longer achieve what they say. In fact, if followed to its logical end, the majority’s contortion of these three words swallows the statute entirely. While on these facts Gypsum does not take control in a city, it is eminently conceivable that consumers could take delivery of natural gas in one city and consume it in another. The majority’s interpretation of “use” sets cities on a collision course. Let us assume Gypsum took delivery in another city. What if the city where the gas was delivered imposed a use tax as well? Would Tacoma’s tax trump the others? Would both taxes prevail? If so Gypsum would be double-taxed for its “consumption” in Tacoma and its “dominion or control” at the point of delivery—both “uses.” See RCW 82.14.230(1); former RCW 82.12.010(2). The majority’s approach is unsustainable because it

dismantles the notion of first use, which is the crux here.

*317 ¶ 25 This case is much simpler than the majority makes it. Gypsum’s use of natural gas, i.e., its “first act within this state by which the taxpayer takes or assumes dominion or control,” occurs outside Sumner or Sumas. The majority goes out of its way to protect Tacoma’s tax-revenue stream when the statutes favor points of first use. In most cases, points of first use will occur where the natural gas is consumed.^{FN1} But in cases like Gypsum’s, where the corporation assumes dominion or control outside Tacoma, another city could reap the use tax revenue. On these facts Gypsum’s first use occurs **263 outside Tacoma. The city’s collection of use taxes, accordingly, cannot stand.

FN1. The majority’s public policy argument on this point is misguided. It asserts: “If we were to apply the disputed portion of the definitional statute to Gypsum’s activities, then every purchaser of natural gas could simply avoid a local tax by purchasing gas [outside Tacoma].” Majority at 261 (emphasis added). Typical purchasers, however, have neither the means nor the incentive to “avoid” the local tax. As Gypsum correctly notes, “it is easier for most taxpayers to take delivery where the gas is actually burned. Gypsum expends significant effort and incurs substantial risks to take delivery outside Tacoma.” Answer at 2 (citation omitted). I note, as well, that the record suggests Gypsum did not take delivery outside Tacoma to “avoid” the city’s use tax; it did so for supply reasons. *Id.* (citing Verbatim Report of Proceedings (Oct. 16, 2006) at 20–23).

¶ 26 The plain language of the statutes is subject to only one interpretation. The statutes are unambiguous. “Use” is plainly defined, and the statute incorporating that definition is relevant to our analysis. Because the plain language is subject to only one interpretation, our inquiry is at an end. *Ar-*

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mandariz, 160 Wash.2d at 110, 156 P.3d 201. The majority's in-depth analysis of legislative history is erroneous and unnecessary.

¶ 27 I would affirm the Court of Appeals and remand for the entry of a judgment refunding the \$853,722.55 that Tacoma collected from Gypsum.

¶ 28 I dissent.

WE CONCUR: CHARLES W. JOHNSON,
GERRY L. ALEXANDER, and JAMES M. JOHN-
SON, Justices.

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▷

Supreme Court of the United States.
 HELSON et al.
 v.
 COMMONWEALTH of KENTUCKY, by
 BOARD, Revenue Agent.

No. 296.
 Argued Feb. 27 and 28, 1929.
 Decided April 8, 1929.

Mr. Justice McReynolds dissenting.

In Error to the Court of Appeals of the State of
 Kentucky:

Action by the Commonwealth of Kentucky, by
 Milton Board, Revenue Agent for the State at
 Large, against James R. Helson and Clyde Ran-
 dolph, doing business as partners under the name of
 the Metropolis Ferry Company. Judgment for the
 Commonwealth was affirmed by the Court of Ap-
 peals of Kentucky (225 Ky. 45, 7 S.W.(2d) 506),
 and defendants bring error. Reversed.

West Headnotes

[2] Commerce 83 ↪ 82.35

83 Commerce

83II Application to Particular Subjects and
 Methods of Regulation

83II(K) Miscellaneous Subjects and Regula-
 tions

83k82.35 k. Public Highways, Navigable
 Waters, and State Lands, Most Cited Cases

(Formerly 83k25)

Transportation by ferry from one state to an-
 other is "interstate commerce," and immune from
 interference by state legislation.

Commerce 83 ↪ 15

83 Commerce

83II Application to Particular Subjects and
 Methods of Regulation

83II(A) In General

83k14.5 Subjects of Commerce in General

83k15 k. Property Subject of Com-
 merce. Most Cited Cases

Regulatory power of Congress over interstate
 commerce embraces all instrumentalities thereof.

Commerce 83 ↪ 62.71

83 Commerce

83II Application to Particular Subjects and
 Methods of Regulation

83II(E) Licenses and Taxes

83k62.70 Taxation in General

83k62.71 k. In General, Most Cited
 Cases

(Formerly 83k62.70, 83k48)

State law which directly burdens interstate or
 foreign commerce by taxation or otherwise is un-
 constitutional.

Commerce 83 ↪ 63.5

83 Commerce

83II Application to Particular Subjects and
 Methods of Regulation

83II(E) Licenses and Taxes

83k63 Licenses and Privilege Taxes

83k63.5 k. In General, Most Cited
 (Formerly 83k63)

State cannot impose tax which is in effect tax
 on privilege of transacting interstate commerce, ir-
 respective of form of tax.

Commerce 83 ↪ 74.5(1)

83 Commerce

83II Application to Particular Subjects and
 Methods of Regulation

83II(E) Licenses and Taxes

83k74.5 Sales and Use Taxes

83k74.5(1) k. In General, Most Cited

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Cases

(Formerly 83k63)

Interstate commerce is directly burdened by tax which falls directly on use of its instrumentalities.

Commerce 83 74.5(2)

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k74.5 Sales and Use Taxes

83k74.5(2) k. Particular Subjects and Transactions. Most Cited Cases

(Formerly 83k64)

Tax on sale of gasoline for use within state held void, as applied to sale of gasoline used for motive power of ferryboat doing exclusive interstate business. Acts Ky.1924, c. 120, § 1, repealed and re-enacted by Acts 1926, c. 169, § 1.

****279 *246** Mr. James G. Wheeler, of Paducah, Ky., for plaintiffs in error.

Mr. James M. Gilbert, of Frankfort, Ky., for defendant in error.

***247** Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is an action brought by the Commonwealth of Kentucky against plaintiffs in error to recover an amount levied under s 1, c. 120, Acts 1924,^{FN1} which imposes a tax of three cents per gallon on all gasoline sold within the commonwealth at wholesale. The words 'sold 'at wholesale,' as used in the act, are defined to include 'any and all sales made for the purpose of resale or distribution or for use,' and also to include any person who ***248** shall purchase such gasoline without the state 'and sell or distribute or use the same within the state.' The tax was increased from three cents to five cents a gallon by section 1, c. 169, Acts 1926, and part of the amount sued for was computed at the latter rate.

^{FN1} * * * A state tax of three (3¢) cents

per gallon is hereby imposed on all gasoline, as defined herein, sold in this commonwealth at Wholesale, as the words 'at wholesale' are hereinafter defined. * * * The words 'at wholesale,' as used in this act, shall be held and construed to mean and include any and all sales made for the purpose of resale or distribution or for use, and, as well, the gasoline furnished or supplied for distribution within this state, whether the distributor be the same person who so furnished the same, his agent or employer or another person, and also to mean and include any person who shall purchase or obtain such gasoline' without the state and sell or distribute or use the same within the state. * * *

****280** Plaintiffs in error are engaged in operating a ferryboat on the Ohio river between Kentucky and Illinois. They do an exclusively interstate business. They are citizens and residents of Illinois. Their office and place of business and the situs of all their personal property is in that state. The motive power of the boat is created by the use of gasoline, all of which is purchased and delivered to plaintiffs in error in Illinois. It is stipulated that 75 per cent. of this gasoline was actually consumed within the limits of Kentucky, but all of it in the making of interstate journeys. The tax in question was computed and imposed upon the use of the gasoline thus consumed.

The trial court rendered judgment for the commonwealth, which was affirmed by the state court of appeals. *Metropolis Ferry Co. v. Commonwealth*, 225 Ky. 45, 7 S.W.(2d) 506. The validity of the statute as applied by the state courts was assailed upon the grounds: (1) That it violated the provisions of the state Constitution requiring that taxes should be uniform upon all property of the same class; and (2) that it was in contravention of the commerce clause and other provisions of the federal Constitution. The state court of appeals held that the tax was not a property tax, but an excise,

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and, therefore, the uniformity clause of the state Constitution was not involved. The claim under the commerce clause of the federal Constitution was denied on the ground that the tax was confined to gasoline used within the limits of the state and the commerce clause was not affected. It is with the latter question only that we are here concerned.

[2] Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this *249 court, unnecessary to be cited that a state law which directly burdens such commerce by taxation or otherwise constitutes a regulation beyond the power of the state under the Constitution. It is likewise settled that transportation by ferry from one state to another is interstate commerce and immune from the interference of such state legislation. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 217, 5 S. Ct. 826, 29 L. Ed. 158; *Mayor of Vidalia v. McNeely*, 274 U. S. 676, 680, 47 S. Ct. 758, 71 L. Ed. 1292. The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on. *Gloucester Ferry Co. v. Pennsylvania*, supra, 114 U. S. page 204, 5 S. Ct. 826, 29 L. Ed. 158. A state cannot 'lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.' *Leloup v. Port of Mobile*, 127 U. S. 640, 648, 8 S. Ct. 1380, 1384 (32 L. Ed. 311); *Lyng v. Michigan*, 135 U. S. 161, 166, 10 S. Ct. 725, 34 L. Ed. 150; *Ozark Pipe Line v. Monier*, 266 U. S. 555, 562, 45 S. Ct. 184, 69 L. Ed. 439. While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce. *Adams Express Company v. Ohio*, 166 U. S. 185, 218, 17 S. Ct. 604, 41 L. Ed. 965.

The following are a few of the cases illustrating the many applications of these principles.

A state statute imposing a tax upon freight, taken up within the state and carried out of it, or taken up without the state and brought within it, was held, in the case of the *State Freight Tax*, 15 Wall. 232, 21 L. Ed. 146, to constitute a regulation of interstate commerce in conflict with the Constitution. The court said (15 Wall. 275, 276):

'Then, why is not a tax upon freight transported from state to state a regulation of interstate transportation, and, therefore, a regulation of commerce among the *250 states? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the state, and in taking them out? The present case is the best possible illustration. The Legislature of Pennsylvania has in effect declared that every ton of freight taken up within the state and carried out, or taken up in other states and brought within her limits, shall pay a specified tax. The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state may impose one of five dollars. Such an imposition, whether large or small, is in restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines.'

A state or state municipality is without power to impose a tax upon persons for selling or seeking to sell the goods of a nonresident within the state prior to their introduction therein, *Stockard v. Morgan*, 185 U. S. 27, 22 S. Ct. 576, 46 L. Ed. 785; or for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce, *McCall v. California*, 136 U. S. 104, 10

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S. Ct. 881, 34 L. Ed. 392; *Texas Transp. Co. v. New Orleans*, 264 U. S. 150, 44 S. Ct. 242, 68 L. Ed. 611, 34 A. L. R. 907. **281 Nor can a state impose a tax on alien passengers coming by vessels from foreign countries. *New York v. Compagnie Gen. Transatlantique*, 107 U. S. 59, 2 S. Ct. 87, 27 L. Ed. 383. And see *Passenger Cases*, 7 How. 283, 12 L. Ed. 702. In *Minot v. Philadelphia, W. & B. R. Co.*, 2 Abb. U. S. 323, 343, 17 Fed. Cas. 458, 464, No. 9,645, it was held that a state law imposing a tax for the use within the state of locomotives, passenger and freight cars, and for the use of rolling stock generally, was a license fee exacted for the privilege of such *251 use. It appearing that larger portion of the locomotives, etc., was used for the interstate transportation of persons and property, the court held that the statute constituted a regulation of such commerce. In the course of the opinion, by Mr. Justice Strong, it is said:

'It is of national importance that in regard to such subjects there should be but one regulating power, for if one state can directly tax persons and property passing through it, or indirectly, by taxing the use of means of transportation, every other may; thus commercial intercourse between states remote from each other may be destroyed.'

To the same effect is a decision by Mr. Justice Matthews, in respect of a similar state statute imposing a tax for the running or using of sleeping cars within the state in the transportation of interstate passengers. *Pullman Southern Car Co. v. Nolan* (C. C.) 22 F. 276, 280, 281. On error to this court, the decision was affirmed and the tax condemned as one laid on the right of transit between states. Sub nom. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 46, 6 S. Ct. 635, 29 L. Ed. 785. To impose a tax upon the transit of passengers from foreign countries or between states is to regulate commerce and is beyond state power. The doctrine of *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745, so far as it is to the contrary, has not been followed. *Head Money Cases*, 112 U. S. 580, 591-594, 5 S. Ct. 247, 28 L. Ed. 798; *Henderson v.*

New York, 92 U. S. 259, 270, 23 L. Ed. 543; *Pickard v. Pullman Southern Car Co.*, supra, 117 U. S. 48 (6 S. Ct. 635). The stamp tax on bills of lading for the transportation of gold and silver from within the state to points outside, which was held invalid (inadvertently on the ground that it was a tax on exports) in *Almy v. California*, 24 How. 169, 16 L. Ed. 644, was characterized in *Woodruff v. Parham*, 8 Wall. 123, 138, 19 L. Ed. 382, as 'a regulation of commerce, a tax imposed upon the transportation of goods from one state to another, over the high seas, in conflict with that freedom of transit of goods and persons between one state *252 and another, which is within the rule laid down in *Crandall v. Nevada*, and with the authority of Congress to regulate commerce among the states.'

The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferryboat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form to taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.' *Gloucester Ferry Co. v. Pennsylvania*, supra, 114 U. S. 214 (5 S. Ct. 833).

Judgment reversed.

Mr. Justice McREYNOLDS is of opinion that the

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judgment below should be affirmed.

Concurring opinion of Mr. Justice STONE.

In view of earlier decisions of the court, I acquiesce in the result. But I cannot yield assent to the reasoning by which the present forbidden tax on the use of property in interstate commerce is distinguished from a permissible *253 tax on property, measured by its use or use value in interstate commerce. *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 456, 38 S. Ct. 373, 62 L. Ed. 827; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 154 U. S. 439, 445, 14 S. Ct. 1122, 38 L. Ed. 1041; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 220, 17 S. Ct. 305, 41 L. Ed. 683; *Western Union Tel. Co. v. Missouri*, 190 U. S. 412, 422, 23 S. Ct. 730, 47 L. Ed. 1116; cf. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; 11 S. Ct. 876, 35 L. Ed. 613. Nor can I find any practical justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce. It 'affects commerce among the states and impedes the transit of persons and property from one state to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the **282 thing taxed.' *Delaware Railroad Tax*, 18 Wall. 206, 232 (21 L. Ed. 888).

Mr. Justice HOLMES and Mr. Justice BRANDEIS concur in this opinion.

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(Cite as: 435 U.S. 734, 98 S.Ct. 1388)

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▷ Supreme Court of the United States
DEPARTMENT OF REVENUE OF THE STATE OF
WASHINGTON, Petitioner,
v.
ASSOCIATION OF WASHINGTON STEVE-
DORING COMPANIES et al.

No. 76-1706.

Argued Jan. 16, 17, 1978.

Decided April 26, 1978.

Association of private stevedoring companies and nonprofit corporation consisting of port authorities that engaged in stevedoring activities sought a declaratory judgment that the State of Washington's application of its business and occupation tax to stevedoring violated both the commerce clause and the import-export clause. The Superior Court, Thurston County, declared the tax invalid to the extent that it related to stevedoring in interstate or foreign commerce. The Department of Revenue of the State of Washington appealed to the Washington Court of Appeals and that court certified the case for direct appeal to the State Supreme Court. After accepting certification, the Supreme Court of Washington, 88 Wash.2d 315, 559 P.2d 997, affirmed the Superior Court's judgment holding the tax invalid. Certiorari was granted upon the petition of the Department of Revenue, and the Supreme Court, Mr. Justice Blackmun, held that: (1) the application by State of Washington of its business and occupation tax to the activity of stevedoring did not violate the commerce clause by taxing interstate commerce where the operations taxed were conducted entirely within the State, the tax was levied solely on the value of loading and unloading occurring in the State, the tax rate was applied to stevedoring as well as generally to businesses rendering services and the tax was fairly related to services and protection provided by the State; (2) the application of the business and occupation tax to stevedoring was not prohibited by the import-export clause, and (3)

the tax was not invalid under the import-export clause as constituting the imposition of a transit fee on inland consumers.

Reversed and remanded.

Mr. Justice Powell, J., filed an opinion concurring in part and concurring in the result.

West Headnotes

[1] Commerce 83 ⇨ 63.10

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k63 Licenses and Privilege Taxes

83k63.10 k. Particular Subjects and Taxes. Most Cited Cases

When a general business tax levies only on the value of services performed within the state, the tax is properly apportioned and multiple tax burdens on interstate commerce cannot occur. U.S.C.A.Const. art. 1, § 8, cl. 3.

[2] Commerce 83 ⇨ 62.71

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k62.70 Taxation in General

83k62.71 k. In General. Most Cited Cases

(Formerly 83k62.70)

A state has a significant interest in exacting from interstate commerce its fair share of the cost of state government. U.S.C.A.Const. art. 1, § 8, cl. 3.

[3] Commerce 83 ⇨ 62.71

83 Commerce

83II Application to Particular Subjects and

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Methods of Regulation

83II(E) Licenses and Taxes

83k62.70 Taxation in General

83k62.71 k. In General. Most Cited

Cases

(Formerly 83k62.70)

Not all tax burdens impermissibly impede interstate commerce; the commerce clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity. U.S.C.A.Const. art. 1, § 8, cl. 3.

[4] Commerce 83 ↪12

83 Commerce

83I Power to Regulate in General

83k11 Powers Remaining in States, and Limitations Thereon

83k12 k. In General. Most Cited Cases

The commerce clause does not state a prohibition but merely grants specific power to Congress; the prohibited effect of the clause on state legislation results from the supremacy clause and from decisions of the United States Supreme Court. U.S.C.A. Const. Art. 1, § 8, cl. 3; U.S.C.A. Const. Art. 6, cl. 2.

[5] Commerce 83 ↪63.10

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k63 Licenses and Privilege Taxes

83k63.10 k. Particular Subjects and Taxes. Most Cited Cases

Application by the State of Washington of its business and occupation tax to the activity of stevedoring did not violate the commerce clause by taxing interstate commerce where the taxed stevedoring operations were entirely conducted within the State, the tax was levied solely on the value of the loading and unloading occurring in the State, the tax rate was applied to stevedoring as well as generally to businesses rendering services and the

tax was fairly related to services and protection provided by the State; overruling *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68, and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993, to the extent that they stand to the contrary. U.S.C.A.Const. art. 1, § 8, cl. 3; RCWA 82.04.220, 82.04.290.

[6] Commerce 83 ↪62.71

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k62.70 Taxation in General

83k62.71 k. In General. Most Cited

Cases

(Formerly 83k62.70)

Interstate commerce must bear its fair share of the state tax burden. U.S.C.A.Const. art. 1, § 8, cl. 3.

[7] Commerce 83 ↪77.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.5 k. In General. Most Cited

While the commerce clause touches all state taxation and regulation of interstate and foreign commerce, the import-export clause bans only "Imports or Duties on Imports or Exports." U.S.C.A.Const. art. 1, §§ 8, cl. 3, 10, cl. 2.

[8] Commerce 83 ↪77.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.5 k. In General. Most Cited

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The application of the State of Washington's business and occupation tax to stevedoring did not threaten any policy underlying the import-export clause where the tax did not restrain the ability of the federal government to conduct foreign policy and where only business conducted entirely within the State of Washington was assessed and the effect of the tax on federal import revenue was merely to compensate the state for services and protection extended to the stevedoring business. RCWA 82.04.220, 82.04.290; U.S.C.A.Const. art. 1, § 10, cl. 2.

[9] Commerce 83 77.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.5 k. In General. Most Cited

The policy of the import-export clause to prevent interstate rivalry and friction is vindicated if a tax falls on a taxpayer with reasonable nexus to the State and if the tax is properly apportioned, does not discriminate and relates reasonably to services provided by the State. U.S.C.A.Const. art. 1, § 10, cl. 2.

[10] Commerce 83 77.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.5 k. In General. Most Cited

Application of the State of Washington's business and occupation tax to stevedoring violated no import-export clause policy and, therefore, such tax did not qualify as an "Impost or Duty" subject to the absolute ban of the import-export clause. U.S.C.A.Const. art. 1, § 10, cl. 2.

[11] Commerce 83 77.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.5 k. In General. Most Cited

Despite fact that the activity taxed by the State of Washington occurred while imports and exports were in transit, where the State's business and occupation tax did not fall on the goods themselves but reached only the business of loading and unloading ships, that is, the business of transporting cargo within the State of Washington, the State's business and occupation tax was not a prohibited "Impost or Duty" when it violated none of the policies underlying the import-export clause. U.S.C.A.Const. art. 1, § 10, cl. 2.

[12] Commerce 83 77.10(1)

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.10 Imports

83k77.10(1) k. In General. Most

Cited Cases

Commerce 83 77.15(1)

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.15 Exports

83k77.15(1) k. In General. Most

Cited Cases

The approach of analyzing the nature of a tax to determine whether it is a prohibited "Impost or Duty" should apply to taxation involving exports as well as to taxation involving imports.

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U.S.C.A.Const. art. 1, § 10, cl. 2.

[13] Commerce 83  77.15(1)

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.15 Exports

83k77.15(1) k. In General. Most

Cited Cases

If constitutional interests in precluding state disruption of United States foreign policy and avoiding friction and trade barriers among the states are not disturbed by a tax relating to exports, the tax should no more be considered an "Impost or Duty" for purposes of the import-export clause than should a tax related to imports. U.S.C.A.Const. art. 1, § 10, cl. 2.

[14] Commerce 83  77.15(1)

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.15 Exports

83k77.15(1) k. In General. Most

Cited Cases

Stevedoring companies' gross receipts from loading exports were as subject to the State of Washington's business and occupation tax as were receipts from unloading imports. U.S.C.A.Const. art. 1, §§ 8, cl. 3, 10, cl. 2; RCWA 82.04.220, 82.04.290.

[15] Commerce 83  77.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.5 k. In General. Most Cited

Cases

Application of the State of Washington's business and occupation tax to the activity of stevedoring was not invalid under the import-export clause as constituting the imposition of a transit fee on inland consumers. U.S.C.A.Const. art. 1, § 10, cl. 2.

[16] Commerce 83  77.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(H) Imports and Exports

83k77 State Revenue Measures

83k77.5 k. In General. Most Cited

To the extent that the import-export clause was intended to preserve interstate harmony, the policy will be vindicated by the prohibition of discrimination and the requirements of apportionment, nexus and reasonable relationship between tax and benefits. U.S.C.A.Const. art. 1, § 10, cl. 2.

****1390 Syllabus^{FN*}**

FN* Note: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*734 1. The State of Washington's business and occupation tax does not violate the Commerce Clause by taxing the interstate commerce activity of stevedoring within the State. ****1391** *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, followed; *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68, and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 67 S.Ct.

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815, 91 L.Ed. 993, overruled. Pp. 1395-1400.

(a) A State under appropriate conditions may tax directly the privilege of conducting interstate business. *Complete Auto Transit, Inc. v. Brady*, *supra*. Pp. 1396-1397.

(b) When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens on interstate commerce cannot occur. Pp. 1397-1398.

(c) All state tax burdens do not impermissibly impede interstate commerce, and the Commerce Clause balance tips against the state tax only when it unfairly burdens commerce by exacting from the interstate activity more than its just share of the cost of state government. P. 1398.

(d) State taxes are valid under the Commerce Clause, where they are applied to activity having a substantial nexus with the State, are fairly apportioned, do not discriminate against interstate commerce, and are fairly related to the services provided by the State; and here the Washington tax in question meets this standard, since the stevedoring operations are entirely conducted within the State, the tax is levied solely on the value of the loading and unloading occurring in the State, the tax rate is applied to stevedoring as well as generally to businesses rendering services, and there is nothing in the record to show that the tax is not fairly related to services and protection provided by the State. Pp. 1399-1400.

2. Nor is the Washington business and occupation tax, as applied to stevedoring so as to reach services provided wholly within the State to imports, exports, and other goods, among the "Imposts or Duties" *735 prohibited by the Import-Export Clause. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495. Pp. 1400-1405.

(a) The application of the tax to stevedoring

threatens none of the Import-Export Clause's policies of precluding state disruption of United States foreign policy, protecting federal revenues, and avoiding friction and trade barriers among the States. The tax as so applied does not restrain the Federal Government's ability to conduct foreign policy. Its effect on federal import revenue is merely to compensate the State for services and protection extended to the stevedoring business. The policy against interstate friction and rivalry is vindicated, as is the Commerce Clause's similar policy, if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State. Pp. 1400-1402.

(b) While, as distinguished from *Michelin Tire Corp. v. Wages*, *supra*, where the goods taxed were no longer in transit, the activity taxed here occurs while imports and exports are in transit, nevertheless the tax does not fall on the goods themselves but reaches only the business of loading and unloading ships, *i. e.*, the business of transporting cargo, within the State, and hence the tax is not a prohibited "Impost or Duty" when it violates none of the policies of the Import-Export Clause. Pp. 1402-1403.

(c) While here the stevedores load and unload imports and exports, whereas in *Michelin Tire Corp. v. Wages*, *supra*, the state tax in question touched only imports, nevertheless the *Michelin* approach of analyzing the nature of the tax to determine whether it is a prohibited "Impost or Duty" should apply to taxation involving exports as well as imports. Any tax relating to exports can be tested for its conformity to the Import-Export Clause's policies of precluding state disruption of United States foreign policy and avoiding friction and trade barriers among the States, although the tax does not serve the Clause's policy of protecting federal revenues in view of the fact that the Constitution forbids federal taxation of exports. Pp. 1403-1404.

**1392 (d) The Import-Export Clause does not

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effect an absolute ban on all state taxation of imports and exports, but only on "Imposts or Duties." P. 1404.

(e) To say that the Washington tax violates the Import-Export Clause because it taxes the imports themselves while they remain a part of commerce, would be to resurrect the now rejected "original package" analysis whereby goods enjoyed immunity from state taxation as long as they retained their status as imports by remaining in their import packages. Pp. 1404-1405.

*736 (f) The Washington tax is not invalid under the Import-Export Clause as constituting the imposition of a transit fee upon inland customers, since, as is the case in Commerce Clause jurisprudence, interstate friction will not chafe when commerce pays for the state services it enjoys. Fair taxation will be assured by the prohibition on discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits. Pp. 1404-1405.

88 Wash.2d 315, 559 P.2d 997, reversed and remanded.
 Slade Gorton, Atty. Gen., Olympia, Wash., for petitioner.

Mr. Justice BLACKMUN delivered the opinion of the Court.

For the second time in this century, the State of Washington would apply its business and occupation tax to stevedoring. The State's first application of the tax to stevedoring was unsuccessful, for it was held to be unconstitutional as violative of the Commerce Clause^{FN1} of the United States Constitution. *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 (1937). The Court now faces the question whether Washington's second attempt violates either the Commerce Clause or the Import-Export Clause.^{FN2}

FN1. "The Congress shall have Power . . .

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S.Const., Art. I, § 8, cl. 3.

FN2. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress." U.S.Const., Art. I, § 10, cl. 2.

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Stevedoring is the business of loading and unloading cargo from ships.^{FN3} Private stevedoring companies constitute respondent Association of Washington Stevedoring Companies; respondent Washington Public Ports Association is a nonprofit corporation consisting of port authorities that engage in stevedoring activities. App. 3. In 1974 petitioner Department of Revenue of the **1393 State of Washington adopted Revised Rule 193, pt. D, Wash.Admin.Code 458-20-193-D, to implement the State's 1% business and occupation tax on *738 services, set forth in Wash.Rev.Code §§ 82.04.220 and 82.04.290 (1976).^{FN4} The Rule applies the tax to stevedoring and reads in pertinent part as set forth in the margin.^{FN5}

FN3. The record does not contain a precise definition or description of the business of stevedoring or of the activities of respondents and their respective members. By admitting the factual allegations in the respondents' Petition for Declaratory Judgment on Validity of Rule, App. 3-7, petitioner Department of Revenue accepted paragraph VI of that petition. That paragraph alleged that the private companies that constitute respondent Association of

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Washington Stevedoring Companies "are engaged in the same stevedoring activities that were held not taxable in *Puget Sound Stevedoring Co.*" This Court explained the activities of the appellant stevedoring company in *Puget Sound* as follows:

"What was done by this appellant in the business of loading and unloading was not prolonged beyond the stage of transportation and its reasonable incidents. . . . True, the service did not begin or end at the ship's side, where the cargo is placed upon a sling attached to the ship's tackle. It took in the work of carriage to and from the 'first place of rest,' which means that it covered the space between the hold of the vessel and a convenient point of discharge upon the dock. . . . The fact is stipulated, however, that no matter by whom the work is done or paid for, 'stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the "first place of rest," and vice versa.'" 302 U.S., at 93, 58 S.Ct., at 73.

FN4. Section 82.04.220 reads:

"There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales or gross income of the business, as the case may be."

Section 82.04.290 reads in pertinent part:

"Upon every person engaging within this state in any business activity other than or in addition to those enumerated in . . . ; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one percent. This section includes, among others, and without limiting

the scope hereof . . . , persons engaged in the business of rendering any type of service which does not constitute a 'sale at retail' or a 'sale at wholesale.'"

We note, also, that § 82.04.460 reads in part:

"Any person rendering services taxable under RCW 82.04.290 and maintaining places of business both within and without this state which contribute to the rendition of such services shall, for the purpose of computing tax liability under RCW 82.04.290, apportion to this state that portion of his gross income which is derived from services rendered within this state."

A temporary additional tax of 6% of the base tax is now imposed for the period from June 1, 1976, through June 30, 1979. 1977 Wash.Laws, 1st Ex.Sess., ch. 324, § 1, and 1975-1976 Wash.Laws, 2d Ex.Sess., ch. 130, § 3, codified as Wash.Rev.Code § 82.04.2901 (Supp.1977).

FN5. "In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accommodations, providing funds and the like, by which they engage in such com-

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merce is taxable.

“EXAMPLES OF EXEMPT INCOME:

“1. Income from those activities which consist of the actual transportation of persons or property across the state's boundaries is exempt.

“EXAMPLES OF TAXABLE INCOME:

“3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable.”

Revised Rule 193D restores the original scope of the Washington business and occupation tax. After initial imposition *739 of the tax in 1935,^{FN6} the then State Tax Commission ^{FN7} adopted Rule 198 of the Rules and Regulations Relating to the Revenue Act of 1935.^{FN8} That Rule permitted taxpayers to deduct certain income received from interstate and foreign commerce. Income from stevedoring, however, was not described as deductible. When, in 1937, this Court in *Puget Sound* invalidated the application of the tax to stevedoring, the Commission complied by adding stevedoring income to **1394 the list of *740 deductions.^{FN9} The deduction for stevedoring remained in effect until the revision of Rule 193 in 1974.^{FN10}

FN6. 1935 Wash.Laws, ch. 180.

FN7. The Tax Commission was abolished in 1967, and, with specified exceptions, its powers, duties, and functions were transferred to the Director of the Department of Revenue. 1967 Wash.Laws, Ex.Sess., ch. 26, § 7.

FN8. Rule 198, as it was in effect in 1936 and 1937, that is, prior to the decision in *Puget Sound*, read in part:

“In computing the tax under the classifica-

tion of ‘Service and Other Business Activities’ there may be deducted from gross income of the business the amount thereof derived as compensation for the performance of services which in themselves constitute foreign or interstate commerce to an extent that a tax measured by the compensation received therefrom constitutes a direct burden upon such commerce. Included in the above are those activities which involve the actual transportation of goods or commodities in foreign commerce or commerce between the states; the transmission of communications from a point within the state to a point outside the state and vice versa; the solicitation of freight for foreign or interstate shipment; and the selling of tickets for foreign and interstate passage accommodations.” Rules and Regulations Relating to the Revenue Act of 1935, Rule 198, p. 122 (1936); *id.*, at 133 (1937).

FN9. Effective May 1, 1939, Rule 198 read in part:

“In computing the tax under the classification of ‘Service and Other Business Activities’ there may be deducted from gross income of the business the amount thereof derived as compensation for the performance of services which in themselves constitute foreign or interstate commerce to an extent that a tax measured by the compensation received therefrom constitutes a direct burden upon such commerce. Included in the above [is] . . . the compensation received by a contracting stevedoring company for loading and unloading cargo from vessels where such cargo is moving in interstate or foreign commerce and where the work is actually directed and controlled by the stevedoring company” *Id.*, at 137 (1939).

FN10. Rules and Regulations Relating to the Revenue Act of 1935, Rule 193, p. 94

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(1943), and *id.*, Rule 193, p. 123 (1970).

Seeking to retain their theretofore-enjoyed exemption from the tax, respondents in January 1975 sought from the Superior Court of Thurston County, Wash., a declaratory judgment to the effect that Revised Rule 193D violated both the Commerce Clause and the Import-Export Clause. They urged that the case was controlled by *Puget Sound*, which this Court had reaffirmed in *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 433, 67 S.Ct. 815, 821, 91 L.Ed. 993 (1947) (together, the *Stevedoring Cases*). Absent a clear invitation from this Court, respondents submitted that the Superior Court could not avoid the force of the *Stevedoring Cases*, which had never been overruled. Record 9.

^{FN11} Petitioner replied that this Court had invited rejection *741 of those cases by casting doubt on the Commerce Clause analysis that distinguished between direct and indirect taxation of interstate commerce. *Id.*, at 25-37, citing, e. g., *Interstate Pipe Line Co. v. Stone*, 337 U.S. 662, 69 S.Ct. 1264, 93 L.Ed. 1613 (1949); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938). Petitioner also argued that the Rule did not violate the Commerce Clause because it taxed only intrastate activity, namely, the loading and unloading of ships, Record 17-20, and because it levied only a nondiscriminatory tax apportioned to the activity within the State. *Id.*, at 20-22. The Rule did not impose any "Imposts or Duties on Imports or Exports" because it taxed merely the stevedoring services and not the goods themselves, *id.*, at 22-25, citing *Canton R. Co. v. Rogan*, 340 U.S. 511, 71 S.Ct. 447, 95 L.Ed. 488 (1951). The Superior Court, however, not surprisingly, considered itself bound by the *Stevedoring Cases*. It therefore issued a declaratory judgment that Rule 193D was invalid to the extent it related to stevedoring in interstate or foreign commerce. App. 17-18.^{FN12}

^{FN11} In a reply brief, respondents supported the continuing validity of the *Stevedoring Cases*. In particular, they argued:

"Final, and we think conclusive, proof of

the continued vitality of the stevedoring cases lies in the language of *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 [71 S.Ct. 508, 95 L.Ed. 573] . . . (1951), decided *after* all four of the 'major' cases relied on by the State. We have previously noted that *Spector* struck down a tax on the activity of moving goods in interstate commerce." Record 69 (emphasis in original).

Spector was overruled last Term in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288-289, 97 S.Ct. 1076, 1083-1084, 51 L.Ed.2d 326 (1977), decided after respondents advanced the above argument.

^{FN12} In its oral decision the Superior Court noted its doubt about the continued validity of the *Stevedoring Cases* :

"It would seem to the Court . . . that there certainly is a swing away from the *Puget Sound* and *Carter* and *Weekes* cases . . ." App. 8. "It sticks in this Court's mind, however, that there has to be a reason, of which is beyond the ability of this Court to comprehend, that everyone has shied from the stevedoring cases, and many minds obviously more brilliant than mine have not been able to overturn those cases directly in thirty-eight years . . ." *Id.*, at 11. "Under those circumstances the Court does hold that the *Puget Sound* and *Carter* and *Weekes* cases are the law of the land, as exemplified by those decisions; that they have not been reversed by implication, nor has there been an invitation to anyone to reverse those cases." *Id.*, at 8, 11, 13-14.

Petitioner appealed to the Washington Court of Appeals. Record 77. That court certified the case for direct appeal to the **1395 State's Supreme Court, citing Wash.Rev.Code § 2.06.030(c) (1976), and Wash. Supreme Court Rule on Appeal I-14(1)(c) (now Rule 4.2(a)(2), Wash. Rules of Court (1977)). *742 After accepting certification, the Su-

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preme Court, with two justices dissenting, affirmed the judgment of the Superior Court. 88 Wash.2d 315, 559 P.2d 997 (1977). The majority considered petitioner's argument that recent cases ^{FN13} had eroded the holdings in the *Stevedoring Cases*. It concluded, nonetheless:

FN13. The court stated, 88 Wash.2d, at 318, 559 P.2d, at 998, that petitioner had cited *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976); *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 95 S.Ct. 1538, 44 L.Ed.2d 1 (1975); *Canton R. Co. v. Rogan*, 340 U.S. 511, 71 S.Ct. 447, 95 L.Ed. 488 (1951); *Interstate Pipe Line Co. v. Stone*, 337 U.S. 662, 69 S.Ct. 1264, 93 L.Ed. 1613 (1949); and *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633 (1948).

"[W]e must hold the tax invalid; we do so in recognition of our duty to abide by controlling United States Supreme Court decisions construing the federal constitution. Hence, we find it unnecessary to discuss the aforementioned cases beyond the fact that nowhere in them do we find language criticizing, expressly contradicting, or overruling (even impliedly) the stevedoring cases.

"Fully mindful of our prior criticism of the principles and reasoning of the stevedore cases (*See Washington-Oregon Shippers Cooperative Ass'n v. Schumacher*, 59 Wash.2d 159, 167, 367 P.2d 112, 115-116 (1961)), we must nevertheless hold the instant tax on stevedoring invalid." 88 Wash.2d, at 318-320, 559 P.2d, at 998-999.

The two dissenting justices would have upheld the tax against the Commerce Clause attack on the ground that recent cases had eroded the direct-indirect taxation analysis employed in the *Stevedoring Cases*. They found no violation of the Import-Export Clause because the State had taxed only the activity of stevedoring, not the imports or

exports themselves. Even if stevedoring were considered part of interstate or foreign commerce, the Washington tax was valid because it did not discriminate against importing or exporting, did not impair transportation, did not impose multiple burdens, and did not *743 regulate commerce. 88 Wash.2d, at 320-322, 559 P.2d, at 999-1000.

Because of the possible impact on the issues made by our intervening decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), filed after the Washington Supreme Court's ruling, we granted certiorari. 434 U.S. 815, 98 S.Ct. 51, 54 L.Ed.2d 70 (1977).

II The Commerce Clause

A

In *Puget Sound Stevedoring Co. v. State Tax Comm'n*, the Court invalidated the Washington business and occupation tax on stevedoring only because it applied directly to interstate commerce. Stevedoring was interstate commerce, according to the Court, because:

"Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master." 302 U.S., at 92, 58 S.Ct., at 73.

Without further analysis, the Court concluded:

"The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling." *Id.*, at 94, 58 S.Ct., at 74.

The petitioners (officers of New York City) in *Joseph v. Carter & Weekes Stevedoring Co.*, urged the Court to overrule *Puget Sound*. They argued that intervening**1396 cases ^{FN14} had permitted *744 local taxation of gross proceeds derived from

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interstate commerce. They concluded, therefore, that the Commerce Clause did not preclude the application to stevedoring of the New York City business tax on the gross receipts of a stevedoring corporation. The Court disagreed on the theory that the intervening cases permitted taxation only of local activity separate and distinct from interstate commerce. 330 U.S., at 430-433, 67 S.Ct., at 819-821. This separation theory was necessary, said the Court, because it served to diminish the threat of multiple taxation on commerce; if the tax actually fell on intrastate activity, there was less likelihood that other taxing jurisdictions could duplicate the levy. *Id.*, at 429, 67 S.Ct., at 819. Stevedoring, however, was not separated from interstate commerce because, as previously enunciated in *Puget Sound*, it was interstate commerce:

FN14. They cited, among others, four particular cases. The first was *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62, 61 S.Ct. 885, 85 L.Ed. 1188 (1941). In that case the Court sustained an Indiana tax on the gross receipts of a foreign corporation from purchase and resale of timber in Indiana. The transaction was considered local even though the timber was to be transported, after the resale, to Ohio for creosote treatment by the foreign corporation. The second case was *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565 (1940). There a Pennsylvania corporation sold coal to New York City consumers through a city sales office. Even though the coal was shipped from Pennsylvania, the Court permitted the city to tax the sale because the tax was conditioned on local activity, that is, the delivery of goods within New York upon their purchase in New York for consumption in New York. The third case was *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 (1939). There California was permitted to impose a tax on storage and use with re-

spect to the retention and ownership of goods brought into the State by an interstate railroad for its own use. The fourth was *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938). There the Court upheld a New Mexico privilege tax upon the gross receipts from the sale of advertising. It concluded that the business was local even though a magazine with interstate circulation and advertising was published.

"Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of *Puget Sound Stevedoring Company*. 'What makes the *745 tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.' *Freeman v. Hewit* [329 U.S. 249,] 256, 67 S.Ct. 274, 91 L.Ed. 265. " 330 U.S., at 433, 67 S.Ct., at 821.

Because the tax in the present case is indistinguishable from the taxes at issue in *Puget Sound* and in *Carter & Weekes*, the *Stevedoring Cases* control today's decision on the Commerce Clause issue unless more recent precedent and a new analysis require rejection of their reasoning.

We conclude that *Complete Auto Transit, Inc. v. Brady*, where the Court held that a State under appropriate conditions may tax directly the privilege of conducting interstate business, requires such rejection. In *Complete Auto*, Mississippi levied a gross-receipts tax on the privilege of doing business within the State. It applied the tax to the appellant, a Michigan corporation transporting motor vehicles manufactured outside Mississippi. After the vehicles were shipped into Mississippi by railroad, the appellant moved them by truck to Mississippi dealers. This Court assumed that appellant's activity was in interstate commerce. 430 U.S., at 276 n. 4, 97 S.Ct., at 1077.

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The Mississippi tax survived the Commerce Clause attack. Absolute immunity from state tax did not exist for interstate businesses because it “ ‘was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.’ ” *Id.*, at 288, 97 S.Ct., at 1079, quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S., at 254, 58 S.Ct., at 548, and ****1397***Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108, 95 S.Ct. 1538, 1542, 44 L.Ed.2d 1 (1975). The Court therefore specifically overruled *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951), where a direct gross-receipts tax on the privilege of engaging in interstate commerce had been invalidated. 430 U.S., at 288-289, 97 S.Ct., at 1083-1084.

The principles of *Complete Auto* also lead us now to question the underpinnings of the *Stevedoring Cases*. First, *Puget Sound* invalidated the Washington tax on stevedoring activity only because it burdened the privilege of engaging in interstate ***746** commerce. Because *Complete Auto* permits a State properly to tax the privilege of engaging in interstate commerce, the basis for the holding in *Puget Sound* is removed completely.^{FN15}

FN15. That the holding in *Spector* parallels that in *Puget Sound* is demonstrated by the authorities relied upon or provided by both cases in the past. *Spector* relied on *Carter & Weekes*, which reaffirmed *Puget Sound*, and upon *Freeman v. Hewitt*, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265 (1946). 340 U.S., at 609, 71 S.Ct., at 512. *Freeman*, in turn, relied upon *Puget Sound*, 329 U.S., at 257, 67 S.Ct., at 279, and *Carter & Weekes* relied upon *Freeman*, 330 U.S., at 433, 67 S.Ct., at 821. Both *Freeman* and *Puget Sound* relied upon *Galveston H. & S. A. R. Co. v. Texas*, 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031 (1908). 329 U.S., at 257, 67 S.Ct., at 279; 302 U.S., at 94, 58 S.Ct., at 74.

Respondents, also, have observed the parallel between *Spector* and the *Stevedoring Cases*. In their reply brief to the Superior Court, they argued that *Spector*, which had not then been overruled by *Complete Auto*, was dispositive on the question of the continued vitality of *Puget Sound* and *Carter & Weekes*. See n. 11, *supra*.

Second, *Carter & Weekes* supported its reaffirmance of *Puget Sound* by arguing that a direct privilege tax would threaten multiple burdens on interstate commerce to a greater extent than would taxes on local activity connected to commerce. But *Complete Auto* recognized that errors of apportionment that may lead to multiple burdens may be corrected when they occur. 430 U.S., at 288-289, n. 15, 97 S.Ct., at 1083-1084 ^{FN16}.

FN16. Subsequent to *Carter & Weekes*, the Court explained more precisely its concern about multiple burdens on interstate commerce:

“While the economic wisdom of state net income taxes is one of state policy not for our decision, one of the ‘realities’ raised by the parties is the possibility of a multiple burden resulting from the exactions in question. The answer is that none is shown to exist here. . . . Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. . . . We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do.” *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450, 462-463, 79 S.Ct. 357, 364, 3 L.Ed.2d 421 (1959).

[1] The argument of *Carter & Weekes* was an abstraction. No multiple burdens were demonstrated. When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple bur-

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dens*747 logically cannot occur.^{FN17} The reasoning of *Carter & Weekes*, therefore, no longer supports automatic tax immunity for stevedoring from a levy such as the Washington business and occupation tax.

FN17. *Carter & Weekes* has received criticism from commentators for its reliance on the possibility of the imposition of multiple tax burdens. Professor Hartman argued that the burden on interstate commerce imposed by a privilege tax "is multiple only because the elements of transportation itself are multiple." P. Hartman, *State Taxation of Interstate Commerce* 204 (1953). Because the loading or unloading of a ship is confined to one State, no other State could tax that particular phase of commerce. "Thus, the Court's basis for the unconstitutionality of the *Weekes* tax assumed the existence of a premise which did not exist, except in the mind of a majority of the Justices." *Id.*, at 205. See Hellerstein, *State Taxation Under the Commerce Clause: An Historical Perspective*, 29 *Vand.L.Rev.* 335 (1976).

Third, *Carter & Weekes* reaffirmed *Puget Sound* on a basis rejected by *Complete Auto* and previous cases. *Carter & Weekes* considered any direct tax on interstate commerce to be unconstitutional because it burdened or interfered with commerce. 330 U.S., at 433, 67 S.Ct., at 821. In support of that conclusion, the Court there cited only **1398 *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915 (1945), the case where Arizona's limitations on the length of trains were invalidated. In *Southern Pacific*, however, the Court had not struck down the legislation merely because it burdened interstate commerce. Instead, it weighed the burden against the State's interests in limiting the size of trains:

"The decisive question is whether in the circumstances the total effect of the law as a safety

measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free . . ." *Id.*, at 775-776, 65 S.Ct. at 1523.

Only after concluding that railroad safety was not advanced by the regulations, did the Court invalidate them. They contravened the Commerce Clause because the burden on interstate commerce outweighed the State's interests.

*748 [2][3] Although the balancing of safety interests naturally differs from the balancing of state financial needs, *Complete Auto* recognized that a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government. 430 U.S., at 288, 97 S.Ct., at 1083. Accord, *Colonial Pipeline Co. v. Traigle*, 421 U.S., at 108, 95 S.Ct., at 1542; *Western Live Stock v. Bureau of Revenue*, 303 U.S., at 254, 58 S.Ct., at 548. All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity. Again, then, the analysis of *Carter & Weekes* must be rejected.

B

Respondents' additional arguments do not demonstrate the wisdom of, or need for, preserving the *Stevedoring Cases*. First, respondents attempt to distinguish so-called movement cases, in which tax immunity has been broad, from nonmovement cases, in which the immunity traditionally has been narrower. Brief for Respondents 23-28. Movement cases involve taxation on transport, such as the Texas tax on a natural gas pipeline in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954). Nonmovement cases involve taxation on commerce that does not move goods, such as the New Mexico tax on publishing newspapers and magazines in *Western Live Stock v. Bureau of Revenue*. This distinction, however, disregards *Complete Auto*, a movement case which held that a state privilege tax on the business of moving goods in interstate commerce is

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not *per se* unconstitutional.

Second, respondents would distinguish *Complete Auto* on the ground that it concerned only intrastate commerce, that is, the movement of vehicles from a Mississippi railhead to Mississippi dealers. Brief for Respondents 26-28. This purported distinction ignores two facts. In *Complete Auto*, we expressly assumed that the activity was interstate, a segment of the movement of vehicles from the out-of-state manufacturer*749 to the in-state dealers. 430 U.S., at 276 n. 4, 97 S.Ct., at 1077. Moreover, the stevedoring activity of respondents occurs completely within the State of Washington, even though the activity is a part of interstate or foreign commerce. The situation was the same in *Complete Auto*, and that case, thus, is not distinguishable from the present one.

[4] Third, respondents suggest that what they regard as such an important change in Commerce Clause jurisprudence should come from Congress and not from this Court. To begin with, our rejection of the *Stevedoring Cases* does not effect a significant present change in the law. The primary alteration occurred in *Complete Auto*. Even if this case did effect an important change, it would not offend the separation-of-powers principle because it does not restrict the ability of Congress to regulate commerce. The Commerce Clause does not state a prohibition; it merely grants specific power to Congress. The prohibitive effect of the Clause on state legislation results from the Supremacy **1399 Clause and the decisions of this Court. See, e. g., *Cooley v. Board of Wardens*, 12 How. 299, 13 L.Ed. 996 (1852); *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824). If Congress prefers less disruption of interstate commerce, it will act.^{FN18}

FN18. Respondents seem to be particularly concerned about the continued validity of *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954). There, Texas levied a tax on the production of natural gas measured by the entire volume of gas to be shipped in

interstate commerce. A refinery extracted the gas from crude oil and transported it 300 yards to the pipeline. The State identified, as a local incident, the transfer of gas from the refinery to the pipeline. This Court declared the tax unconstitutional because it amounted to an unapportioned levy on the transportation of the entire volume of gas. The exaction did not relate to the length of the Texas portion of the pipeline or to the percentage of the taxpayer's business taking place in Texas. Today's decision does not question the *Michigan-Wisconsin* judgment, because Washington apportions its business and occupation tax to activity within the State. Taxes that are not so apportioned remain vulnerable to Commerce Clause attack.

[5] Consistent with *Complete Auto*, then, we hold that the Washington business and occupation tax does not violate the *750 Commerce Clause by taxing the interstate commerce activity of stevedoring. To the extent that *Puget Sound Stevedoring Co. v. State Tax Comm'n* and *Joseph v. Carter & Weekes Stevedoring Co.* stand to the contrary, each is overruled.

C

[6] With the distinction between direct and indirect taxation of interstate commerce thus discarded, the constitutionality under the Commerce Clause of the application of the Washington business and occupation tax to stevedoring depends upon the practical effect of the exaction. As was recognized in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938), interstate commerce must bear its fair share of the state tax burden. The Court repeatedly has sustained taxes that are applied to activity with a substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State. E. g., *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12

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L.Ed.2d 430 (1964); *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959); *Memphis Gas Co. v. Stone*, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832 (1948); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940); see *Complete Auto Transit, Inc. v. Brady*, 430 U.S., at 279, and n. 8, 97 S.Ct., at 1079.

Respondents proved no facts in the Superior Court that, under the above test, would justify invalidation of the Washington tax. The record contains nothing that minimizes the obvious nexus between Washington and respondents; indeed, respondents conduct their entire stevedoring operations within the State. Nor have respondents successfully attacked the apportionment of the Washington system. The tax under challenge was levied solely on the value of the loading and unloading that occurred in Washington. Although the rate of taxation varies with the type of business activity, respondents have not demonstrated how the 1% rate, which applies to them and generally to businesses rendering services, discriminates against interstate commerce. Finally, nothing in the *751 record suggests that the tax is not fairly related to services and protection provided by the State. In short, because respondents relied below on the *per se* approach of *Puget Sound* and *Carter & Weekes*, they developed no factual basis on which to declare the Washington tax unconstitutional as applied to their members and their stevedoring activities.

III

The Import-Export Clause

[7] Having decided that the Commerce Clause does not *per se* invalidate the application of the Washington tax to stevedoring, we must face the question whether the **1400 tax contravenes the Import-Export Clause. Although the parties dispute the meaning of the prohibition of "Imposts or Duties on Imports or Exports," they agree that it differs from the ban the Commerce Clause erects against burdens and taxation on interstate commerce. Brief for Petitioner 32-33; Brief for Re-

spondents 9-10; Tr. of Oral Arg. 13, 22. The Court has noted before that the Import-Export Clause states an absolute ban, whereas the Commerce Clause merely grants power to Congress. *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 75, 67 S.Ct. 156, 159, 91 L.Ed. 80 (1946). On the other hand, the Commerce Clause touches all state taxation and regulation of interstate and foreign commerce, whereas the Import-Export Clause bans only "Imposts or Duties on Imports or Exports." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 279, 290-294, 96 S.Ct. 535, 537, 543-544, 46 L.Ed.2d 495 (1976). The resolution of the Commerce Clause issue, therefore, does not dispose of the Import-Export Clause question.

A

In *Michelin* the Court upheld the application of a general ad valorem property tax to imported tires and tubes. The Court surveyed the history and purposes of the Import-Export Clause to determine, for the first time, which taxes fell within the absolute ban on "Imposts or Duties." *Id.*, at 283-286, 96 S.Ct., at 539-541. *752 Previous cases had assumed that all taxes on imports and exports and on the importing and exporting processes were banned by the Clause. See, e. g., *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 343, 84 S.Ct. 1247, 1248, 12 L.Ed.2d 362 (1964); *Richfield Oil Corp. v. State Board*, 329 U.S., at 76, 67 S.Ct., at 160; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S., at 445, 67 S.Ct., at 827 (Douglas, J., dissenting in part); *Anglo-Chilean Corp. v. Alabama*, 288 U.S. 218, 226-227, 53 S.Ct. 373, 375, 77 L.Ed. 710 (1933); *License Cases*, 5 How. 504, 575-576, 12 L.Ed. 256 (1847) (opinion of Taney, C. J.). Before *Michelin*, the primary consideration was whether the tax under review reached imports or exports. With respect to imports, the analysis applied the original-package doctrine of *Brown v. Maryland*, 12 Wheat. 419, 6 L.Ed. 678 (1827); see, e. g., *Department of Revenue v. James B. Beam Distilling Co.*; *Anglo-Chilean Corp. v. Alabama*; *Low v. Austin*, 13 Wall. 29, 20 L.Ed. 517 (1872), overruled in *Michelin Tire Corp. v. Wages*. So long as

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the goods retained their status as imports by remaining in their import packages, they enjoyed immunity from state taxation. With respect to exports, the dispositive question was whether the goods had entered the "export stream," the final, continuous journey out of the country. *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 70-71, 94 S.Ct. 2108, 2113, 40 L.Ed.2d 660 (1974); *Empresa Siderurgica v. County of Merced*, 337 U.S. 154, 157, 69 S.Ct. 995, 997, 93 L.Ed. 1276 (1949); *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69, 43 S.Ct. 485, 486, 67 L.Ed. 865 (1923); *Coe v. Errol*, 116 U.S. 517, 526, 527, 6 S.Ct. 475, 477, 478, 29 L.Ed. 715 (1886). As soon as the journey began, tax immunity attached.

Michelin initiated a different approach to Import-Export Clause cases. It ignored the simple question whether the tires and tubes were imports. Instead, it analyzed the nature of the tax to determine whether it was an "Impost or Duty." 423 U.S., at 279, 290-294, 96 S.Ct., at 537, 543-544. Specifically, the analysis examined whether the exaction offended any of the three policy considerations leading to the presence of the Clause:

"The Framers of the Constitution thus sought to alleviate three main concerns . . . : the Federal Government*753 must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony **1401 among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." *Id.*, at 285-286, 96 S.Ct., at 540. (footnotes omitted).

The ad valorem property tax there at issue offended none of these policies. It did not usurp the

Federal Government's authority to regulate foreign relations since it did not "fall on imports as such because of their place of origin." *Id.*, at 286, 96 S.Ct., at 541. As a general tax applicable to all property in the State, it could not have been used to create special protective tariffs and could not have been applied selectively to encourage or discourage importation in a manner inconsistent with federal policy. Further, the tax deprived the Federal Government of no revenues to which it was entitled. The exaction merely paid for services, such as fire and police protection, supplied by the local government. Although the tax would increase the cost of the imports to consumers, its effect on the demand for Michelin tubes and tires was insubstantial. The tax, therefore, would not significantly diminish the number of imports on which the Federal Government could levy import duties and would not deprive it of income indirectly. Finally, the tax would not disturb harmony among the States because the coastal jurisdictions would receive compensation only for services and protection extended to the imports. Although intending to prevent coastal States from abusing their geographical positions, the Framers also did not expect residents *754 of the ports to subsidize commerce headed inland. The Court therefore concluded that the Georgia ad valorem property tax was not an "Impost or Duty," within the meaning of the Import-Export Clause, because it offended none of the policies behind that Clause.

[8] A similar approach demonstrates that the application of the Washington business and occupation tax to stevedoring threatens no Import-Export Clause policy. First, the tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. The assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States.

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Second, the effect of the Washington tax on federal import revenues is identical to the effect in *Michelin*. The tax merely compensates the State for services and protection extended by Washington to the stevedoring business. Any indirect effect on the demand for imported goods because of the tax on the value of loading and unloading them from their ships is even less substantial than the effect of the direct ad valorem property tax on the imported goods themselves.

[9] Third, the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause. See P. Hartman, *State Taxation of Interstate Commerce* 2-3 (1953).^{FN19} The third Import-Export Clause policy, therefore, is vindicated if the tax falls upon a *755 taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State. As has been explained in Part II-C, *supra*, the record in this case, as presently developed, reveals the presence of all these factors.

FN19. "Two of the chief weaknesses of the Articles of Confederation were the lack of power in Congress to regulate foreign and interstate commerce, and the presence of power in the States to do so. The almost catastrophic results from this sort of situation were harmful commercial wars and reprisals at home among the States" P. Hartman, *State Taxation of Interstate Commerce* 2 (1953), citing, *e. g.*, *The Federalist* Nos. 7, 11, 22 (Hamilton), No. 42 (Madison).

**1402 [10] Under the analysis of *Michelin*, then, the application of the Washington business and occupation tax to stevedoring violates no Import-Export Clause policy and therefore should not qualify as an "Impost or Duty" subject to the absolute ban of the Clause.

B

[11] The Court in *Michelin* qualified its hold-

ing with the observation that Georgia had applied the property tax to goods "no longer in transit." 423 U.S., at 302, 96 S.Ct., at 548.^{FN20} Because the goods were no longer in transit, however, the Court did not have to face the question whether a tax relating to goods in transit would be an "Impost or Duty" even if it offended none of the policies behind the Clause. Inasmuch as we now face this inquiry, we note two distinctions between this case and *Michelin*. First, the activity taxed here occurs while imports and exports are in transit. Second, however, the tax does not fall on the goods themselves. The levy reaches only the business of loading and unloading ships or, in other words, the business of transporting cargo within the State of Washington. Despite the existence of the first distinction, the presence of the second leads to the conclusion that the Washington tax is not a prohibited "Impost or Duty" when it violates none of the policies.

FN20. Commentators have noted the qualification but have questioned its significance. See *W. Hellerstein, Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports*, 1976 S.Ct.Rev. 99, 122-126; Comment, 30 Rutgers L.Rev. 193, 203 (1976); Note, 12 Wake Forest L.Rev. 1055, 1062 (1976).

In *Canton R. Co. v. Rogan*, 340 U.S. 511, 71 S.Ct. 447, 95 L.Ed. 488 (1951), the Court upheld a gross-receipts tax on a steam railroad operating *756 exclusively within the Port of Baltimore. The railroad operated a marine terminal and owned rail lines connecting the docks to the trunk lines of major railroads. It switched and pulled cars, stored imports and exports pending transport, supplied wharfage, weighed imports and exports, and rented a stevedoring crane. Somewhat less than half of the company's 1946 gross receipts were derived from the transport of imports or exports. The company contended that this income was immune, under the Import-Export Clause, from the state tax. The Court rejected that argument primarily on the ground that

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immunity of services incidental to importing and exporting was not so broad as the immunity of the goods themselves.^{FN21}

FN21. The Court distinguished the Maryland tax from others struck down by the Court. 340 U.S., at 513-514, 71 S.Ct., at 448, distinguishing *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946); *Thames & Mersey Ins. Co. v. United States*, 237 U.S. 19, 35 S.Ct. 496, 59 L.Ed. 821 (1915); and *Fairbank v. United States*, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862 (1901). In these cases the State had taxed either the goods or activity so connected with the goods that the levy amounted to a tax on the goods themselves. In *Richfield*, the tax fell upon the sale of goods and was overturned because the Court had always considered a tax on the sale of goods to be a tax on the goods themselves. See *Brown v. Maryland*, 12 Wheat. 419, 439, 6 L.Ed. 678 (1827). The sale had no value or significance apart from the goods. Similarly, the stamp tax on bills of lading in *Fairbank* effectively taxed the goods because the bills represented the goods. The basis for distinguishing *Thames & Mersey* is less clear because there the tax fell upon marine insurance policies. Arguably, the policies had a value apart from the value of the goods. In distinguishing that case from the taxation of stevedoring activities, however, one might note that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships.

“The difference is that in the present case the tax is not on the *goods*, but on the *handling* of them at the port. An article may be an export and immune from a tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity

cannot be so wide.

*757 “. . . The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead **1403 back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined.” *Id.*, at 514-515, 71 S.Ct., at 449. (emphasis in original).

In *Canton R. Co.* the Court did not have to reach the question about taxation of stevedoring because the company did not load or unload ships.^{FN22} As implied in the opinion, however, *id.*, at 515, 71 S.Ct., at 449, the only distinction between stevedoring and the railroad services was that the loading and unloading of ships crossed the waterline. This is a distinction without economic significance in the present context. The transportation services in both settings are necessary to the import-export process. Taxation in neither setting relates to the value of the goods, and therefore in neither can it be considered taxation upon the goods themselves. The force of *Canton R. Co.* therefore prompts the conclusion that the *Michelin* policy analysis should not be discarded merely because the goods are in transit, at least where the taxation falls upon a service distinct from the goods and their value.^{FN23}

FN22. The Court expressly noted that it did not need to reach the stevedoring issue. 340 U.S., at 515, 71 S.Ct., at 449. It was also reserved in the companion case of *Western Maryland R. Co. v. Rogan*, 340 U.S. 520, 522, 71 S.Ct. 450, 451, 95 L.Ed. 501 (1951).

FN23. We do not reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit.

Our Brother POWELL, as his concurring opinion indicates, obviously would prefer to reach the issue today, even though the facts of the present case, as he agrees, do

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not present a case of a tax on goods in transit. As in *Michelin*, decided less than three years ago, we prefer to defer decision until a case with pertinent facts is presented. At that time, with full argument, the issue with all its ramifications may be decided.

C

Another factual distinction between this case and *Michelin* is that here the stevedores load and unload imports and exports *758 whereas in *Michelin* the Georgia tax touched only imports. As noted in Part III-A, *supra*, the analysis in the export cases has differed from that in the import cases. In the former, the question was when did the export enter the export stream; in the latter, the question was when did the goods escape their original package. The questions differed, for example, because an export could enter its export package and not secure tax immunity until later when it began its journey out of the country. Until *Michelin*, an import retained its immunity so long as it remained in its original package.

[12][13][14] Despite these formal differences, the *Michelin* approach should apply to taxation involving exports as well as imports. The prohibition on the taxation of exports is contained in the same Clause as that regarding imports. The export-tax ban vindicates two of the three policies identified in *Michelin*. It precludes state disruption of the United States foreign policy.^{FN24} It does not serve to protect federal revenues, however, because the Constitution forbids federal taxation of exports. U.S.Const., Art. I, § 9, cl. 5; ^{FN25} see *United States v. Hvoslef*, 237 U.S. 1, 35 S.Ct. 459, 59 L.Ed. 813 (1915). But it does avoid friction and trade barriers among the States. As a result, any tax relating to exports can be tested for its conformance with the first and third policies. If the constitutional interests are not disturbed, the tax should not be considered an "Impost or Duty" any more than should a tax related to imports. This approach is consistent with *Canton R. Co.*, which permitted tax-

ation of income from services connected to both imports and exports. The respondents' gross receipts from loading exports, therefore, are as subject to the Washington business and occupation tax as are the receipts from unloading imports.

FN24. See Abramson, *State Taxation of Exports: The Stream of Constitutionality*, 54 N.C.L.Rev. 59 (1975).

FN25. "No Tax or Duty shall be laid on Articles exported from any State."

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None of respondents' additional arguments convinces us that the *Michelin* approach should not be applied in this case to sustain the tax.

First, respondents contend that the Import-Export Clause effects an absolute prohibition on all taxation of imports and exports. The ban must be absolute, they argue, in order to give the Clause meaning apart from the Commerce Clause. They support this contention primarily with dicta from *Richfield Oil*, 329 U.S., at 75-78, 67 S.Ct., at 159-161, and with the partial dissent in *Carter & Weekes*, 330 U.S., at 444-445, 67 S.Ct., at 827. Neither, however, provides persuasive support because neither recognized that the term "Impost or Duty" is not self-defining and does not necessarily encompass all taxes. The partial dissent in *Carter & Weekes* did not address the term at all. *Richfield Oil's* discussion was limited to the question whether the tax fell upon the sale or upon the right to retail. 329 U.S., at 83-84, 67 S.Ct., at 163-164. The State apparently conceded that the Clause precluded all taxes on exports and the process of exporting. *Id.*, at 84, 67 S.Ct., at 164. The use of these two cases, therefore, ignores the central holding of *Michelin* that the absolute ban is only of "Imposts or Duties" and not of all taxes. Further, an absolute ban of all taxes is not necessary to distinguish the Import-Export Clause from the Commerce Clause. Under the *Michelin* approach, any tax offending either of the first two Import-Export policies becomes suspect regardless of whether it creates interstate friction.

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Commerce Clause analysis, on the other hand, responds to neither of the first two policies. Finally, to conclude that "Imposts or Duties" encompasses all taxes makes superfluous several of the terms of Art. I, § 8, cl. 1 of the Constitution, which grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises." In particular, the Framers apparently did not include "Excises," such as an exaction on the privilege of doing business, within the scope of "Imposts" or "Duties." See *Michelin*, 423 U.S., at 291-292, n. 12, 96 S.Ct., at 543, citing *760 2 M. Farrand, *The Records of the Federal Convention of 1787*, p. 305 (1911), and 3 *id.*, at 203-204.^{FN26}

FN26. But see 1 W. Crosskey, *Politics and the Constitution in the History of the United States* 296-297 (1953), cited in 423 U.S., at 290-291, 96 S.Ct., at 543, in which the author argues that the concept of "Duties" encompassed excises. He does not explain, however, why Art. I, § 8, cl. 1, enumerated "Taxes, Duties, Imposts and Excises" if the Framers intended duties to include excises.

Second, respondents would distinguish *Michelin* on the ground that Georgia levied a property tax on the mass of goods in the State, whereas Washington would tax the imports themselves while they remain a part of commerce. This distinction is supported only by citation to the *License Cases*, 5 How., at 576, 12 L.Ed. 256 (opinion of Taney, C. J.). The argument must be rejected, however, because it resurrects the original-package analysis. See *id.*, at 574-575. Rather than examining whether the taxes are "Imposts or Duties" that offend constitutional policies, the contention would have the Court explore when goods lose their status as imports and exports. This is precisely the inquiry the Court abandoned in *Michelin*, 423 U.S., at 279, 96 S.Ct., at 537. Nothing in the *License Cases*, in which a fractioned Court produced nine opinions, prompts a return to the exclusive consideration of what constitutes an import or export.

[15][16] Third, respondents submit that the Washington tax imposes a transit fee upon inland consumers. Regardless of the validity of such a toll under the Commerce Clause, respondents conclude that it violates the Import-Export Clause. The problem with that analysis is that it does not explain how the policy of preserving harmonious commerce among the States and of preventing interstate tariffs, rivalries, and friction, differs as between the two Clauses. After years of development of Commerce Clause jurisprudence, the Court has concluded that interstate friction will not chafe when commerce**1405 pays for the governmental services it enjoys. See Part II, *supra*. Requiring coastal States to subsidize the commerce of inland consumers may well exacerbate, rather than diminish, *761 rivalries and hostility. Fair taxation will be assured by the prohibition on discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits. To the extent that the Import-Export Clause was intended to preserve interstate harmony, the four safeguards will vindicate the policy. To the extent that other policies are protected by the Import-Export Clause, the analysis of an Art. I, § 10, challenge must extend beyond that required by a Commerce Clause dispute. But distinctions not based on differences in constitutional policy are not required. Because respondents identify no such variation in policy, their transit-fee argument must be rejected.

E

The Washington business and occupation tax, as applied to stevedoring, reaches services provided wholly within the State of Washington to imports, exports, and other goods. The application violates none of the constitutional policies identified in *Michelin*. It is, therefore, not among the "Imposts or Duties" within the prohibition of the Import-Export Clause.

IV

The judgment of the Supreme Court of Washington is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

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FN27

FN27. See generally Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich.L.Rev. 1426 (1977).

It is so ordered.

Mr. Justice BRENNAN took no part in the consideration or decision of this case.

Mr. Justice POWELL, concurring in part and concurring in the result.

I join the opinion of the Court with the exception of Part III-B. As that section of the Court's opinion appears to *762 resurrect the discarded "direct-indirect" test, I cannot join it.

In *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), this Court abandoned the traditional, formalistic methods of determining the validity of state levies under the Import-Export Clause and applied a functional analysis based on the exaction's relationship to the three policies that underlie the Clause: (i) preservation of uniform federal regulation of foreign relations; (ii) protection of federal revenue derived from imports; and (iii) maintenance of harmony among the inland States and the seaboard States. The nondiscriminatory ad valorem property tax in *Michelin* was held not to violate any of those policies, but the Court suggested that even a nondiscriminatory tax on goods merely in transit through the State might run afoul of the Import-Export Clause.

The question the Court addresses today in Part III-B is whether the business tax at issue here is such a tax upon goods in transit. The Court gives a negative answer, apparently for two reasons. The first is that *Canton R. Co. v. Rogan*, 340 U.S. 511, 71 S.Ct. 447, 95 L.Ed. 488 (1951), indicates that this is a tax "not on the goods, but on the handling of them at the port." *Id.*, at 514, 71 S.Ct., at 449. (emphasis in original). While *Canton R. Co.*

provides precedential support for the proposition that a tax of this kind is not invalid under the Import-Export Clause, its rather artificial distinction between taxes on the handling of the goods and taxes on the goods themselves harks back to the arid "direct-indirect" distinction that we rejected in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), in favor of analysis framed in light of economic reality.

The Court's second reason for holding that the instant tax is not one on goods in transit has the surface appearance of economic-reality analysis, but turns out to be the "direct-indirect" test in another guise. The Court likens this tax to the one at issue **1406 in *Canton R. Co.* and declares that since "[t]axation in neither setting relates to the value of the goods, . . . in neither can it be considered taxation upon the goods themselves." *763 *Ante*, at 1403. That this distinction has no economic significance is apparent from the fact that it is possible to design transit fees that are imposed "directly" upon the goods, even though the amount of the exaction bears no relation to the value of the goods. For example, a State could levy a transit fee of \$5 per ton or \$10 per cubic yard. These taxes would bear no more relation to the value of the goods than does the tax at issue here, which is based on the volume of the stevedoring companies' business, and, in turn, on the volume of goods passing through the port. Thus, the Court does not explain satisfactorily its pronouncement that Washington's business tax upon stevedoring-in economic terms-is not the type of transit fee that the *Michelin* Court questioned.

In my view, this issue can be resolved only with reference to the analysis adopted in *Michelin*. The Court's initial mention of the validity of transit fees in that decision is found in a discussion concerning the right of the taxing state to seek a *quid pro quo* for benefits conferred by the State:

"There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as po-

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lice and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods. An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State. [The tax at issue] obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when *764 the tax is assessed." 423 U.S., at 289-290, 96 S.Ct., at 542. (Footnotes omitted.)

In questioning the validity of "transit fees," the *Michelin* Court was concerned with exactions that bore no relation to services and benefits conferred by the State. Thus, the transit-fee inquiry cannot be answered by determining whether or not the tax relates to the value of the goods; instead, it must be answered by inquiring whether the State is simply making the imported goods pay their own way, as opposed to exacting a fee merely for "the privilege of moving through a State." *Ibid.*

The Court already has answered that question in this case. In Part II-C, the Court observes that "nothing in the record suggests that the tax is not fairly related to services and protection provided by the State." *Ante*, at 1399. Since the stevedoring companies undoubtedly avail themselves of police and fire protection, as well as other benefits Washington offers its local businesses, this statement cannot be questioned. For that reason, I agree with the Court's conclusion that the business tax at issue here is not a "transit fee" within the prohibition of the Import-Export Clause.

U.S.Wash.,1978.
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ciation of Washington Stevedoring Companies
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H

Supreme Court of Washington.
 PARRISH et al.
 v.
 WEST COAST HOTEL CO.

No. 26038.
 April 2, 1936.

Department 2.

Appeal from Superior Court, Chelan County;
 W. O. Parr, Judge.

Action by Ernest Parrish and another against
 the West Coast Hotel Company. From a judgment
 for plaintiffs in an unsatisfactory amount, they ap-
 peal.

Reversed and remanded, with instructions.

West Headnotes

[1] States 360 ↪ 4.4(1)

360 States

360I Political Status and Relations

360I(A) In General

360k4.4 Powers Reserved to States

360k4.4(1) k. In General. Most Cited

Cases

(Formerly 360k4.4, 360k4)

Powers not delegated to United States, nor pro-
 hibited to states, by Federal Constitution, are re-
 served to states.

[2] States 360 ↪ 4.4(2)

360 States

360I Political Status and Relations

360I(A) In General

360k4.4 Powers Reserved to States

360k4.4(2) k. Police Power. Most

Cited Cases

(Formerly 360k4.5, 360k4)

State's police power not being given federal
 government, nor prohibited to people of states, by
 Federal Constitution, is reserved to states.

[3] Constitutional Law 92 ↪ 4255

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applica-
tions

92XXVII(G)11 Contracts

92k4255 k. In General. Most Cited

Cases

(Formerly 92k276(1), 92k276)

Statute depriving persons of liberty to contract,
 but with due process in reasonable exercise of po-
 lice power to correct known and stated public evil
 and promote public welfare, is constitutional and
 proper exercise of legislative power. Const. U.S.
 Amend. 14, § 1.

[4] Constitutional Law 92 ↪ 4179

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applica-
tions

92XXVII(G)7 Labor, Employment, and

Public Officials

92k4176 Regulation of Employment

92k4179 k. Wage and Hour Regula-

tion. Most Cited Cases

(Formerly 92k275(3), 92k275(2))

Labor and Employment 231H ↪ 2212

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime

Pay

231HXIII(B)1 In General

231Hk2211 Power to Regulate

231Hk2212 k. In General. Most

Cited Cases

(Formerly 232Ak1082.1, 232Ak1082 Labor Re-

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lations)

Mere fact that parties to employment contract are of full age does not necessarily deprive state of power to interfere in terms of contract, where they do not stand on equality or public health demands that one party be protected against himself, as by enactment of minimum wage law. Laws 1913, p. 602, §§ 1-3; U.S.C.A.Const. Amend. 14, § 1.

[5] Constitutional Law 92 4177

92 Constitutional Law
 92XXVII Due Process
 92XXVII(G) Particular Issues and Applications
 92XXVII(G)7 Labor, Employment, and Public Officials
 92k4176 Regulation of Employment
 92k4177 k. In General. Most Cited Cases
 (Formerly 92k275(2.1), 92k275(2))

Labor and Employment 231H 1238

231H Labor and Employment
 231HXII Labor Relations
 231HXII(E) Labor Contracts
 231Hk1237 Constitutional and Statutory Provisions
 231Hk1238 k. In General. Most Cited Cases
 (Formerly 232Ak243 Labor Relations)
 Legislature may interfere in terms of employment contract, where private parties do not stand on equality or public health demands that one of them be protected against himself, though they are of full age and competent to contract. U.S.C.A.Const. Amend. 14, § 1.

[6] Constitutional Law 92 4179

92 Constitutional Law
 92XXVII Due Process
 92XXVII(G) Particular Issues and Applications
 92XXVII(G)7 Labor, Employment, and

Public Officials

92k4176 Regulation of Employment
 92k4179 k. Wage and Hour Regulation. Most Cited Cases
 (Formerly 92k275(3), 92k275(2))

Labor and Employment 231H 2218(8)

231H Labor and Employment
 231HXIII Wages and Hours
 231HXIII(B) Minimum Wages and Overtime Pay
 231HXIII(B)1 In General
 231Hk2215 Constitutional and Statutory Provisions
 231Hk2218 Validity
 231Hk2218(8) k. Women and Minors. Most Cited Cases
 (Formerly 232Ak1094 Labor Relations, 255k69 Master and Servant)
 State law, requiring employers to pay women employees minimum wages found necessary by Industrial Welfare Commission for maintenance of their health and morals, held not unconstitutional interference with freedom of contract as applied to adult women. Laws 1913, p. 602, §§ 1-3; U.S.C.A.Const. Amend. 14, § 1.

Labor and Employment 231H 2218(8)

231H Labor and Employment
 231HXIII Wages and Hours
 231HXIII(B) Minimum Wages and Overtime Pay
 231HXIII(B)1 In General
 231Hk2215 Constitutional and Statutory Provisions
 231Hk2218 Validity
 231Hk2218(8) k. Women and Minors. Most Cited Cases
 (Formerly 232Ak1094 Labor Relations)
 State law, requiring employers to pay women employees minimum wages found necessary by Industrial Welfare Commission for maintenance of their health and morals, held not unconstitutional. Laws 1913, p. 602, §§ 1-3.

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*581 **1083 C. B. Conner, of Wenatchee, for appellants.

Crollard & O'Connor, of Wenatchee, for respondent.

MILLARD, Chief Justice.

Mindful of the duty of the state to protect women and minors from conditions of labor which have a pernicious effect on their health and morals, the Legislature enacted chapter 174, Laws 1913 (page 602). The provisions of the act pertinent to this appeal are as follows:

'Section 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington,*582 therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

'Sec. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

'Sec. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors **1084 employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women.'

From August, 1933, to May, 1935, when she was discharged, plaintiff was in the employ of defendant hotel corporation as a chambermaid at an agreed wage which was less than the minimum weekly wage of \$14.50 as fixed by the Industrial

Welfare Commission under section 3, chapter 174, Laws 1913 (page 602). If payable at the agreed wage, defendant owes plaintiff a balance of \$17. If entitled to payment at the minimum rate established by the Industrial Welfare Commission, a balance of \$216.19 is due to the plaintiff. To recover that balance, plaintiff brought this action. The cause was tried to the court, which found that plaintiff was entitled to a recovery of \$17 against defendant. The court further found that chapter 174, p. 602, Laws 1913, in so far as it applies to adult women, is an unconstitutional interference with the freedom of contract included within *583 the guaranties of the due process clause of the Constitution of the United States.

'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' Section 1, Amendment 14, Federal Constitution.

Judgment was entered accordingly. Plaintiff appealed.

In *Larsen v. Rice*, 100 Wash. 642, 171 P. 1037, 1039, we held that the minimum wage law (chapter 174, p. 602, Laws 1913) for women was constitutional. We said: 'It is undoubtedly a general rule that private controversies between individuals sui juris may be compromised by them by mutual agreement, and that the courts will not, where no question of fraud intervenes, relieve from the agreement, even though it be shown that the one gained rights thereby to which he would not otherwise have been entitled, and that the other gave up rights to which he was fully entitled; this on the principle that compromises are favored by the law, since they tend to prevent strife and conduce to peace and to the general welfare of the community. But the controversy here had an added element not found in the ordinary controversy between individuals. It was not wholly of private concern. It was affected with

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a public interest. The state, having declared that a minimum wage of a certain amount is necessary to a decent maintenance of an employee engaged in the employment in which the respondent was engaged, has an interest in seeing that the fixed compensation is actually paid. The statute making the declaration not only makes contracts of employment for less than the minimum wage void, but has sought to secure its enforcement by making it a penal offense on the part of the employer to pay less than the minimum wage, and by giving to the employee a right of action to recover *584 the difference between the wage actually paid and such minimum wage. The statute was not therefore intended solely for the benefit of the individual wage-earner. It was believed that the welfare of the public requires that wage-earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wage-earner, it must follow that any contract of settlement of a controversy arising out of a failure to pay the fixed minimum wage in which the state did not participate is voidable, if not void. Especially must this be so, as here, where the contract of settlement is executory, has been repudiated by one of the parties, the parties can be placed in statu quo, and the wage-earner, by carrying out the contract, will not receive the wage to which she is justly entitled.'

The Oregon minimum wage law for women-in all essentials the same as our law-was sustained in *Stettler v. O'Hara*, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann.Cas.1916A, 217, and *Simpson v. O'Hara*, 70 Or. 261, 141 P. 158. These two cases were affirmed without an opinion by an equally divided court in *Stettler v. O'Hara*, 243 U.S. 629, 37 S.Ct. 475, 61 L.Ed. 937, Mr. Justice Brandeis taking no part in the consideration and decision of the cases. In *Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann.Cas.1918A, 1043, the United States Supreme Court sustained a wage-fixing statute. The statute limited the hours of labor of any person, whether man or woman, working in any mill, factory, or manufacturing establishment, to ten hours a day, with a proviso requiring such

employees, if they worked more than ten hours a day, to accept for the three additional hours permitted not less than 50 per cent. more than their usual wage.

By act of September 19, 1918 (40 Stat. 960, c. 174), Congress provided for the fixing **1085 of minimum wages for women and children in the District of Columbia. The *585 statute was declared unconstitutional on the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment of the Constitution of the United States. *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 403, 67 L.Ed. 785, 24 A.L.R. 1238. Mr. Chief Justice Taft, dissenting, said:

'The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitution is not easy to mark. Our court has been laboriously engaged in pricking out a line in successive cases. We must be careful, it seems to me, to follow that line as well as we can, and not to depart from it by suggesting a distinction that is formal rather than real.'

'Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this court to hold congressional acts invalid simply be-

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cause they are passed to carry out economic views which the court believes to be unwise or unsound.

'Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their *586 profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law, and that while in individual cases, hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large.

'The right of the Legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee, it seems to me, has been firmly established. As to that, one would think, the line had been pricked out so that it has become a well formulated rule. In *Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780, it was applied to miners and rested on the unfavorable environment of employment in mining and smelting. In *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, 3 Ann.Cas. 1133, it was held that restricting those employed in bakeries to 10 hours a day was an arbitrary and invalid interference with the liberty of contract secured by the Fourteenth Amendment. Then followed a number of cases beginning with *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann.Cas. 957, sustaining the validity of a limit on maximum hours of labor for women to which I shall hereafter allude, and following these cases came *Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann. Cas. 1918A, 1043. In that case, this court sustained a law limiting the hours of labor of any person, whether man or woman, working in any mill, factory, or manufacturing establishment to 10 hours a day with a proviso as to further hours to which I shall hereafter advert. The law covered the whole field of industrial employment and certainly covered the case of persons

employed in bakeries. Yet the opinion in the *Bunting Case* does not mention the *Lochner Case*. No one can suggest any constitutional distinction between employment in a bakery and one in any other kind of a manufacturing establishment which should make a limit of hours in the one invalid, and the same limit in the other permissible. It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case*, and I have always supposed that the *Lochner Case* was thus overruled sub silentio. Yet the opinion of the court herein in support of its conclusion quotes *587 from the opinion in the *Lochner Case* as one which has been sometimes distinguished but never overruled. Certainly there was no attempt to distinguish it in the *Bunting Case*.

'However, the opinion herein does not overrule the *Bunting Case* in express terms, and therefore I assume that the conclusion in this case rests on the distinction between a minimum of wages and a maximum of hours in the limiting of liberty to contract. **1086 I regret to be at variance with the court as to the substance of this distinction. In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand.

'If it be said that long hours of labor have a more direct effect upon the health of the employee than the low wage, there is very respectable authority from close observers, disclosed in the record and in the literature on the subject quoted at length in the briefs that they are equally harmful in this regard. Congress took this view and we cannot say it was not warranted in so doing.

'With deference to the very able opinion of the court and my brethren who concur in it, it appears to me to exaggerate the importance of the wage term of the contract of employment as more inviolate than its other terms. Its conclusion seems influenced by the fear that the concession of the power

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to impose a minimum wage must carry with it a concession of the power to fix a maximum wage. This, I submit, is a non sequitur. A line of distinction like the one under discussion in this case is, as the opinion elsewhere admits, a matter of degree and practical experience and not of pure logic. Certainly the wide difference between prescribing a minimum wage and a maximum wage could as a matter of degree and experience be easily affirmed.

'Moreover, there are decisions by this court which have sustained legislative limitations in respect to the *588 wage term in contracts of employment. In *McLean v. Arkansas*, 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315, it was held within legislative power to make it unlawful to estimate the graduated pay of miners by weight after screening the coal. In *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55, it was held that stores orders issued for wages must be redeemable in cash. In *Patterson v. Bark Eudora*, 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002, a law forbidding the payment of wages in advance was held valid. A like case is *Strathearn S. S. Co. v. Dillon*, 252 U.S. 348, 40 S.Ct. 350, 64 L.Ed. 607. While these did not impose a minimum on wages, they did take away from the employee the freedom to agree as to how they should be fixed, in what medium they should be paid, and when they should be paid, all features that might affect the amount or the mode of enjoyment of them. The first two really rested on the advantage the employer had in dealing with the employee. The third was deemed a proper curtailment of a sailor's right of contract in his own interest because of his proneness to squander his wages in port before sailing. In *Bunting v. Oregon*, *supra*, employees in a mill, factory, or manufacturing establishment were required if they worked over 10 hours a day to accept for the 3 additional hours permitted not less than 50 per cent. more than their usual wage. This was sustained as a mild penalty imposed on the employer to enforce the limitation as to hours; but it necessarily curtailed the employee's freedom to contract to work for the wages he saw fit to accept during those 3 hours. I do not feel,

therefore, that either on the basis of reason, experience, or authority, the boundary of the police power should be drawn to include maximum hours and exclude a minimum wage.

'Without, however, expressing an opinion that a minimum wage limitation can be enacted for adult men, it is enough to say that the case before us involves only the application of the minimum wage to women. If I am right in thinking that the Legislature can find as much support in experience for the view that a sweating wage has as great and as direct a tendency to bring about an injury to the health and morals of workers, as for the view that long hours *589 injure their health, then I respectfully submit that *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann.Cas. 957, controls this case. The law which was there sustained forbade the employment of any female in any mechanical establishment or factory or laundry for more than 10 hours. This covered a pretty wide field in women's work, and it would not seem that any sound distinction between that case and this can be built up on the fact that the law before us applies to all occupations of women with power in the board to make certain exceptions. Mr. Justice Brewer, who spoke for the court in *Muller v. Oregon*, based its conclusion on the natural limit to women's physical strength and the likelihood that long hours would therefore injure her health, and we have had since a series of cases which may be said to have established a rule of decision. *Riley v. Massachusetts*, 232 U.S. 671, 34 S.Ct. 469, 58 L.Ed. 788; *Miller v. Wilson*, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A. 1915F, 829; **1087 *Bosley v. McLaughlin*, 236 U.S. 385, 35 S.Ct. 345, 59 L.Ed. 632. The cases covered restrictions in wide and varying fields of employment and in the later cases it will be found that the objection to the particular law was based, not on the ground that it had general application, but because it left out some employments.

'I am not sure from a reading of the opinion whether the court thinks the authority of *Muller v.*

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Oregon is shaken by the adoption of the Nineteenth Amendment. The Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller v. Oregon* rests. The amendment did give women political power and makes more certain that legislative provisions for their protection will be in accord with their interests as they see them. But I do not think we are warranted in varying constitutional construction based on physical differences between men and women, because of the amendment.

'But for my inability to agree with some general observations in the forcible opinion of Mr. Justice Holmes, who follows me, I should be silent and merely record my concurrence in what he says. It is perhaps wiser for me, however, in a case of this importance separately to give my reasons for dissenting.'

*590 Mr. Justice Holmes' dissenting opinion reads, in part, as follows:

'The question in this case is the broad one, Whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress had no power to meddle with the matter at all. To me, notwithstanding the deference due to the prevailing judgment of the Court, the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have learned our greatest lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price it seems to me impossible to deny that the belief reasonably may be held by reasonable men. If the law encountered no other objection than that the means bore no relation to the end or that they cost too much I do not suppose that anyone would venture to say that it was bad. I

agree, of course, that a law answering the foregoing requirements might be invalidated by specific provisions of the Constitution. For instance it might take private property without just compensation. But in the present instance the only objection that can be urged is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law. To that I turn.

'The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expended into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law *591 consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. Statutes of frauds restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life. Insurance rates may be regulated. *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A. 1915C, 1189. (I concurred in that decision without regard to the public interest with which insurance was said to be clothed. It seemed to me that the principle was general.) Contracts may be forced upon the companies. *National Union Fire Insurance Co. v. Wanberg*, 260 U.S. 71, 43 S.Ct. 32, 67 L.Ed. 136.

Employers of miners may be required to pay for coal by weight before screening. *McLean v. Arkansas*, 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315. Employers generally may be required to redeem in cash store orders accepted by their employ-

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ees in payment. *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55. Payment of sailors in advance may be forbidden. *Patterson v. Bark Eudora*, 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002. The size of a loaf of bread may be established. **1088 *Schmidinger v. Chicago*, 226 U.S. 578, 33 S.Ct. 182, 57 L.Ed. 364, Ann.Cas. 1914B, 284. The responsibility of employers to their employees may be profoundly modified. *New York Central R. Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A.1917D, 1, Ann.Cas.1917D, 629; *Arizona Employers' Liability Cases*, 250 U.S. 400, 39 S.Ct. 553, 63 L.Ed. 1058, 6 A.L.R. 1537. Finally women's hours of labor may be fixed, *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann.Cas. 957; *Riley v. Massachusetts*, 232 U.S. 671, 679, 34 S.Ct. 469, 58 L.Ed. 788; *Hawley v. Walker*, 232 U.S. 718, 34 S.Ct. 479, 58 L.Ed. 813; *Miller v. Wilson*, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A.1915F, 829; *Bosley v. McLaughlin*, 236 U.S. 385, 35 S.Ct. 345, 59 L.Ed. 632; and the principle was extended to men with the allowance of a limited overtime to be paid for 'at the rate of time and one-half of the regular wage,' in *Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann.Cas.1918A, 1043.

'I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. I fully assent to the proposition that here as elsewhere the *592 distinctions of the law are distinctions of degree, but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate. *Muller v. Oregon*, I take it, is as good law today as it was in 1908. It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account. I should not hesitate to take them into account if I thought it necessary to sustain this Act. *Quong Wing v.*

Kirkendall, 223 U.S. 59, 63, 32 S.Ct. 192, 56 L.Ed. 350. But after *Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann.Cas.1918A, 1043, I had supposed that it was not necessary, and that *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, 3 Ann.Cas. 1133, would be allowed a deserved repose.

'This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld.'

Respondent insists that the foregoing decision of the United States Supreme Court is controlling, and that the judgment should be affirmed. Let us bear in mind that *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238, was based upon an act of Congress passed for the District of Columbia. In *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251, 51 S.Ct. 130, 132, 75 L.Ed. 324, 72 A.L.R. 1163, the United States Supreme Court held that the business of insurance is so far affected with the public interest that the state may regulate the rates and likewise the relations of those engaged in business; that a state statute dealing with a subject clearly within the police power cannot be declared void upon the ground that *593 the specific method of regulation prescribed by it is unreasonable, in the absence of any factual foundation in the record to overcome the presumption of constitutionality. The court said: 'The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of

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legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness.'

[1][2][3] That the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states needs no citation of sustaining authority. The police power of a state was not given to the federal government nor prohibited by the Constitution to the people of the respective states, hence it is one of the reserved powers. It is true that **1089 the employer and the employee are deprived to a certain extent of their liberty to contract by the minimum wage law. However, if the deprivation is with due process, if it corrects a known and stated public evil, if it promotes the public welfare-that is, if it is a reasonable exercise of the police power-it is constitutional and it is a proper exercise of legislative power. In *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 516, 78 L.Ed. 940, 89 A.L.R. 1469, it was held that one may be compelled*594 to pay a greater sum than that which may be asked because at another end of the industrial scale is found one who may not be paid what his product is worth and who may be unable to bargain freely with those who possess the marketing facilities. The court said: 'The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the lawmaking body within its sphere of government

concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.'

The legal duty placed upon the employer by our minimum wage law is that he must pay women in his employ in wages a sum found to be necessary for the *595 maintenance of the health as well as the morals of the employee. If the wages paid equal or are in excess of the cost of the maintenance of a normal health standard, the state's concern in the matter ceases. If the employer pays less than the amount found to be the minimum cost of the maintenance of the normal health standard by virtue of his more secure and powerful economic position, the transaction savors of exploitation. Restraints upon the liberty to contract have been declared constitutional in many cases, as cited in the dissenting opinion of Mr. Justice Holmes in *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238. The underlying principle in all such cases is the state's right, the state's duty, to interfere in the terms of a contract between private parties when there is an inequality in bar-

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gaining power.

'And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.' *Vernon v. Bethell*, 2 Eden's Chancery Reports, 68.

[4] The mere fact that the parties are of full age does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to a contract shall be protected against himself.

[5] 'The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor *596 as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors **1090 lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

'It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently, under the statute, is the only one liable, his defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace

and greater cogency from the latter class. But the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.'" *Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 390, 42 L.Ed. 780.

[6] We held in *Larsen v. Rice*, 100 Wash. 642, 171 P. 1037, that the controversy there, which differs in no important particular from the controversy here, had an added element not found in the ordinary controversy by the individual. It was not wholly a private concern. It was affected with a public interest, the state having declared the minimum wage of a certain amount to be necessary. Therefore the state has an interest in the way that the fixed compensation is actually paid. *597 The statute is protective of the public as well as the wage earner. If the state Legislature and state Supreme Court find that the statute is of a public interest, the Supreme Court of the United States will accept such judgment in the absence of facts to support the contrary conclusion. Unless the Supreme Court of the United States can find beyond question that chapter 174, p. 602, Laws 1913, is a plain, palpable invasion of rights secured by the fundamental law and has no real or substantial relation to the public morals or public welfare, then the law must be sustained. The United States Supreme Court has not yet held that a state statute such as the one in the case at bar is unconstitutional, and until such time- *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238, is not controlling-we shall adhere to our holding in the case of *Larsen v. Rice*, 100 Wash. 642, 171 P. 1037, and *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 P. 595. It does not appear upon the face of the minimum wage law or from any facts of which the Supreme

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Court of the United States must take judicial notice that in the state of Washington evils did not exist for which our minimum wage law was an appropriate remedy. The action of the state Legislature and of this court indicates that such evils do exist.

The judgment is reversed, and the cause remanded, with instructions to the trial court to enter judgment in favor of the appellant in an amount equal to the difference between the amount paid and the amount due under the minimum wage law.

HOLCOMB, MAIN, BLAKE, and BEALS, JJ.,
concur.

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H

Supreme Court of the United States
WEST COAST HOTEL CO.

v.

PARRISH et ux.

No. 293.

Argued Dec. 16, 17, 1936.

Decided March 29, 1937.

Action by Ernest Parrish and wife against the West Coast Hotel Company. From a judgment of the Supreme Court of the State of Washington (185 Wash. 581, 55 P.(2d) 1083), reversing a judgment of the trial court and directing judgment for plaintiffs, the defendant appeals.

Affirmed.

Mr. Justice SUTHERLAND, VAN
DEVANTER, McREYNOLDS, and BUTLER, dis-
senting.

West Headnotes

[1] Courts 106 ↪90(3)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k90 Decisions of Same Court or Co-Ordinate Court

106k90(3) k. Constitutional Questions. Most Cited Cases

Where state Supreme Court in determining that minimum wage law for women was valid, refused to regard prior decision of federal Supreme Court determining that another minimum wage law was invalid as determinative and pointed to other decisions of federal Supreme Court as justifying its position, such ruling of state Supreme Court de-

manded re-examination on part of federal Supreme Court of prior decision determining minimum wage law to be invalid, especially in view of importance of question, close division by which prior decision was reached, and change in economic conditions.

[2] Labor and Employment 231H ↪2218(3)

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)1 In General

231Hk2215 Constitutional and Statutory Provisions

231Hk2218 Validity

231Hk2218(3) k. State Statutes in General. Most Cited Cases

(Formerly 232Ak1088 Labor Relations, 255k69 Master and Servant)

Reasonableness of exercise of protective power of state through enactment of minimum wage laws must be determined in light of economic conditions.

[3] Constitutional Law 92 ↪3873

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3868 Rights, Interests, Benefits, or Privileges Involved in General

92k3873 k. Liberties and Liberty Interests. Most Cited Cases

(Formerly 92k275(2.1), 92k275(2))

Constitutional Law 92 ↪3902

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3902 k. Police Power, Relationship to Due Process. Most Cited Cases

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(Formerly 92k275(2.1), 92k275(2))

"Liberty" safeguarded by due process clause of Fourteenth Amendment is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. U.S.C.A.Const. Amend. 14.

[4] Constitutional Law 92 ↪ 3877

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3877 k. Reasonableness, Rationality, and Relationship to Object. Most Cited Cases

(Formerly 92k275(1))

Liberty, under Constitution, is subject to restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. U.S.C.A.Const. Amend. 14.

[5] Constitutional Law 92 ↪ 4255

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)11 Contracts

92k4255 k. In General. Most Cited

Cases

(Formerly 92k276(1), 92k276)

Freedom of contract is qualified and not absolute right since "liberty," guaranteed by Constitution, implies absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in interests of the community. U.S.C.A. Const. Amend. 14.

[6] Constitutional Law 92 ↪ 4177

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)7 Labor, Employment, and Public Officials

92k4176 Regulation of Employment

92k4177 k. In General. Most Cited

Cases

(Formerly 92k275(2.1), 92k275(2))

Labor and Employment 231H ↪ 1238

231H Labor and Employment

231HXII Labor Relations

231HXII(E) Labor Contracts

231Hk1237 Constitutional and Statutory Provisions

231Hk1238 k. In General. Most Cited

Cases

(Formerly 232Ak243 Labor Relations)

Power under Constitution to restrict freedom of contract may be exercised in public interest with respect to contracts between employer and employee. U.S.C.A.Const. Amend. 14.

[7] Constitutional Law 92 ↪ 4177

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)7 Labor, Employment, and Public Officials

92k4176 Regulation of Employment

92k4177 k. In General. Most Cited

Cases

(Formerly 92k275(2.1), 92k275(2))

Constitutional Law 92 ↪ 4180

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)7 Labor, Employment, and Public Officials

92k4176 Regulation of Employment

92k4180 k. Health and Safety Regulation. Most Cited Cases

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231H Labor and Employment

231HI In General

231Hk2 Constitutional and Statutory Provisions

231Hk3 k. In General. Most Cited Cases
(Formerly 232Ak5 Labor Relations)

In dealing with relation of employer and employee, Legislature has wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. U.S.C.A.Const. Amend. 14.

[8] Constitutional Law 92 ↪ 4179

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)7 Labor, Employment, and Public Officials

92k4176 Regulation of Employment

92k4179 k. Wage and Hour Regulation. Most Cited Cases

(Formerly 92k275(3), 92k275(2))

Labor and Employment 231H ↪ 2218(8)

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)1 In General

231Hk2215 Constitutional and Statutory Provisions

231Hk2218 Validity

231Hk2218(8) k. Women and Minors. Most Cited Cases

(Formerly 232Ak1094 Labor Relations, 255k69 Master and Servant)

Washington minimum wage law for women

held not invalid on ground that adult employees should be deemed competent to make their own contracts since employers and employees do not stand on basis of equality. Rem.Rev.Stat.Wash. § 7623 et seq.

[9] Constitutional Law 92 ↪ 4255

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)11 Contracts

92k4255 k. In General. Most Cited Cases

(Formerly 92k275(2.1), 92k275(2))

Labor and Employment 231H ↪ 1238

231H Labor and Employment

231HXII Labor Relations

231HXII(E) Labor Contracts

231Hk1237 Constitutional and Statutory Provisions

231Hk1238 k. In General. Most Cited Cases

(Formerly 232Ak243 Labor Relations)

Fact that both parties are of full age and competent to contract does not necessarily deprive state of power to interfere where parties do not stand on equality or where public health demands that one party to contract shall be protected against himself. U.S.C.A.Const. Amend. 14.

[10] Constitutional Law 92 ↪ 4255

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)11 Contracts

92k4255 k. In General. Most Cited Cases

(Formerly 92k276(1), 92k276)

If statute enacted under police power of state regulating making of private contracts has reason-

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able relation to proper legislative purpose and is neither arbitrary nor discriminatory, requirements of due process are satisfied. U.S.C.A. Const. Amend. 14.

[11] Constitutional Law 92 ↪ 2486

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2485 Inquiry Into Legislative Judgment

92k2486 k. In General. Most Cited

Cases

(Formerly 92k70.3(1), 92k70(3))

The questions of the wisdom, justice, policy, or expediency of a statute are for the Legislature alone.

[12] Constitutional Law 92 ↪ 2491

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2485 Inquiry Into Legislative Judgment

92k2491 k. Necessity. Most Cited

Cases

(Formerly 92k70.3(1), 92k70(3))

Legislature is primarily judge of necessity of an enactment. U.S.C.A. Const. Amend. 14.

[13] Constitutional Law 92 ↪ 990

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k990 k. In General. Most Cited Cases

(Formerly 92k48(1), 92k48)

Constitutional Law 92 ↪ 1007

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k1006 Particular Issues and Applications

92k1007 k. In General. Most Cited

Cases

(Formerly 92k48(1), 92k48)

Every presumption favors validity of legislative enactment, and though court may hold views inconsistent with wisdom of law, it may not be annulled unless palpably in excess of legislative power. U.S.C.A. Const. Amend. 14.

[14] Constitutional Law 92 ↪ 4179

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)7 Labor, Employment, and Public Officials

92k4176 Regulation of Employment

92k4179 k. Wage and Hour Regulation. Most Cited Cases

(Formerly 92k275(3), 92k275(2))

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)1 In General

231Hk2215 Constitutional and Statutory Provisions

231Hk2218 Validity

231Hk2218(8) k. Women and Minors. Most Cited Cases

(Formerly 92k275(3), 92k275(2))

Washington minimum wage law requiring payment to women employees of minimum wages found necessary for decent maintenance of women held not invalid as arbitrary or capricious.

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Rem.Rev.Stat.Wash. § 7623 et seq., and §§ 10840, 10893; U.S.C.A. Const. Amend. 14.

[15] Evidence 157 ↻14

157: Evidence

157I Judicial Notice

157k14 k. Facts Relating to Human Life, Health, Habits, and Acts. Most Cited Cases

In determining state's power to enact minimum wage law for women, federal Supreme Court could take judicial notice of unparalleled demands for relief which arose during economic depression, since denial of a living wage is not only detrimental to health and well being of workers, but casts direct burden for their support on the community.

[16] Labor and Employment 231H ↻2212

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)1 In General

231Hk2211 Power to Regulate

231Hk2212 k. In General. Most

Cited Cases

(Formerly 232Ak1082.1, 232Ak1082 Labor Relations, 255k69 Master and Servant)

In view that the exploitation of a class of workers who are in an unequal position with regard to bargaining power and are thus relatively defenseless against denial of a living wage casts direct burden for their support on the community, the community may direct its law-making power to correct the abuse which springs from employers' selfish disregard of public interest. U.S.C.A. Const. Amend. 14.

[17] Constitutional Law 92 ↻3389

92 Constitutional Law

92XXVI Equal Protection

92XXVI(B) Particular Classes

92XXVI(B)11 Sex or Gender

92k3388 Labor, Employment, and

Public Officials

92k3389 k. In General. Most Cited

Cases

(Formerly 92k224(3), 92k238(2))

Labor and Employment 231H ↻2218(8)

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime

Pay

231HXIII(B)1 In General

231Hk2215 Constitutional and Statutory Provisions

231Hk2218 Validity

231Hk2218(8) k. Women and

Minors. Most Cited Cases

(Formerly 232Ak1094 Labor Relations)

Washington minimum wage law for women held not unconstitutional as arbitrary discrimination notwithstanding it did not extend to men, since legislative authority acting within its proper field is not bound to extend its regulation to all cases which it might possibly reach. Rem.Rev.Stat.Wash. § 7623 et seq., and §§ 10840, 10893; U.S.C.A. Const. Amend. 14.

[18] Constitutional Law 92 ↻2970

92 Constitutional Law

92XXV Class Legislation; Discrimination and Classification in General

92k2970 k. In General. Most Cited Cases

(Formerly 92k208(1))

Legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest, and if the law presumably hits the evil, where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.

****579 *379** Appeal from the Supreme Court of the State of Washington. Messrs. ***3800** E. L. Skeel and John W. Roberts, both of Seattle, Wash., for appel-

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300 U.S. 379, 57 S.Ct. 578, 1 L.R.R.M. (BNA) 754, 108 A.L.R. 1330, 81 L.Ed. 703, 8 O.O. 89, 1 Lab.Cas. P 17,021
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lant.

Messrs. W. A. Toner, of Olympia, Wash., and *381 Sam M. Driver, of Wenatchee, Wash., for ap- pellees.

*386 Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the state of Washington.

The act, entitled 'Minimum Wages for Women,' authorizes the fixing of minimum wages for women and minors. Laws 1913 (Washington) c. 174, p. 602, Remington's Rev.Stat.(1932) s 7623 et seq. It provides:

'Section 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

'Sec. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ *387 women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

'Sec. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health **580 and morals, and which shall be sufficient for the decent maintenance of women.'

Further provisions required the commission to

ascertain the wages and conditions of labor of women and minors within the state. Public hearings were to be held. If after investigation the commission found that in any occupation, trade, or industry the wages paid to women were 'inadequate to supply them necessary cost of living and to maintain the workers in health,' the commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public. The conference was to recommend to the commission, on its request, an estimate of a minimum wage adequate for the purpose above stated, and on the approval of such a recommendation it became the duty of the commission to issue an obligatory order fixing minimum wages. Any such order might be reopened and the question reconsidered with the aid of the former conference or a new one. Special licenses were authorized for the employment of women who were 'physically defective or crippled by age or otherwise,' and also for apprentices, at less than the prescribed minimum wage.

By a later act the Industrial Welfare Commission was abolished and its duties were assigned to the Industrial Welfare Committee consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance, *388 the Supervisor of Industrial Relations, the Industrial Statistician, and the Supervisor of Women in Industry. Laws 1921 (Washington) c. 7, p. 12, Remington's Rev.Stat.(1932) ss 10840, 10893.

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was \$14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the state, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. Parrish v. West Coast

Hotel Co., 185 Wash. 581, 55 P. (2d) 1083. The case is here on appeal.

The appellant relies upon the decision of this Court in *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238, which held invalid the District of Columbia Minimum Wage Act (40 Stat. 960) which was attacked under the due process clause of the Fifth Amendment. On the argument at bar, counsel for the appellees attempted to distinguish the *Adkins* Case upon the ground that the appellee was employed in a hotel and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that in one of the cases ruled by the *Adkins* opinion the employee was a woman employed as an elevator operator in a hotel. *Adkins v. Lyons*, 261 U.S. 525, at page 542, 43 S.Ct. 394, 395, 67 L.Ed. 785, 24 A.L.R. 1238.

The recent case of *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 56 S.Ct. 918, 80 L.Ed. 1347, 103 A.L.R. 1445, came here on certiorari to the New York court which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the *Adkins* Case and that for that and other reasons the New *389 York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes and this Court held that the 'meaning of the statute' as fixed by the decision of the state court 'must be accepted here as if the meaning had been specifically expressed in the enactment.' 298 U.S. 587, at page 609, 56 S.Ct. 918, 922, 80 L.Ed. 1347, 103 A.L.R. 1445. That view led to the affirmance by this Court of the judgment in the *Morehead* Case, as the Court considered that the only question before it was whether the *Adkins* Case was distinguishable and that reconsideration of that decision had not been sought. Upon that point the Court said: 'The petition for the writ sought review upon the ground that this case

(*Morehead*) is distinguishable from that one (*Adkins*). No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted. * * * Here the review granted was no broader than sought by the petitioner. * * * He is not entitled and does not ask to be heard upon the **581 question whether the *Adkins* Case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar.' 298 U.S. 587, at pp. 604, 605, 56 S.Ct. 918, 920, 80 L.Ed. 1347, 103 A.L.R. 1445.

[1][2] We think that the question which was not deemed to be open in the *Morehead* Case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that state. It has decided that the statute is a reasonable exercise of the police power of the state. In reaching that conclusion, the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the *Adkins* Case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of *390 the state court demands on our part a re-examination of the *Adkins* Case. The importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the *Adkins* Case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. Prior to the decision in the instant case, it had

twice been held valid by the Supreme Court of the state. *Larsen v. Rice*, 100 Wash. 642, 171 P. 1037; *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 P. 595. The Washington statute is essentially the same as that enacted in Oregon in the same year. Laws 1913 (Oregon) c. 62, p. 92. The validity of the latter act was sustained by the Supreme Court of Oregon in *Stettler v. O'Hara*, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann.Cas.1916A, 217, and *Simpson v. O'Hara*, 70 Or. 261, 141 P. 158. These cases, after reargument, were affirmed here by an equally divided court, in 1917. 243 U.S. 629, 37 S.Ct. 475, 61 L.Ed. 937. The law of Oregon thus continued in effect. The District of Columbia Minimum Wage Law (40 Stat. 960) was enacted in 1918. The statute was sustained by the Supreme Court of the District in the *Adkins Case*. Upon appeal the Court of Appeals of the District first affirmed that ruling, but on rehearing reversed it and the case came before this Court in 1923. The judgment of the Court of Appeals holding the act invalid was affirmed, but with Chief Justice Taft, Mr. Justice Holmes, and Mr. Justice Sanford dissenting, and Mr. Justice Brandeis taking no part. The dissenting opinions took the ground that the decision was at variance with the *391 principles which this Court had frequently announced and applied. In 1925 and 1927, the similar minimum wage statutes of Arizona and Arkansas were held invalid upon the authority of the *Adkins Case*. The Justices who had dissented in that case bowed to the ruling and Mr. Justice Brandeis dissented. *Murphy v. Sardell*, 269 U.S. 530, 46 S.Ct. 22, 70 L.Ed. 396; *Donham v. West-Nelson Co.*, 273 U.S. 657, 47 S.Ct. 343, 71 L.Ed. 825. The question did not come before us again until the last term in the *Morehead Case*, as already noted. In that case, briefs supporting the New York statute were submitted by the states of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, and Rhode Island. 298 U.S. page 604, note, 56 S.Ct. 920, 80 L.Ed. 1347, 103 A.L.R. 1445. Throughout this entire period the Washington statute now under consideration has been in force.

[3][4] The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the *Adkins Case* governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in **582 the interests of the community is due process.

*392 [5] This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described.^{FN1}

FN1 *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832; *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, 3 Ann.Cas. 1133; *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436, 13 Ann.Cas. 764.

'But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of con-

tracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.' *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U.S. 549, 565, 31 S.Ct. 259, 262, 55 L.Ed. 328.

[6][7] This power under the Constitution to restrict freedom of contract has had many illustrations.^{FN2} That it may be exercised in the public interest with respect to contracts *393 between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (*Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55); in forbidding the payment of seamen's wages in advance (*Patterson v. The Bark Eudora*, 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315); in prohibiting contracts limiting liability for injuries to employees (*Chicago, Burlington & Quincy R. Co. v. McGuire*, supra); in limiting hours of work of employees in manufacturing establishments (*Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann.Cas.1918A, 1043); and in maintaining workmen's compensation laws (*New York Central R. Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A.1917D, 1, Ann.Cas.1917D, 629; *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann.Cas.1917D, 642). In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion **583 in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from

oppression. *Chicago, Burlington & Quincy R. Co. v. McGuire*, supra, 219 U.S. 549, at page 570, 31 S.Ct. 259, 55 L.Ed. 328.

FN2 *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77; *Railroad Commission Cases*, 116 U.S. 307, 6 S.Ct. 334, 388, 1191, 29 L.Ed. 636; *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 29 S.Ct. 192, 53 L.Ed. 382, 48 L.R.A.(N.S.) 1134, 15 Ann.Cas. 1034; *Atkin v. Kansas*, 191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148; *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205; *Crowley v. Christensen*, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620; *Gundling v. Chicago*, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725; *Booth v. Illinois*, 184 U.S. 425, 22 S.Ct. 425, 46 L.Ed. 623; *Schmidinger v. Chicago*, 226 U.S. 578, 33 S.Ct. 182, 57 L.Ed. 364; *Armour & Co. v. North Dakota*, 240 U.S. 510, 36 S.Ct. 440, 60 L.Ed. 771, Ann.Cas.1916D, 548; *National Union Fire Insurance Co. v. Wanberg*, 260 U.S. 71, 43 S.Ct. 32, 67 L.Ed. 136; *Radice v. New York*, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690; *Yeiser v. Dysart*, 267 U.S. 540, 45 S.Ct. 399, 69 L.Ed. 775; *Liberty Warehouse Company v. Burley Tobacco Growers' Association*, 276 U.S. 71, 97, 48 S.Ct. 291, 297, 72 L.Ed. 473; *Highland v. Russell Car Co.*, 279 U.S. 253, 261, 49 S.Ct. 314, 316, 73 L.Ed. 688; *O'Gorman & Young v. Hartford Insurance Co.*, 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163; *Hardware Insurance Co. v. Glidden Co.*, 284 U.S. 151, 157, 52 S.Ct. 69, 70, 76 L.Ed. 214; *Packer Corporation v. Utah*, 285 U.S. 105, 111, 52 S.Ct. 273, 275, 76 L.Ed. 643, 79 A.L.R. 546; *Stephenson v. Binford*, 287 U.S. 251, 274, 53 S.Ct. 181, 188, 77 L.Ed. 288, 87 A.L.R. 721; *Hartford Accident Co. v. Nelson Co.*, 291 U.S. 352, 360, 54 S.Ct. 392, 395, 78 L.Ed. 840; *Petersen Baking Co. v. Bryan*, 290 U.S. 570, 54 S.Ct. 277, 78 L.Ed. 505, 90 A.L.R.

1285; *Nebbia v. New York*, 291 U.S. 502, 527-529, 54 S.Ct. 505, 511, 512, 78 L.Ed. 940, 89 A.L.R. 1469.

[8] The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden v. Hardy*, supra, where we pointed out the inequality in the footing of the parties. We said (*Id.*, 169 U.S. 366, 397, 18 S.Ct. 383, 390, 42 L.Ed. 780):

'The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that *394 their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.'

[9] And we added that the fact 'that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.' 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.'

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the state has a special interest. That phase of the subject received elaborate consideration in *Muller v. Oregon* (1908)

208 U.S. 412, 28 S.Ct. 324, 326, 52 L.Ed. 551, 13 Ann.Cas. 957, where the constitutional authority of the state to limit the working hours of women was sustained. We emphasized the consideration that 'woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence' and that her physical well being 'becomes an object of public interest and care in order to preserve the strength and vigor of the race.' We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that 'though limitations upon personal and contractual rights may be removed by legislation, there is that in her *395 disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.' Hence she was 'properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.' We concluded that the limitations which the statute there in question 'places upon her contractual powers, upon her right to agree with her employer, as to the time she shall labor' were 'not imposed solely for her benefit, but also largely for the benefit of all.' Again, in *Quong Wing v. Kirkendall*, 223 U.S. 59, 63, 32 S.Ct. 192, 56 L.Ed. 350, in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a 'fictitious equality.' We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the state. In later rulings this Court sustained the regulation of hours of work of women employees in *Riley v. Massachusetts*, 232 U.S. 671, 34 S.Ct. 469, 58 L.Ed. 788 (factories), *Miller v. Wilson*, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A.1915F, 829 (hotels), and *Bosley v. McLaughlin*, 236 U.S. 385, 35 S.Ct. 345, 59 L.Ed. 632 (hospitals).

This array of precedents and the principles they applied were thought by the dissenting Justices in the Adkins Case to demand that the minimum wage statute be **584 sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. 261 U.S. 525, at page 564, 43 S.Ct. 394, 403, 67 L.Ed. 785, 24 A.L.R. 1238. That challenge persists and is without any satisfactory answer. As Chief Justice Taft observed: 'In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to *396 the one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand.' And Mr. Justice Holmes, while recognizing that 'the distinctions of the law are distinctions of degree,' could 'perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate.' *Id.*, 261 U.S. 525, at p. 569, 43 S.Ct. 394, 405, 67 L.Ed. 785, 24 A.L.R. 1238.

One of the points which was pressed by the Court in supporting its ruling in the Adkins Case was that the standard set up by the District of Columbia Act did not take appropriate account of the value of the services rendered. In the Morehead Case, the minority thought that the New York statute had met that point in its definition of a 'fair wage' and that it accordingly presented a distinguishable feature which the Court could recognize within the limits which the Morehead petition for certiorari was deemed to present. The Court, however, did not take that view and the New York Act was held to be essentially the same as that for the District of Columbia. The statute now before us is like the latter, but we are unable to conclude that in its minimum wage requirement the state has passed beyond the boundary of its broad protective power.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees, and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the Adkins Case is pertinent: 'This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as *397 the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been up-held.' 261 U.S. 525, at page 570, 43 S.Ct. 394, 406, 67 L.Ed. 785, 24 A.L.R. 1238. And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character: 'Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law, and that while in individual cases, hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large.' *Id.*, 261 U.S. 525, at page 563, 43 S.Ct. 394, 403, 67 L.Ed. 785, 24 A.L.R. 1238.

[10][11][12][13] We think that the views thus expressed are sound and that the decision in the Adkins Case was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed. Those principles have been reenforced by our subsequent decisions. Thus in *Radice v. New York*, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690, we sus-

tained the New York statute which restricted the employment of women in restaurants at night. In *O'Gorman & Young v. Hartford Fire Insurance Company*, 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation of record for deciding that the limits of power had been transcended. In **585Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469, dealing **398* with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination, and we again declared that if such laws 'have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied'; that 'with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal'; that 'times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.' *Id.*, 291 U.S. 502, at pages 537, 538, 54 S.Ct. 505, 516, 78 L.Ed. 940, 89 A.L.R. 1469.

[14] With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins Case*, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of

existence is not an admissible means to that end? The Legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The Legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' **399* the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The Legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment.

[15][16][17][18] There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the state of Washington

has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The *400 community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The Legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might **586 have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms. *Carroll v. Greenwich Insurance Co.*, 199 U.S. 401, 411, 26 S.Ct. 66, 50 L.Ed. 246; *Patsone v. Pennsylvania*, 232 U.S. 138, 144, 34 S.Ct. 281, 58 L.Ed. 539; *Keokee Coke Co. v. Taylor*, 234 U.S. 224, 227, 34 S.Ct. 856, 58 L.Ed. 1288; *Sproles v. binford*, 286 U.S. 374, 396, 52 S.Ct. 581, 588, 76 L.Ed. 1167; *Semler v. Oregon Board*, 294 U.S. 608, 610, 611, 55 S.Ct. 570, 571, 79 L.Ed. 1086. This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the state's protective power. *Miller v. Wilson*, supra, 236 U.S. 373, at page 384, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A.1915F, 829; *Bosley v. McLaughlin*, supra, 236 U.S. 385, at pages 394, 395, 35 S.Ct. 345, 59 L.Ed. 632; *Radice v. New York*, supra, 264 U.S. 292, at pages 295-298, 44 S.Ct. 325, 326, 327, 68 L.Ed. 690. Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

Our conclusion is that the case of *Adkins v. Children's Hospital*, supra, should be, and it is, overruled. The judgment of the Supreme Court of

the state of Washington is affirmed.

Affirmed.

Mr. Justice SUTHERLAND.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, Mr. Justice BUTLER, and I think the judgment of the court below should be reversed.

*401 The principles and authorities relied upon to sustain the judgment were considered in *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238, and *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 56 S.Ct. 918, 80 L.Ed. 1347, 103 A.L.R. 1445, and their lack of application to cases like the one in hand was pointed out. A sufficient answer to all that is now said will be found in the opinions of the court in those cases. Nevertheless, in the circumstances, it seems well to restate our reasons and conclusions.

Under our form of government, where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been intrusted to this court when the question arises in a controversy within its jurisdiction; and so long as the power remains there, its exercise cannot be avoided without betrayal of the trust.

It has been pointed out many times, as in the *Adkins Case*, that this judicial duty is one of gravity and delicacy; and that rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an in-

dividual one. And in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so *402 important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

The suggestion that the only check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution, and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint. This Court acts as a unit. It cannot act in any other way; and the majority (whether a bare majority or a majority of all but one of its members), therefore, establishes the controlling rule as the decision of the court, binding, so long as it remains unchanged, equally upon those who disagree and upon those who subscribe to it. Otherwise, orderly**587 administration of justice would cease. But it is the right of those in the minority to disagree, and sometimes, in matters of grave importance, their imperative duty to voice their disagreement at such length as the occasion demands-always, of course, in terms which, however forceful, do not offend the proprieties or impugn the good faith of those who think otherwise.

It is urged that the question involved should now receive fresh consideration, among other reasons, because of 'the economic conditions which have supervened'; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more gen-

eral words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of *403 living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written-that is, that they do not apply to a situation now to which they would have applied then-is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.

The words of Judge Campbell in *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 139, 140, apply with peculiar force. 'But it may easily happen,' he said, 'that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things. * * *

'Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances. * * * But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false construction.' The principle is reflected in many decisions of this Court. See *South Carolina v. United States*, 199 U.S. 437, 448, 449, 26 S.Ct. 110, 50 L.Ed. 261, 4 Ann.Cas. 737; *Lake County v. Rollins*, 130 U.S. 662, 670, 9 S.Ct. 651, 32 L.Ed. 1060; *Knowlton v. Moore*, 178 U.S. 41, 95, 20 S.Ct. 747, 44 L.Ed. 969; *Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L.Ed. 1233; *Craig v. Missouri*, 4 Pet. 410, 431, 432, 7 L.Ed. 903; *Ex parte Bain*, 121 U.S. 1, 12, 7 S.Ct. 781, 30 L.Ed. 849; *Maxwell v. Dow*,

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176 U.S. 581, 602, 20 S.Ct. 494, 44 L.Ed. 597; Jarrott v. Moberly, 103 U.S. 580, 586, 26 L.Ed. 492.

*404 The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation-and the only true remedy-is to amend the Constitution. Judge Cooley, in the first volume of his *Constitutional Limitations* (8th Ed.) p. 124, very clearly pointed out that much of the benefit expected from written Constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. He pointed out that the common law, unlike a Constitution, was subject to modification by public sentiment and action which the courts might recognize; but that 'a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. * * * What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent **588 time when a court has occasion to pass upon it.'

The Adkins Case dealt with an Act of Congress which had passed the scrutiny both of the legislative and executive branches of the government. We recognized that *405 thereby these departments had affirmed the validity of the statute, and properly de-

clared that their determination must be given great weight, but we then concluded, after thorough consideration, that their view could not be sustained. We think it not inappropriate now to add a word on that subject before coming to the question immediately under review.

The people by their Constitution created three separate, distinct, independent, and coequal departments of government. The governmental structure rests, and was intended to rest, not upon any one or upon any two, but upon all three of these fundamental pillars. It seems unnecessary to repeat, what so often has been said, that the powers of these departments are different and are to be exercised independently. The differences clearly and definitely appear in the Constitution. Each of the departments is an agent of its creator; and one department is not and cannot be the agent of another. Each is answerable to its creator for what it does, and not to another agent. The view, therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling.

Coming, then, to a consideration of the Washington statute, it first is to be observed that it is in every substantial respect identical with the statute involved in the Adkins Case. Such vices as existed in the latter are present in the former. And if the Adkins Case was properly decided, as we who join in this opinion think it was, it necessarily follows that the Washington statute is invalid.

In support of minimum-wage legislation, it has been urged, on the one hand, that great benefits will result in favor of underpaid labor, and, on the other hand, that the danger of such legislation is that the minimum will tend to become the maximum and thus bring down the *406 earnings of the more efficient toward the level of the less-efficient employees. But with these speculations we have nothing to do. We are concerned only with the question of constitutionality.

That the clause of the Fourteenth Amendment which forbids a state to deprive any person of life,

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liberty, or property without due process of law includes freedom of contract is so well settled as to be no longer open to question. Nor reasonably can it be disputed that contracts of employment of labor are included in the rule. *Adair v. United States*, 208 U.S. 161, 174, 175, 28 S.Ct. 277, 280, 52 L.Ed. 436, 13 Ann.Cas. 764; *Coppage v. Kansas*, 236 U.S. 1, 10, 14, 35 S.Ct. 240, 59 L.Ed. 441, L.R.A.1915C, 960. In the first of these cases, Mr. Justice Harlan, speaking for the Court, said, 'The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. * * * In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.'

In the *Adkins Case* we referred to this language, and said that while there was no such thing as absolute freedom of contract, but that it was subject to a great variety of restraints, nevertheless, freedom of contract was the general rule and restraint the exception; and that the power to abridge that freedom could only be justified by the existence of exceptional circumstances. This statement of the rule has been many times affirmed; and we do not understand that it is questioned by the present decision.

We further pointed out four distinct classes of cases in which this court from time to time had upheld statutory interferences with the liberty of contract. They were, in brief, (1) statutes fixing rates and charges to be *407 exacted by businesses impressed with a public interest; (2) statutes relating to contracts for the performance of public work; (3) statutes prescribing the character, methods, and time for payment of wages; and (4) statutes fixing hours of labor. It is the last class that has been most relied upon as affording support for minimum-wage **589 legislation; and much of the opinion in the

Adkins Case, 261 U.S. 525, 547-553, 43 S.Ct. 394, 397-399, 67 L.Ed. 785, 24 A.L.R. 1238, is devoted to pointing out the essential distinction between fixing hours of labor and fixing wages. What is there said need not be repeated. It is enough for present purposes to say that statutes of the former class deal with an incident of the employment, having no necessary effect upon wages. The parties are left free to contract about wages, and thereby equalize such additional burdens as may be imposed upon the employer as a result of the restrictions as to hours by an adjustment in respect of the amount of wages. This court, wherever the question is adverted to, has been careful to disclaim any purpose to uphold such legislation as fixing wages, and has recognized an essential difference between the two. E.g., *Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann.Cas.1918A, 1043; *Wilson v. New*, 243 U.S. 332, 345, 346, 353, 354, 37 S.Ct. 298, 61 L.Ed. 755, L.R.A.1917E, 938, Ann.Cas.1918A, 1024; and see *Freund, Police Power*, s 318.

We then pointed out that minimum wage legislation such as that here involved does not deal with any business charged with a public interest, or with public work, or with a temporary emergency, or with the character, methods, or periods of wage payments, or with hours of labor, or with the protection of persons under legal disability, or with the prevention of fraud. It is, simply and exclusively, a law fixing wages for adult women who are legally as capable of contracting for themselves as men, and cannot be sustained unless upon principles apart from those involved in cases already decided by the court.

Two cases were involved in the *Adkins* decision. In one of them it appeared that a woman twenty-one years of age, *408 who brought the suit, was employed as an elevator operator at a fixed salary. Her services were satisfactory, and she was anxious to retain her position, and her employer, while willing to retain her, was obliged to dispense with her services on account of the penalties prescribed by the act. The wages received by her were

the best she was able to obtain for any work she was capable of performing; and the enforcement of the order deprived her, as she alleged, not only of that employment, but left her unable to secure any position at which she could make a living with as good physical and moral surroundings and as good wages as she was receiving and was willing to take. The Washington statute, of course, admits of the same situation and result, and, for aught that appears to the contrary the situation in the present case may have been the same as that just described. Certainly, to the extent that the statute applies to such cases, it cannot be justified as a reasonable restraint upon the freedom of contract. On the contrary, it is essentially arbitrary.

Neither the statute involved in the Adkins Case nor the Washington statute, so far as it is involved here, has the slightest relation to the capacity or earning power of the employee, to the number of hours which constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment. The sole basis upon which the question of validity rests is the assumption that the employee is entitled to receive a sum of money sufficient to provide a living for her, keep her in health and preserve her morals. And, as we pointed out at some length in that case (261 U.S. 525, at pages 555-557, 43 S.Ct. 394, 400, 401, 67 L.Ed. 785, 24 A.L.R. 1238), the question thus presented for the determination of the board can not be solved by any general formula prescribed by a statutory bureau, since it is not a composite but an individual question to be answered for each individual, considered by herself. *409 What we said further in that case (261 U.S. 525, at pages 557-559, 43 S.Ct. 394, 401, 67 L.Ed. 785, 24 A.L.R. 1238), is equally applicable here:

'The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of

the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half **590 of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

'The feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it *410 exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals. The ethical right of every worker, man or woman, to a living wage may be

conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz. that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or grocer to buy food, he is morally entitled to obtain the worth of his money; but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demanding more, simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission *411 power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which pre-

scribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it, and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.'

Whether this would be equally or at all true in respect of the statutes of some of the states we are not called upon to say. They are not now before us; and it is enough that it applies in every particular to the Washington statute now under consideration.

The Washington statute, like the one for the District of Columbia, fixes minimum wages for adult women. Adult men and their employers are left free to bargain as they please; and it is a significant and an **591 important fact that all state statutes to which our attention has been called are of like character. The common-law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal *412 right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. And it is an arbitrary exercise of the legislative power to do so. In the *Tipaldo Case*, 298 U.S. 587, 615, 56 S.Ct. 918, 925, 80 L.Ed. 1347, 103 A.L.R. 1445, it appeared that the New York Legislature had passed two minimum-wage measures—one dealing with women alone, the other with both men and women. The act which included men was vetoed by the Governor. The other, applying to women alone, was approved. The 'factual background' in respect of both measures was substantially the same. In pointing out the arbitrary discrimination which resulted (298 U.S. 587, at pages 615-617, 56 S.Ct. 918, 925, 80 L.Ed. 1347, 103 A.L.R. 1445), we said:

'These legislative declarations, in form of findings or recitals of fact, serve well to illustrate why

57 S.Ct. 578

300 U.S. 379, 57 S.Ct. 578, 1 L.R.R.M. (BNA) 754, 108 A.L.R. 1330, 81 L.Ed. 703, 8 O.O. 89, 1 Lab.Cas. P 17,021
(Cite as: 300 U.S. 379, 57 S.Ct. 578)

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any measure that deprives employers and adult women of freedom to agree upon wages, leaving employers and men employees free so to do, is necessarily arbitrary. Much, if not all that in them is said in justification of the regulations that the act imposes in respect of women's wages apply with equal force in support of the same regulation of men's wages. While men are left free to fix their wages by agreement with employers, it would be fanciful to suppose that the regulation of women's wages would be useful to prevent or lessen the evils listed in the first section of the act. Men in need of work are as likely as women to accept the low wages offered by unscrupulous employers. Men in greater number than women support themselves and dependents and because of need will work for whatever wages they can get and that without regard to the value of the service and even though the pay is less than minima prescribed in accordance with this act. It is plain that, under circumstances such as those portrayed in the 'factual background,' prescribing of minimum wages for women alone would unreasonably restrain them *413 in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work.'

An appeal to the principle that the Legislature is free to recognize degrees of harm and confine its restrictions accordingly, is but to beg the question, which is—Since the contractual rights of men and women are the same, does the legislation here involved, by restricting only the rights of women to make contracts as to wages, create an arbitrary discrimination? We think it does. Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free. Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average man would lack substance. The ability to make a fair bargain, as every one knows, does not depend upon sex.

If, in the light of the facts, the state legislation, without reason or for reasons of mere expediency,

excluded men from the provisions of the legislation, the power was exercised arbitrarily. On the other hand, if such legislation in respect of men was properly omitted on the ground that it would be unconstitutional, the same conclusion of unconstitutionality is inescapable in respect of similar legislative restraint in the case of women. Adkins Case, 261 U.S. 525, 553, 43 S.Ct. 394, 399, 67 L.Ed. 785, 24 A.L.R. 1238.

Finally, it may be said that a statute absolutely fixing wages in the various industries at definite sums and forbidding employers and employees from contracting for any other than those designated would probably not be thought to be constitutional. It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to *414 become substantially the same, the right to make any contract in respect of wages will have been completely abrogated.

A more complete discussion may be found in the Adkins and Tipaldo Cases cited supra.

U.S. 1937.

West Coast Hotel Co. v. Parrish

300 U.S. 379, 57 S.Ct. 578, 1 L.R.R.M. (BNA) 754, 108 A.L.R. 1330, 81 L.Ed. 703, 8 O.O. 89, 1 Lab.Cas. P 17,021

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FDR v. The Constitution

The Court-Packing Fight
and the Triumph of Democracy

BURT SOLOMON



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Franklin Jr. The groom's family considered the marriage a godsend for the most foul-tempered of the Roosevelt boys, a Harvard senior who was living lavishly at school, much like his father had. But the president had another reason for feeling a frisson of delight at the marital alliance with the wealthy family of industrial chemists. He could only savor the provocation of his presence at the wedding reception on June 30, when the du Ponts would have no choice but to welcome a traitor to their class into their home.

"OYEZ, OYEZ, OYEZ."

Precisely at noon on Easter Monday, the twenty-ninth of March, the vast velvet drapes parted and Charles Evans Hughes stepped into the courtroom, his eight brethren following. The courtroom's high ceiling and indirect lighting evoked the feel of a church, as did the rules of decorum, which barred spectators from squirming or chewing gum or reading a newspaper or taking notes.

The courtroom had been packed each decision day, in anticipation of verdicts in the five Wagner Act cases pending since February and in another minimum wage case, from Washington State, which had been argued in December. By eleven o'clock, as many as four thousand people had entered the building, though the courtroom itself seated no more than three hundred. Every seat was occupied, and a double line of spectators waited to get in. The presence of senators and especially of most of the justices' wives foretold an event of consequence. As the gavel fell, the justices took their seats, and then the lawyers, reporters, VIPs, social hostesses, and throngs of Easter tourists did the same.

The announcement of the second case brought spectators to the edge of their seats. *West Coast Hotel Co. v. Parrish* was a challenge to the pre-World War statute in Washington State that prescribed a minimum wage for women of thirty cents an hour. It was strikingly similar to the New York law that the Court had struck down, to such public disgust, just ten months earlier. The very fact that the justices had accepted the *Parrish* case at all, and on the same day in October that they refused a rehearing of the New York case, had aroused competing conjectures among lawyers in the know. Did the Court intend to change its mind or—this was considered more

likely—did it mean to bury the issue by striking yet another conservative blow?

Elsie Parrish was a forty-six-year-old grandmother and a chambermaid at the Cascadian Hotel in Wenatchee, Washington, at the base of the Cascades. She was paid \$12.00 for a forty-eight-hour week, short of the \$14.40 the state law required, so she and her husband sued for \$216.19 in back pay. The state's own supreme court had found in their favor, which prompted the hotel's appeal to the highest court in the land. The attorneys for Elsie Parrish and for Washington State had specifically asked the Court to uphold the state law by overturning its fourteen-year-old judicial precedent, in the *Adkins* case, which had struck down a minimum wage for women in Washington, D.C.

Charles Evans Hughes himself was delivering the majority opinion. He had voted with the minority in the New York case, against the five conservative justices who had overturned the minimum wage on the grounds that it deprived employers of their right of due process to bargain freely with workers. If Hughes was presenting the majority opinion, either he had switched to the conservative side to assign the opinion to himself—a chief justice's prerogative—or the Court was reversing itself. The answer became evident just before Hughes started to read, when Justice McReynolds, an unbending conservative, rose from his high-backed chair and, with a swish of the curtains, vanished from view.

"This case presents the question of the constitutional validity of the minimum wage law of the State of Washington," Hughes began, and he left no one in suspense for long. "We are of the opinion," he declared, "that this ruling of the state court demands on our part a reexamination of the *Adkins* case." To reexamine, everyone understood, was to overturn. He specified three reasons for such a step: the narrow margin, five to four, by which the Court had decided *Adkins*; the potent—indeed, poignant—fact that eighteen states had passed minimum wage laws, mainly for women and children; and the economic conditions that had arisen since the *Adkins* decision in 1923. In Hughes's mind, apparently, the case did not involve legal principles or even the intent of the Constitution, but matters more temporal—the thinness of a long-ago majority, and the political and economic developments in the fourteen years since.

This case, like the earlier minimum wage cases, hinged on the liberty

of contract that the conservative jurists had discerned in the due process clauses in the Fifth and Fourteenth amendments, which guaranteed that neither the federal nor a state government, respectively, could deprive a "person" of property without a legal proceeding. Hughes cared deeply about the stability of the law, as a bulwark of the judiciary's standing with the people, and he had no wish to scuttle the liberty of contract. But he had every intention of limiting it. Any such liberty is not "absolute and uncontrollable," he declared in a tone of triumph. Instead, it is "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." The devoted husband and father of three daughters wanted to know, "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?"

And even if a policy was unwise, the chief justice decreed, "still the legislature is entitled to its judgment." This was the doctrine, invoked more often than obeyed, of judicial self-restraint. As long as the regulation was reasonably related to its goal and was adopted in the community's interest, Hughes reasoned, the requirements of due process had been met. The Constitution, in short, was a living document, and its meaning depended upon lawmakers' assessments of society's needs.

This was not the first time the Court's majority had accorded such a deference to legislators' judgment. If the chief justice's reasoning sounded familiar, it was meant to. It echoed Justice Roberts's reasoning in the *Nebbia* case, three years before, the far-reaching liberal opinion that had allowed New York regulators to control the retail price of milk. Hughes persisted in quoting from Roberts's ruling—three times—in making his case, and at last the Court's judgment was plain. "Our conclusion," the chief justice boomed, his eyes flashing, "is that the case of *Adkins v. Children's Hospital* should be, and it is, overruled."

The reversal was blunt and unembarrassed—and a shock. The Court had frequently overturned its own precedents. Justice Brandeis had once listed fifty such occasions in a footnote. But never before had it happened so quickly. In the most famous instance, after President Grant had filled his two vacancies, fifteen months passed before the Supreme Court reversed its decision on legal tender—its swiftness a serious mistake, by Hughes's reckoning, one that had shaken popular respect for the Court.

This time the Court had taken less than ten months since it had ruled the other way in the *Tipaldo* case involving an almost identical law in New York. And unlike in Grant's day, the very same set of justices had changed its collective mind.

The size of the reversing majority remained a mystery, however, until Hughes finished and Justice Sutherland began. Even his ideological antagonists admired the cultured Utahan with the Vandyke beard—"for whatever you may say of him," Brandeis had once remarked, "he has character and conscience." Just the previous Thursday he had turned seventy-five, and from the bench he viewed the world in black and white, as if the nineteenth century still lived and the frontier had never died. A friend of Warren G. Harding and a devotee of Herbert Spencer and his social Darwinism, Sutherland had once proclaimed that the natural law of supply and demand ought to be ranked with the multiplication tables, the Constitution, and the Sermon on the Mount as fundamental truths. He had voted to overturn every New Deal law that had come before the Court other than the TVA.

From his seat to the right of Justice McReynolds's vacant chair, Sutherland began to read his dissent in a voice that could hardly be heard. "Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Butler and I think the judgment of the court . . ." In an instant, everything was clear: Owen Roberts had switched sides. It had been Roberts and nobody else. On a five-to-four vote, the Court was reversing its five-to-four vote in the *Tipaldo* case of the previous June.

Justice Sutherland took a sip of water, and suddenly in place of the mild-mannered justice sprang a man unwilling to shrink from a fight. He had watched his black-and-white world corrode into grays, and he meant to deliver a eulogy of sorts, a defense of his fourteen and a half years on the Court.

"The meaning of the Constitution does not change with the ebb and flow of economic events," the most eloquent of the Four Horsemen proclaimed, rapping his knuckles on the bench. He quoted a legal scholar that "the meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time." To Sutherland, the proper conclusion could not have been more obvious. To the extent that a minimum wage for women "exceeds the fair value of the services rendered," he deduced, "it

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amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole." Time and again, he noted, the Court had recognized a liberty of contract, "and we do not understand" what has changed.

Justice Roberts sat in his swivel chair at the left end of the bench and pressed a handkerchief to his lips. While the chief justice presented the majority opinion, Roberts had leaned back in his seat, his eyes shut, but as Sutherland delivered the dissent, Roberts sat up and kept glancing along the bench at his erstwhile ally with a look of annoyance. Sutherland was demanding that he explain himself, and Roberts had no such intention.

He alone had switched sides and everything had changed. "Here, truly, was another Saul at another Tarsus," Professor Corwin wrote. Roberts had voted with the conservatives in striking down New York's minimum wage for women, and now he sided with the liberals to uphold a minimum wage for women in Washington State. Suddenly, the "no-man's-land" the president had scorned, where neither the state nor the federal government could intervene, had disappeared. At last, it seemed, state legislatures possessed the authority to regulate business to help society's needy, and presumably the federal government could do the same.

Before the day's session ended, the justices had announced four other decisions that allowed the government to protect the weak against the strong. White Monday, the New Dealers called March 29, 1937, in contrast to Black Monday, the day in 1935 when the NRA had been struck down and the liberals' accomplishments were slipping away. The *Christian Science Monitor* trumpeted the gist of the news that afternoon, in a subheadline reporting that the nation's High Court

"Opens the Way
to Liberal Era."

Unless, of course, the Court decided to reverse itself once again. Of the day's five rulings, one had been unanimous but the other four were decided by the narrowest of margins—in each case, the same five justices prevailing over the Four Horsemen. Every time, Owen Roberts lined up with the liberals, without once explaining why. At least in regard to the minimum wage for women, Arthur Krock pointed out the next morning in

the *New York Times* says it is."

Owen Roberts, because as a middle-aged man Owen's mind lieve their the justice against the his name and served was called

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the *New York Times*, "the Constitution . . . is today what Justice Roberts says it is." Justice was a seesaw, on the fulcrum of a single justice's scale.

Owen Roberts's paternal grandparents had named his father Josephus, because of its biblical sound, and Josephus Roberts had bestowed it as a middle name upon his only son. Neighbors had tried to persuade Owen's mother that it was a Jewish historian's name, but she did not believe them. As it happened, they were correct, and it offered an omen for the justice-to-be. In A.D. 70, a general for the Jews during their revolt against the Romans abandoned his troops in the midst of battle, changed his name from Joseph ben Matthias to Flavius Josephus, moved to Rome, and served as the emperor's court historian. "The traitor of Jerusalem," he was called—quick to betray his people, too willing to switch sides.

"Roberts' somersault"—such was Felix Frankfurter's epithet, in a letter to Harlan Stone, the day after the Court reversed itself on the minimum wage. "Everything that he now subscribes to he rejected . . . and everything that he rejected in your dissenting opinion of last June, especially the significance of his own opinion in the *Nebbia* case, he now subscribes to. What kind of respect for the institution can be aroused in informed and able young minds?"

"A sad chapter in our judicial history," a disheartened Stone replied, though Roberts's switch had given the liberals a victory, alluding darkly to "explanations which do not explain."

PEOPLE IN WASHINGTON, by and large, were finicky in their humor. They shunned slapstick or farce or anything off-color. Irony was a hard sell, and Hollywood's favorite comedies, about the careless rich and the virtuous poor, left many in Washington unamused. The thriving city was not a dour place, but it was not a frivolous one either. People took themselves seriously; power was not only an aphrodisiac but a depressant as well. Humor in the capital assumed a certain level of knowledge.

This was the case for the witticism that swept the capital in the spring of 1937, a twist on one of Benjamin Franklin's famous maxims that had made such a commercial success of *Poor Richard's Almanack*: *Early to bed and early to rise, makes a man healthy, wealthy, and wise. A stitch in time saves nine.*

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H

Supreme Court of Washington,
 En Banc.
 Ronald LUNSFORD and Esther Lunsford, Re-
 spondents,
 v.
 SABERHAGEN HOLDINGS, INC., and First Doe
 through One Hundreth DOE, Petitioners.

No. 80728-1.
 Argued Oct. 30, 2008.
 Decided June 4, 2009.

Background: Son of refinery worker brought action against manufacturer whose predecessor supplied asbestos-containing materials, alleging that manufacturer was strictly liable for injuries caused by childhood exposure to asbestos dust brought home by father. The trial court granted manufacturer's motion for summary judgment. Plaintiff appealed. The Court of Appeals, 125 Wash.App. 784, 106 P.3d 808, reversed and remanded. On remand, the Superior Court, King County, No. 02-2-32133.0, Sharon S. Armstrong, J., granted manufacturer's motion for summary judgment. Plaintiff appealed again. The Court of Appeals, 139 Wash.App. 334, 160 P.3d 1089, reversed and remanded. Manufacturer appealed.

Holding: The Supreme Court, Fairhurst, J., held that strict product liability applied retroactively to plaintiff's claims.

Affirmed, and remanded.

Madsen, J., concurred and filed opinion, joined by Alexander, C.J., and Johnson, J.

West Headnotes

[1] Courts 106 ↪ 100(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases

Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have prospective effect only.

[2] Courts 106 ↪ 100(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases

"Selective prospectivity" allows a court to apply a new rule of law to the litigants in the case announcing the new rule and to all litigants whose claims arise after that decision.

[3] Appeal and Error 30 ↪ 893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most Cited Cases

The Supreme Court reviews summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party.

[4] Appeal and Error 30 ↪ 893(1)

30 Appeal and Error

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30XVI Review
 30XVI(F) Trial De Novo
 30k892 Trial De Novo
 30k893 Cases Triable in Appellate
 Court
 30k893(1) k. In General. Most
 Cited Cases
 Where only legal questions are before the Su-
 preme Court, the court reviews those questions of
 law de novo.

[5] Courts 106 ↪ 100(1)

106 Courts
 106II Establishment, Organization, and Proced-
 ure
 106II(H) Effect of Reversal or Overruling
 106k100 In General
 106k100(1) k. In General; Retroactive
 or Prospective Operation. Most Cited Cases
 Judicial decisions may have retroactive, pro-
 spective, or selectively prospective application.

[6] Courts 106 ↪ 100(1)

106 Courts
 106II Establishment, Organization, and Proced-
 ure
 106II(H) Effect of Reversal or Overruling
 106k100 In General
 106k100(1) k. In General; Retroactive
 or Prospective Operation. Most Cited Cases
 "Retroactive application" of a new rule of law
 applies a judicial decision both to the litigants be-
 fore the court and all cases arising prior to and sub-
 sequent to the announcing of the new rule.

[7] Courts 106 ↪ 100(1)

106 Courts
 106II Establishment, Organization, and Proced-
 ure
 106II(H) Effect of Reversal or Overruling
 106k100 In General
 106k100(1) k. In General; Retroactive
 or Prospective Operation. Most Cited Cases

"Prospective application" of a new rule of law
 affects only those cases arising after the announce-
 ment of the new rule.

[8] Courts 106 ↪ 100(1)

106 Courts
 106II Establishment, Organization, and Proced-
 ure
 106II(H) Effect of Reversal or Overruling
 106k100 In General
 106k100(1) k. In General; Retroactive
 or Prospective Operation. Most Cited Cases
 "Selective prospective application" of a new
 rule of law requires that a judicial decision is ap-
 plied to the litigants before the court, but not to
 those whose causes of action arose before the an-
 nouncement of the new rule.

[9] Courts 106 ↪ 100(1)

106 Courts
 106II Establishment, Organization, and Proced-
 ure
 106II(H) Effect of Reversal or Overruling
 106k100 In General
 106k100(1) k. In General; Retroactive
 or Prospective Operation. Most Cited Cases
 When questions of state law are at issue, state
 courts generally have the authority to determine the
 retroactivity of their own decisions.

[10] Courts 106 ↪ 100(1)

106 Courts
 106II Establishment, Organization, and Proced-
 ure
 106II(H) Effect of Reversal or Overruling
 106k100 In General
 106k100(1) k. In General; Retroactive
 or Prospective Operation. Most Cited Cases
 Selective application of new rules of law viol-
 ates the principle of treating similarly situated de-
 fendants the same; the problem with not applying
 new rules to cases pending on direct review is the
 actual inequity that results when the Supreme Court

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chooses which of many similarly situated defendants should be the chance beneficiary of the new rule.

[11] Courts 106 ↪89

106 Courts
 106II Establishment, Organization, and Procedure

106II(G) Rules of Decision
 106k88 Previous Decisions as Controlling or as Precedents

106k89 k. In General. Most Cited Cases
 "Stare decisis" protects reliance interests by requiring a clear showing that an established rule is incorrect and harmful before it is abandoned; the substantive restraints placed on courts to not only heed the relevant judicial past in arriving at a decision, but also to arrive at it within as straight and narrow a path as possible, ordinarily produces changes in the law with a minimum of shock to those who act in reliance upon judicial decisions.

[12] Appeal and Error 30 ↪100(1)

30 Appeal and Error
 30III Decisions Reviewable
 30III(E) Nature, Scope, and Effect of Decision
 30k96 Relating to Provisional Remedies.
 30k100 Injunction
 30k100(1) k. In General. Most Cited Cases

Where changes in the law cannot be made without undue hardship, the Supreme Court has discretion to apply a new rule of law purely prospectively to all litigants whose claims arise after its decision; if rights have vested under a faulty rule, or a constitution misinterpreted, or a statute misconstrued, or subsequent events demonstrate a ruling to be in error, prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected.

[13] Courts 106 ↪100(1)

106 Courts
 106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling
 106k100 In General
 106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases

Once the Supreme Court has resolved the issue of retroactive application of a new rule of law, whether by applying the new rule to the parties before the court or by announcing the new rule will apply prospectively only, the rule will be applied equally to all similarly situated litigants with no further balancing of the equities in the individual case or any other test.

[14] Courts 106 ↪100(1)

106 Courts
 106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling
 106k100 In General
 106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
 Selective prospectivity of a new rule of law violates the principle that all similarly situated litigants should be treated equally.

[15] Courts 106 ↪90(1)

106 Courts
 106II Establishment, Organization, and Procedure

106II(G) Rules of Decision
 106k88 Previous Decisions as Controlling or as Precedents
 106k90 Decisions of Same Court or Co-Ordinate Court
 106k90(1) k. In General. Most Cited Cases

A later holding "overrules" a prior holding sub silentio when it directly contradicts the earlier rule of law.

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[16] Courts 106 ⇨ 89

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k89 k. In General. Most Cited Cases

The doctrine of stare decisis applies regardless of whether the Supreme Court overrules a prior decision explicitly or implicitly; therefore, the court will continue to require a clear showing that an established rule is incorrect and harmful.

[17] Courts 106 ⇨ 100(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases

Strict product liability applies retroactively to all claims against manufacturers and suppliers of products, regardless of whether those claims arose prior or subsequent to the Supreme Court's adoption of strict liability provision of the Restatement of Torts. Restatement (Second) of Torts § 402A.

[18] Courts 106 ⇨ 100(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases

The Supreme Court's decisions of law apply retroactively to all litigants not barred by procedural requirements unless the court expressly limits its decision to purely prospective application.

**1093 Timothy Kost Thorson, Jason Wayne Anderson, Carney Bradley & Spellman, Seattle, for Petitioner.

Philip Albert Talmadge, Talmadge/Fitzpatrick, Tukwila, Cameron O. Carter, Brayton Purcell, LLP, Portland, OR, for Respondent.

James Otis Neet, Jr., Kansas City, MO, Paul Kalish, Crowell & Moring, LLP, Washington, DC, Karen Harned, Elizabeth Milito, N.F.I.B.L.F., Washington, DC, **1094 Robin S. Conrad, Amar Sarwal, Washington, DC, Lynda Mounts, Kenneth Stoller, American Ins. Ass'n, Washington, DC, Mark Behrens, Shook, Hardy & Bacon, LLP, Washington, DC, George W. Keely, Keely, Kuenn & Reid, Chicago, IL, Ann Spragens, Sean McMurrrough, Property Casualty Insurers, Des Plaines, IL, Gregg Dykstra, National Ass'n of Mutual Ins. Co., Indianapolis, IN, for amicus curiae on behalf of American Insurance Association.

William Joel Ritzick, Janet L. Rice, Schroeter & Bender, Seattle, for amicus curiae on behalf of Schroeter, Goldmark & Bender.

Bryan Patrick Harnetiaux, Spokane, WA, Tim M. Higgins, Winston & Cashatt, Spokane, WA, for amici curiae on behalf of Washington State Ass'n for Justice Foundation.

FAIRHURST, J.

[1][2] *267 ¶ 1 This case requires us to decide whether strict product liability applies retroactively to a claim arising out of asbestos exposure occurring prior to our adoption of strict product liability. "Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have prospective effect only." *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash.2d 645, 671, 384 P.2d 833 (1963) (quoting *Fla. Forest & Park Serv. v. Strickland*, 154 Fla. 472, 476, 18 So.2d 251 (1944)). An exception to this general rule is selective prospectivity,

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which allows a court to apply a new rule of law to the litigants in the case announcing the new rule and to all litigants whose claims arise after that decision. Claims arising prior to the announcement of the new rule of law continue to be governed under the old-now overruled-rule of law.

¶ 2 In *Robinson v. City of Seattle*, 119 Wash.2d 34, 830 P.2d 318 (1992), we abolished selective prospectivity. *Robinson* eliminates selective prospectivity by holding “retroactive application of a principle in a case announcing a new rule precludes prospective application of the rule in any subsequently raised suit based upon the new rule.” *Id.* at 77, 830 P.2d 318 (emphasis omitted).

*268 ¶ 3 Saberhagen Holdings, Inc., argues we have implicitly overruled *Robinson*. According to Saberhagen, before Ronald Lunsford's strict product liability claim, filed by Respondents Ronald and Esther Lunsford, can go forward, the court must apply the *Chevron Oil* test^{FN1} to determine if strict product liability should have selectively prospective application. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), *overruled in part by Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). We disagree. This court has not overruled *Robinson*. Under *Robinson*, because we have already applied strict product liability retroactively, it applies to all claims arising before our adoption of strict product liability as to manufacturers in 1969^{FN2} and as to product suppliers in 1975.^{FN3} This necessarily includes Lunsford's claims against Saberhagen. We affirm.

FN1. The United States Supreme Court adopted a three factor test for determining whether a new rule of law should depart from the default rule of retroactivity to be applied either selectively prospectively-only to the litigants before the court and to those whose claims arise after the decision-or purely prospectively-only to those whose claims arise after the new decision. *Chevron Oil Co. v. Huson*, 404 U.S.

97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), *overruled in part by Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).

FN2. *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 452 P.2d 729 (1969).

FN3. *Seattle-First Nat'l Bank v. Tabert*, 86 Wash.2d 145, 542 P.2d 774 (1975).

I. FACTUAL AND PROCEDURAL BACKGROUND

Facts

¶ 4 Lunsford suffers from mesothelioma as a result of his exposure to asbestos over a 29 year period, including nonoccupational exposure through his father, Oakley Lunsford, from 1948 to 1965. Oakley Lunsford worked as an insulator at a Texaco refinery in Anacortes, Washington, during the summer of 1958, where he worked with asbestos insulation products supplied by The Brower Company.**1095^{FN4} *269 Lunsford claims he was exposed to asbestos fibers Oakley Lunsford brought home on his clothing and tools. Lunsford alleges causes of action in negligence and strict product liability against Saberhagen as Brower's successor in interest.

FN4. Saberhagen alleges Brower was a product seller, and not a manufacturer. Clerk's Papers at 51, 54. For purposes of this opinion only, we assume this is correct. Whether Brower is a product seller or manufacturer for purposes of *Restatement (Second) of Torts*, section 402A (1965), has no effect on the outcome of this decision.

Procedural History

¶ 5 Saberhagen first moved for partial summary judgment on Lunsford's strict product liability claim in King County Superior Court, arguing Saberhagen was not liable as a matter of law because Lunsford was not a “user” under section 402A of the *Restatement (Second) of Torts* (1965).

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The trial court granted Sabotage's motion for summary judgment. The Court of Appeals overturned the trial court, holding that a household member was a "user" for purposes of section 402A if his exposure to the product is reasonably foreseeable. *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wash.App. 784, 792, 106 P.3d 808, 812 (2005).

¶ 6 On remand, Saberhagen sought partial summary judgment on Lunsford's strict product liability claims a second time, arguing that strict product liability should not apply retroactively in this case. The trial court agreed and dismissed Lunsford's strict product liability claims. The Court of Appeals reversed, holding *Robinson* requires retroactive application of strict product liability to Lunsford's action against Saberhagen. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wash.App. 334, 347, 160 P.3d 1089 (2007).

¶ 7 Saberhagen asks this court to reverse the Court of Appeals. It claims the Court of Appeals opinion conflicts with this court's decisions in *State v. Atsbeha*, 142 Wash.2d 904, 16 P.3d 626 (2001), *In re Detention of Audett*, 158 Wash.2d 712, 147 P.3d 982 (2006), and *Jain v. State Farm Mutual Automobile Insurance Co.*, 130 Wash.2d 688, 926 P.2d 923 (1996), all of which Saberhagen claims implicitly overrule *Robinson* and its bar against selective prospectivity.

*270 II. ISSUES

A. Whether we have overruled *Robinson*.

B. Whether strict product liability applies retroactively to allow Lunsford's claim.

III. ANALYSIS Standard of Review

[3][4] ¶ 8 "We review summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." *City of Spokane v. County of Spokane*, 158 Wash.2d 661, 671, 146 P.3d 893 (2006) (citing *Berrococal v. Fernandez*, 155 Wash.2d

585, 590, 121 P.3d 82 (2005)). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Where, as here, only legal questions are before the court, we review those questions of law de novo. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wash.2d 284, 300, 174 P.3d 1142 (2007) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002)).

A. We have not overruled or limited our holding in *Robinson*

[5][6][7][8] ¶ 9 Judicial decisions may have retroactive, prospective, or selectively prospective application. *Robinson*, 119 Wash.2d at 74, 830 P.2d 318 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991)). Retroactive application, by which a decision is applied both to the litigants before the court and all cases arising prior to and subsequent to the announcing of the new rule, is "overwhelmingly the norm." *Id.* (emphasis omitted) (quoting *Beam Distilling*, 501 U.S. at 535, 111 S.Ct. 2439). Prospective application affects only those cases arising after *271 the announcement of the new rule. *Id.* Selectively prospective decisions are applied to the litigants before the court, but not to those whose causes of action arose before the **1096 announcement of the new rule. *Id.* at 74-75, 830 P.2d 318. In *Robinson*, we abolished the selectively prospective application of state appellate decisions. *Id.* at 77, 830 P.2d 318.

[9] ¶ 10 "When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." ^{FNS} *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 177, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) (citing *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360 (1932)). Historically, Washington has followed the general rule that a new decision of law applies retroactively unless expressly stated otherwise in the case announcing the new rule of law. *Martin*, 62 Wash.2d

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at 671, 384 P.2d 833 (citing *Strickland*, 154 Fla. at 476, 18 So.2d 251); *Haines v. Anaconda Aluminum Co.*, 87 Wash.2d 28, 35, 549 P.2d 13 (1976) (citing S.R. Shapiro, Annotation, *Prospective or Retroactive Operations of Overruling Decision*, 10 A.L.R.3d 1371, 1384 (1964)); *Bradbury v. Aetna Cas. & Sur. Co.*, 91 Wash.2d 504, 507-08, 589 P.2d 785 (1979); Lewis H. Orland & David G. Stebing, *Retroactivity in Review: The Federal and Washington Approaches*, 16 Gong. L.Rev. 855, 889 (1980-81) ("Although statements may be found to the contrary, the assumption in Washington cases is that a decision of an appellate court in a civil case has both retroactive and prospective effect unless the decision specifies otherwise or the decision is silent on the point and a subsequent decision considering the first decision holds otherwise." (footnote omitted)); see, e.g., *Taskett v. KING Broad. Co.*, 86 Wash.2d 439, 453, 546 P.2d 81 (1976) (Stafford, C.J., dissenting in part).

FN5. For an analysis of the greater temporal restrictions placed upon article III courts by the case and controversy requirement, see Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907 (1962).

¶ 11 In *Chevron Oil*, the United States Supreme Court established a three factor test for determining whether a new rule of federal law should be applied nonretroactively *272 in a civil case. 404 U.S. 97, 92 S.Ct. 349. The Court held where the following three conditions are met, a court may depart from the presumption of retroactivity to give a new decision either prospective or selectively prospective application: (1) the decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed,^{FN6} (2) retroactive application would tend to impede the policy objectives of the new rule, and (3) retroactive application would produce a substantially inequitable result. *Id.* at 106-07, 92 S.Ct. 349.

FN6. In *Chevron*, the Court held state stat-

utes of limitations applied to personal injury claims under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356a (Lands Act). *Chevron*, 404 U.S. at 105, 92 S.Ct. 349. After the petitioner had filed his complaint, the Court announced in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969), that remedy for personal injury claims under the Lands Act was governed by the common law of the adjacent state. *Chevron*, 404 U.S. at 101, 92 S.Ct. 349. Whether *Chevron* itself announced a new rule depends upon one's interpretation of the rule-whether it was the narrow issue decided in *Chevron* or the broader issue in *Rodrigue*. Significantly, the Court characterized *Chevron* as "in relevant respect, a pre-*Rodrigue* case." *Chevron*, 404 U.S. at 105, 92 S.Ct. 349.

¶ 12 In *Taskett*, we adopted the *Chevron Oil* test for determining whether the application of a new rule of state law should depart from our general rule of retroactivity. *Taskett* was a defamation suit where we overruled our prior cases requiring proof of actual malice in a suit by a private person in which the statements at issue were of public concern. After announcing the new rule, we immediately turned to consider whether we should apply it retroactively or prospectively. *Taskett*, 86 Wash.2d at 448, 546 P.2d 81. We noted "absent unique circumstances, we have consistently applied our decisions retroactively whenever the intended purpose was to provide a remedy for an individual who has been tortiously injured and now seeks redress before this court." ^{FN7} **1097*Id.* at 449, 546 P.2d 81 (citing *273*Memel v. Reimer*, 85 Wash.2d 685, 538 P.2d 517 (1975); *Freehe v. Freehe*, 81 Wash.2d 183, 500 P.2d 771 (1972), overruled on other grounds by *Brown v. Brown*, 100 Wash.2d 729, 675 P.2d 1207 (1984); *Godfrey v. State*, 84 Wash.2d 959, 530 P.2d 630 (1975); *Blaak v. Davidson*, 84 Wash.2d 882, 529 P.2d 1048 (1975)). After applying the *Chevron Oil* test, we determined our de-

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cision should apply to all cases arising prior to and after our decision.^{FN8} *Id.* at 449, 546 P.2d 81.

FN7. We later construed this general rule of retroactivity in *Taskett* to refer to both retroactive application in the case before the court, i.e., selective prospectivity, and to general retroactive application. Compare *Lau v. Nelson*, 92 Wash.2d 823, 825-26, 601 P.2d 527 (1979), with *Milbradt v. Margaris*, 103 Wash.2d 337, 342, 693 P.2d 78 (1985); see also *Haines*, 87 Wash.2d at 35, 549 P.2d 13 (holding prior decision has general retroactive application "in keeping with the general rule that an overruling decision is to be given retroactive effect, unless it is specifically provided otherwise"); *Bradbury*, 91 Wash.2d at 508, 589 P.2d 785 (recognizing retroactive application as the general rule, but noting that this court has on occasion applied a new rule of law "either prospectively or with only limited retroactive effect") (citing *Cascade Sec. Bank v. Butler*, 88 Wash.2d 777, 567 P.2d 631 (1977)); *Martin*, 62 Wash.2d at 665-71, 384 P.2d 833 (including acknowledgment of retroactivity as general rule within extensive discussion of pure prospectivity).

FN8. "A vigorous dissent indicates quite clearly that the majority intended to give the opinion general retroactive effect and that the majority opinion was not limited to the case before the court." *Orland & Stebing*, *supra*, at 896. Chief Justice Stafford dissented from the majority based in part upon the majority's decision to address retroactivity before it was raised in a subsequent decision. *Taskett*, 86 Wash.2d at 453-54, 546 P.2d 81 (Stafford, C.J., dissenting in part).

¶ 13 Despite our adoption of the *Chevron Oil* test in *Taskett*, our subsequent decisions relied on a variety of tests to determine whether a new rule of

law should have prospective or selectively prospective application.^{FN9} In *Lau*, we referenced *Taskett's* adoption of the *Chevron Oil* test, but instead used a similar test adopted from a Kansas case to emphasize the impact of a recent decision on the litigants. *Lau v. Nelson*, 92 Wash.2d 823, 826-28, 601 P.2d 527 (1979) (citing *Vaughn v. Murray*, 214 Kan. 456, 521 P.2d 262 (1974)); see also *Milbradt v. Margaris*, 103 Wash.2d 337, 339-40, 693 P.2d 78 (1985). In areas such as property, contracts, and taxation where parties had vested interests, we continued to look to whether the parties justifiably and reasonably relied on our prior decisions when entering the transaction.^{FN10}

FN9. See *Orland & Stebing*, *supra*, at 897-98 (questioning whether Washington truly adopted *Chevron Oil* in light of our later decisions).

FN10. See, e.g., *Martin*, 62 Wash.2d at 663, 384 P.2d 833 (overruling decision allowing issuance and sale of limited obligation bonds prospectively only so as not to "jeopardize the massive contractual and governmental enterprises done under its protective shield"); *Cascade Sec. Bank*, 88 Wash.2d at 784-85, 567 P.2d 631 (applying decision declaring judgments to be liens upon the interests of a real estate contract purchaser prospectively only to prevent harm to reliance interests); *Haines*, 87 Wash.2d 28, 549 P.2d 13 (new rule of law applied retroactively where appellant failed to prove reliance on prior rule when entering lease agreement).

*274 ¶ 14 After *Taskett*, we recognized selective prospectivity as a means to avoid hardship caused by the announcement of a new rule of law, but rarely applied it. See, e.g., *Whitaker v. Spiegel, Inc.*, 95 Wash.2d 661, 678, 637 P.2d 235 (1981) (holding in the decision overruling previous interpretation of usury statute that the new rule applied retroactively only to parties before the court where defendant did not justifiably rely on prior rule);

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Lau, 92 Wash.2d 823, 601 P.2d 527 (applying new rule retroactively only to cases that had not gone to judgment at time decision announced based upon impact of decision on trial courts and litigants). Following the United States Supreme Court's decision in *Beam Distilling*, we abolished selective prospectivity altogether, declaring, "once this court has applied a rule retroactively to the parties in the case announcing a new rule, we will apply the new rule to all others not barred by procedural requirements." *Robinson*, 119 Wash.2d at 77, 830 P.2d 318.

[10] ¶ 15 In *Beam Distilling*, the Court limited the application of *Chevron Oil*. With the support of six justices, the Court abolished selective prospectivity. *Beam Distilling*, 501 U.S. at 537-38, 111 S.Ct. 2439. The Court reasoned that the same policy considerations that led the Court to abandon selective prospectivity in the criminal context in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), applied to a greater extent in civil cases.^{FN11} **1098*Beam Distilling*, 501 U.S. at 537-44, 111 S.Ct. 2439. The principle of the equality of litigants is stronger in a civil context, while the need to maintain an incentive to litigate is weaker. *Id.* at 540-41, 111 S.Ct. 2439. The Court also emphasized the destabilizing effect of switching a rule of law on and off based upon the equities in individual cases:

FN11. "[S]elective application of new rules violates the principle of treating similarly situated defendants the same.... [T]he problem with not applying new rules to cases pending on direct review is 'the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." *Griffith*, 479 U.S. at 323, 107 S.Ct. 708 (citation omitted) (quoting *United States v. Johnson*, 457 U.S. 537, 556, n. 16, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)).

*275 Once retroactive application is chosen for

any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law is not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules. Of course, the generalized inquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases. *Id.* at 543-44, 111 S.Ct. 2439. The Court further reinforced its abolishment of selective retroactivity by announcing the express reservation test,^{FN12} requiring lower courts to apply decisions of the United States Supreme Court retroactively unless the Court specifically reserved the issue.^{FN13} *Id.* at 538-40, 111 S.Ct. 2439; see also *Harper*, 509 U.S. at 97-98, 113 S.Ct. 2510.

FN12. The express reservation test is similar to the rule of general retroactivity discussed by this court in pre-*Robinson* decisions. *Haines*, 87 Wash.2d at 35, 549 P.2d 13; *Bradbury*, 91 Wash.2d at 507-08, 589 P.2d 785; *Martin*, 62 Wash.2d at 671, 384 P.2d 833.

FN13. This rule garnered a clear majority in *Harper*, 509 U.S. 86, 113 S.Ct. 2510.

¶ 16 In *Robinson*, we adopted the *Beam Distilling* Court's holding and limited our use of *Chevron Oil* and other balancing tests by abolishing selective prospectivity. *Robinson*, 119 Wash.2d at 73-77, 80, 830 P.2d 318. In *Robinson*, the city argued the trial court erred by retroactively applying our decisions in *R/L Associates, Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989), and *San Telmo Associates v. City of Seattle*, 108 Wash.2d 20, 735 P.2d 673 (1987), where we invalidated the housing preservation ordinance on state statutory grounds. *Robinson*, 119 Wash.2d at 71,

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830 P.2d 318. Both parties in *Robinson* agreed the *Chevron Oil* test must be used to determine whether those decisions applied retroactively. *Robinson*, 119 Wash.2d at 73, 830 P.2d 318. We held, however, that because the rule had already been applied retroactively, we would not apply *Chevron Oil* to determine the choice of law based upon equity. *Robinson*, 119 Wash.2d at 80, 830 P.2d 318. We agreed with *Beam Distilling's* reasoning that selective *276 prospectivity "would be unequal and un-mindful of stare decisis as it treats similarly situated litigants unequally." *Robinson*, 119 Wash.2d at 77, 830 P.2d 318. We therefore held, "retroactive application of a principle in a case announcing a new rule precludes prospective application of the rule in any subsequently raised suit based upon the new rule." *Id.*

¶ 17 Our holding in *Robinson* is in accord with the policies of many of our sister states that have recognized the inherent inequality of selective prospectivity. Several courts have held, as we did in *Robinson*, that once the new rule has been applied in the case announcing the new rule, it must apply to all others regardless of the equities. *See, e.g., Ireland v. Worcester Ins. Co.*, 149 N.H. 656, 658-60, 826 A.2d 577 (2003); *Burgard v. Benedictine Living Comtys.*, 2004 SD 58, 680 N.W.2d 296, 300 (2004); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 719-20, 39 Tex. Sup.Ct. J. 965 (1996) (using *Chevron Oil* to determine if rule announced in decision should have purely prospective application); *Deaton v. Miss. Farm Bureau Cas. Ins. Co.*, 994 So.2d 164, 169 (Miss.2008) ("we have held that all judicial decisions apply retroactively unless the Court has specifically stated the ruling is prospective." (quoting *Cleveland v. Mann*, 942 So.2d 108, 113 (Miss.2006))); **1099 *Devillers v. Auto Club Ins. Ass'n*, 473 Mich. 562, 586, 702 N.W.2d 539 (2005) (new rule will have retroactive application absent exigent circumstances requiring purely prospective application); *State v. Styles*, 166 Vt. 615, 616, 693 A.2d 734 (1997); *Lakeside Ave. L.P. v. Cuyahoga County Bd. of Revision*, 85 Ohio St.3d 125, 127, 707 N.E.2d 472 (1999). Some courts con-

tinue to use the *Chevron Oil* test, but only to determine if the court should depart from the general rule of retroactivity to apply a new rule purely prospectively. *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 414 (Minn.2007); *see also Wenke v. Gehl Co.*, 274 Wis.2d 220, 267-70, 682 N.W.2d 405 (2004) (using *Chevron Oil* test to determine if court should apply new rule purely prospectively); *Unrau v. Kidron Bethel Ret. Servs., Inc.*, 271 Kan. 743, 755, 27 P.3d 1 (2001) (new decision will be applied *277 prospectively only if all three *Chevron Oil* factors are satisfied).

¶ 18 States that retain selective prospectivity substantially limit its application. Montana continues to use *Chevron Oil* to determine whether a new rule should have selective or purely prospective application but additionally requires that all three prongs of the *Chevron Oil* test be satisfied. *Dempsey v. Allstate Ins. Co.*, 325 Mont. 207, 217, 104 P.3d 483 (2004). Georgia allows selectively prospective application, but requires that its appellate courts expressly provide for selective prospectivity in the case announcing the new rule. *Findley v. Findley*, 280 Ga. 454, 460, 629 S.E.2d 222 (2006). Courts that allow for a case-by-case determination do so in very limited circumstances to avoid hardship. *See, e.g., Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Hawai'i 92, 97, 176 P.3d 91 (2008) (presumption of retroactive application may be overcome only by showing of substantial prejudice); *Wiles v. Wiles*, 289 Ark. 340, 342, 711 S.W.2d 789 (1986) (exceptions to retroactive application based upon reliance); *MacCormack v. Boston Edison Co.*, 423 Mass. 652, 657-58, 672 N.E.2d 1 (1996) (reserving selective prospectivity for contract and property law where rights vested under prior rule); *Beavers v. Johnson Controls World Servs., Inc.*, 118 N.M. 391, 398, 881 P.2d 1376 (1994) (strong presumption of retroactivity may be overcome by express declaration in the opinion announcing the new rule of law or by "sufficiently weighty combination of one or more of the *Chevron Oil* factors").

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[11] ¶ 19 Although we recognize that changes in the law may work a hardship on those who have relied upon past decisions, we have chosen to favor equality of litigants over individual equities.

“Nor, finally, are litigants to be distinguished for choice-of law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component*278 of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis.”

Robinson, 119 Wash.2d at 80, 830 P.2d 318 (quoting *Beam Distilling*, 501 U.S. at 543, 111 S.Ct. 2439). In Washington, stare decisis protects reliance interests by requiring “a clear showing that an established rule is incorrect and harmful before it is abandoned.” *State v. Devin*, 158 Wash.2d 157, 168, 142 P.3d 599 (2006) (internal quotation marks omitted) (quoting *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 147, 94 P.3d 930 (2004)). The substantive restraints placed on courts to “not only heed the relevant judicial past in arriving at a decision, but also to arrive at it within as straight and narrow a path as possible,” ordinarily produces changes in the law “with a minimum of shock to those who act in reliance upon judicial decisions.” Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 *Hastings L.J.* 533, 537 (1976). The constraints of stare decisis prevent the law from becoming “subject to incautious action or the whims of current holders of judicial office.” *In re Rights to Waters of Stranger Creek*, 77 Wash.2d 649, 653, 466 P.2d 508 (1920). Although stare decisis limits judicial discretion, it also protects the interests of litigants by providing clear standards for determining **1100 their rights and the merits of their claims.^{FN14} Therefore, overruling prior precedent should not be taken lightly. *Keene v. Edie*, 131 Wash.2d 822, 831, 935 P.2d 588 (1997).

FN14. Stare decisis does not require, as the

concurrency suggests, concurrence at 3, that we never alter our prior decisions, but merely that we take seriously our responsibility to do so carefully and clearly in order to cause as little hardship as possible to those who may have relied on our prior decisions.

[12] ¶ 20 Where changes in the law cannot be made without undue hardship, we have discretion to apply a new rule of law purely prospectively-to all litigants whose claims arise after our decision. *Robinson*, 119 Wash.2d at 77, 830 P.2d 318 (limiting our decision to the abolishment of selective prospectivity).

If rights have vested under a faulty rule, or a constitution misinterpreted, or a statute misconstrued, or ... subsequent *279 events demonstrate a ruling to be in error, prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected.

Martin, 62 Wash.2d at 666, 384 P.2d 833. By its very nature, the decision to apply a new rule prospectively must be made in the decision announcing the new rule of law. It is at that point-when we are engaged in weighing the relative harms of affirming or overruling precedent-that courts are in the best position to determine whether a new rule should apply retroactively or prospectively only. Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 *Harv. L.Rev.* 56, 64 (1965) (“it is in fact a necessary implication of the general prospectivity approach that the issue of whether a decision is to be given prospective or retroactive effect should be faced at the time of the decision”). It is then that we will employ any balancing of the equities deemed necessary.^{FN15}

FN15. This is consistent with our application of *Chevron Oil* in *Allis-Chalmers Corp. v. City of North Bonneville*, 113

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Wash.2d 108, 115, 119, 775 P.2d 953 (1989) (holding new rule applied retroactively in case declaring ordinance unconstitutional), and in *In re Marriage of Brown*, 98 Wash.2d 46, 653 P.2d 602 (1982) (holding *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), did not apply retroactively to final property settlements in case determining division of marital property prior to *McCarty* should be considered an error of law rather than void for lack of subject matter jurisdiction). Though not a civil case, our immediate determination of retroactivity in *State v. Brown*, 113 Wash.2d 520, 782 P.2d 1013 (1989), is also instructive. Before announcing our new rule, we recognized the impact of overruling our prior decisional law. *Id.* at 523, 782 P.2d 1013. Based upon the application of the *Chevron Oil* factors in *United States v. Givens*, 767 F.2d 574 (9th Cir.1985), we held the rule announced in *Brown* would apply prospectively only. *Brown*, 113 Wash.2d at 544, 782 P.2d 1013.

[13][14] ¶ 21 Once we have resolved the issue of retroactive application, whether by applying the new rule to the parties before this court or by announcing the new rule will apply prospectively only, the rule will be applied equally to all similarly situated litigants with no further balancing of the equities under *Chevron Oil* or any other test. *Robinson*, 119 Wash.2d at 77, 830 P.2d 318. We continue to agree with the United States Supreme Court that selective prospectivity violates the principle that all similarly situated litigants should be *280 treated equally. *Id.* at 75, 830 P.2d 318 (citing *Beam Distilling*, 501 U.S. at 537, 111 S.Ct. 2439). " 'We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of ... law.' " *Beam Distilling*, 501 U.S. at 537-38, 111 S.Ct. 2439 (quoting *Desist v. United States*, 394 U.S. 244, 258-59, 89

S.Ct. 1030, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting)). Our holding in *Robinson* is grounded in this principle.

[15][16] ¶ 22 Nonetheless, Saberhagen claims we readopted selective prospectivity by implicitly overruling *Robinson*. A later holding overrules a prior holding sub silentio when it directly contradicts the earlier rule of law. *See, e.g., Safeco Ins. Co. of Am. v. Butler*, 118 Wash.2d 383, 403, 823 P.2d 499 (1992) (prior holding that "accident" is defined from the point of view of the insured was overruled sub silentio by later holding that "accident" is not a subjective term); **1101 *Indus. Coatings Co. v. Fid. & Deposit Co. of Md.*, 117 Wash.2d 511, 515-18, 817 P.2d 393 (1991) (holding that statute of limitations determination did not overrule sub silentio earlier case where basis for liability differed). Moreover, the doctrine of stare decisis applies regardless of whether we overrule a prior decision explicitly or implicitly. Therefore, we continue to require " 'a clear showing that an established rule is incorrect and harmful.' " *Riehl*, 152 Wash.2d at 147, 94 P.3d 930 (quoting *Stranger Creek*, 77 Wash.2d at 653, 466 P.2d 508). Where we have expressed a clear rule of law as we did in *Robinson*, we will not-and should not-overrule it sub silentio. *Accord State v. Studd*, 137 Wash.2d 533, 548, 973 P.2d 1049 (1999). To do so does an injustice to parties who rely on this court to provide clear rules of law and risks increasing litigation costs and delays to parties who cannot determine from this court's precedent whether a rule of decisional law continues to be valid.

¶ 23 Saberhagen's claim that we implicitly overruled *Robinson* is premised on the faulty assumption that continued use of *Chevron Oil* and adherence to our holding in *Robinson* are mutually exclusive. In *Robinson*, we did not abolish the use of *Chevron Oil*, but "expressly limit [ed] our *281 holding ... to the abolishment of selective prospectivity in the application of our state appellate decisions." *Robinson*, 119 Wash.2d at 77, 830 P.2d 318. *Chevron Oil* continues to be viable for determ-

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ining, in the case announcing a new rule of law, whether that decision should have prospective application. Therefore, mere application of *Chevron Oil* is insufficient to overrule *Robinson*.

¶ 24 Saberhagen claims our use of the *Chevron Oil* factors in *Atsbeha* and *Audett* overruled *Robinson*. In *Atsbeha*-a criminal case-we cited the *Chevron Oil* factors but did not employ a full analysis before determining that retroactive application of our decision in *State v. Ellis*, 136 Wash.2d 498, 963 P.2d 843 (1998), would not be inequitable. *Atsbeha*, 142 Wash.2d at 916-17, 16 P.3d 626. Under our precedent for retroactive application of new rules of criminal law, we would have reached this same result. See *In re Pers. Restraint of St. Pierre*, 118 Wash.2d 321, 325-26, 823 P.2d 492 (1992).

¶ 25 In *Audett*, we determined whether a new civil commitment proceedings rule announced in *In re Detention of Williams*, 147 Wash.2d 476, 55 P.3d 597 (2002), should be applied retroactively. *Audett*, 158 Wash.2d at 720-22, 147 P.3d 982. *Audett* argued that our ruling in *Williams* was based on statutory construction and thus related back to the statute's enactment. The State argued our holding in *Williams*, as a new rule of decisional law, should be applied prospectively, but cited no authority in support. We agreed with the State that the harmonization of the new statute with the rules of evidence was a new rule of law, but not that it had prospective application. *Audett*, 158 Wash.2d at 720-21, 147 P.3d 982. We referred to *Chevron Oil* as "instructive," and extensively discussed the factors, but concluded that *Ellis* should be applied retroactively. *Audett*, 158 Wash.2d at 720-23, 147 P.3d 982.

¶ 26 Although, under *Robinson*, discussion of *Chevron Oil* was unnecessary to reach the holding in either *Atsbeha* or *Audett*, the result in each case was consistent with *Robinson*. Moreover, in neither *Atsbeha* nor *Audett* did the parties argue our holding in *Robinson* was incorrect or *282 harmful. In fact, in neither case did the parties even cite to *Robinson*, *Beam Distilling*, or *Chevron*. In neither

case did we discuss the merits of our rule barring selective prospectivity, and in neither case did we employ selective prospectivity. Mere use of the *Chevron Oil* factors and a scant mention of selective prospectivity in our explanation of the *Chevron Oil* test ^{FN16} is insufficient to overrule our clear statement of law in *Robinson*. This court did not purport to overrule *Robinson* in *Atsbeha* or *Audett*, nor did we intend to.

FN16. We used the term "selective prospectivity" exactly one time in *Audett*: "[I]n *Chevron Oil* the United States Supreme Court has suggested three factors to consider to determine whether a case should be given prospective application or selective prospectivity." *Audett*, 158 Wash.2d at 721, 147 P.3d 982 (emphasis added).

¶ 27 At oral argument, Saberhagen argued our analysis in *Jain* demonstrates our abandonment of *Robinson*. In *Jain*, however, we **1102 considered the effect of a new rule on a final settlement agreement, and not an initial cause of action. 130 Wash.2d at 691-92, 926 P.2d 923. We recognized that if our new rule in *Tissell v. Liberty Mutual Insurance Co.*, 115 Wash.2d 107, 795 P.2d 126 (1990), had been decided prior to *Jain*'s settlement with State Farm, the new rule would have applied retroactively to void the clause excepting her from coverage. *Jain*, 130 Wash.2d at 691, 926 P.2d 923. This is consistent with our holding in *Robinson*. Because the new rule was applied to an insurance release, and not an initial cause of action, we looked to *Bradbury*, rather than *Robinson*, to determine whether *Tissell* should apply retroactively to void the release agreement.^{FN17}

FN17. Our different treatment of retroactive application to settlement agreements compared to initial causes of action is further highlighted by our rejection of the Court of Appeals' use in *Bradbury* of the *Chevron Oil* test in favor of the justifiable reliance test used in vested interest cases.

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Orland & Stebing, *supra*, at 898; compare *Bradbury v. Aetna Cas. & Sur. Co.*, 19 Wash.App. 66, 68-69, 573 P.2d 395 (1978), with *Bradbury*, 91 Wash.2d at 508-09, 589 P.2d 785.

¶ 28 In *Bradbury*, we held our decisions of law apply retroactively to bar an otherwise valid insurance release or settlement unless the insurer established justifiable reliance on prior law. 91 Wash.2d at 508-09, 589 P.2d 785. This is an exception to our general rule of favoring finality in private settlements.*283 *Paopao v. Dep't of Soc. & Health Servs.*, 145 Wash.App. 40, 48, 185 P.3d 640 (2008) (citing *Bradbury*, 91 Wash.2d at 507-08, 589 P.2d 785). In creating this exception, we relied upon our earlier vested rights and contract cases rather than the line of cases following *Taskett*.^{FN18} *Bradbury*, 91 Wash.2d at 508, 589 P.2d 785 (citing *Cascade Sec. Bank v. Butler*, 88 Wash.2d 777, 567 P.2d 631 (1977); *Haines*, 87 Wash.2d 28, 549 P.2d 13; *Martin*, 62 Wash.2d 645, 384 P.2d 833). Although in *Jain*, State Farm argued for a definition of justifiable reliance based upon the *Chevron Oil* test, we rejected that analysis in favor of our traditional approach to retroactivity in the context of contract theory as applied in *Bradbury*. Compare Br. of Def. at 14-15, *Jain*, 130 Wash.2d 688 (No. 63523-4) (citing *In re Marriage of Brown*, 98 Wash.2d 46, 50, 653 P.2d 602 (1982)) with *Jain*, 130 Wash.2d at 694, 926 P.2d 923. Because State Farm failed to establish its justifiable reliance on prior law, we held *Tissell* applied retroactively to void the release. *Jain*, 130 Wash.2d at 694, 926 P.2d 923. This result is not inconsistent with *Robinson*.

FN18. Our reasoning in *Bradbury* and the briefing of the parties there indicate that our decision was grounded in contract theory. See *Bradbury*, 91 Wash.2d at 507, 589 P.2d 785 (noting that "the releases were executed in good faith, without any fraud, undue influence or overreaching," and that both parties believed the coverage could not be increased through " 'stacking' ");

Br. of Appellants at 23-28, *Bradbury*, 91 Wash.2d 504 (No. 2197-III) (arguing release was void because of mutual mistake of law or fact based on assumption by both parties that settlement was for the full amount of the policy); Br. of Resp't at 15-17, *Bradbury*, 91 Wash.2d 504 (No. 2197-III) (arguing there was no mistake of law or fact because both parties reasonably and justifiably relied on current state of the law).

¶ 29 Because we have not overruled *Robinson* and decline to do so now, selectively prospective application of strict product liability is not an option. Our holding in *Robinson* requires that we reject Saberhagen's invitation to apply the *Chevron Oil* test to determine whether strict product liability should have selectively prospective application. Therefore, if we have previously applied strict product liability retroactively to litigants before this court, we must allow Lunsford's strict product liability claim against Saberhagen to go forward.

*284 B. Under *Robinson*, strict product liability applies retroactively to Lunsford's claim

[17] ¶ 30 This court adopted section 402A of the *Restatement (Second) of Torts*, applying strict product liability as to manufacturers in *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 452 P.2d 729 (1969), and as to sellers and suppliers in *Seattle-First National Bank v. Tabert*, 86 Wash.2d 145, 542 P.2d 774 (1975).^{FN19} In both cases, we applied the new **1103 rule of law to the litigants before the court. In neither *Ulmer* nor *Tabert* did we expressly reserve retroactive application of strict product liability. In accordance with our holding in *Robinson*, strict product liability now applies retroactively to all claims against manufacturers and suppliers of products.^{FN20}

FN19. In *Ulmer*, the plaintiff argued that Washington product liability law had reached the point where the fiction of warranty could be replaced by the doctrine of strict product liability. 75 Wash.2d at 528,

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452 P.2d 729. We agreed, finding strict product liability “in accord with the import of our cases which have been decided upon a theory of breach of implied warranty.” *Id.* at 531-32, 452 P.2d 729. We remanded, ordering the trial court to apply the new rule. *Id.* In *Tabert*, we extended strict product liability to distributors, commenting on the “legal fictions” and “tortured reasoning” employed by the courts to impose liability on sellers of defective products. 86 Wash.2d at 147, 542 P.2d 774. Based upon our holding, we overturned summary judgment for the defendant and remanded for trial. *Id.* at 155-56, 542 P.2d 774.

FN20. Although not necessary to our holding, we note this court and our appellate courts have applied strict product liability retroactively in asbestos litigation. The settled rule in our courts is that strict product liability under the common law applies to actions arising before the effective date of the tort reform act, chapter 4.22 RCW. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wash.App. 22, 34, 935 P.2d 684 (1997). Washington appellate courts have approved strict product liability claims where exposure occurred prior to our adoption of section 402A, retroactively applying the rule of *Ulmer* and *Tabert* to those cases. See, e.g., *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373, 198 P.3d 493 (2008) (exposure over 35 years); *Simonetta v. Viad Corp.*, 165 Wash.2d 341, 197 P.3d 127 (2008) (exposure 1954-1974); *Lockwood v. AC & S, Inc.*, 109 Wash.2d 235, 744 P.2d 605 (1987) (exposure 1942-1972); *Falk v. Keene Corp.*, 113 Wash.2d 645, 782 P.2d 974 (1989) (exposure 1947-1953); *Van Hout v. Celotex Corp.*, 121 Wash.2d 697, 853 P.2d 908 (1993) (exposure 1946-1980); *Koker v. Armstrong Cork, Inc.*, 60 Wash.App.

466, 804 P.2d 659 (exposure 1969-1971, 1974-1986), *review denied*, 117 Wash.2d 1006, 815 P.2d 265 (1991); *Bowers v. Fibreboard Corp.*, 66 Wash.App. 454, 832 P.2d 523 (one plaintiff exposed 1927-1963, the other 1946-1986), *review denied*, 120 Wash.2d 1017, 844 P.2d 436 (1992); *Krivanek v. Fibreboard Corp.*, 72 Wash.App. 632, 865 P.2d 527 (1993) (exposure in 1950s and 1960s), *review denied*, 124 Wash.2d 1005, 877 P.2d 1288 (1994); *Viereck v. Fibreboard Corp.*, 81 Wash.App. 579, 915 P.2d 581 (exposure late 1950s), *review denied*, 130 Wash.2d 1009, 928 P.2d 414 (1996); *Mavroudis*, 86 Wash.App. 22, 935 P.2d 684 (exposure late 1950s to early 1960s).

*285 ¶ 31 Saberhagen argues, however, that because the issue has not been squarely addressed, retroactivity of strict product liability under the common law is an issue of first impression. Under our holding in *Robinson*, the issue of retroactivity is settled by our decision announcing a new rule of law regardless of whether it is raised by the parties and regardless of whether we address the issue. 119 Wash.2d at 77, 830 P.2d 318. In *Robinson*, we had not yet addressed the retroactive application of our decisions in *San Telmo Associates* and *R/L Associates* but simply applied those decisions to the litigants before us. *Robinson*, 119 Wash.2d at 78, 830 P.2d 318. Despite our failure to directly address this issue, we held these prior applications of a new rule of law required application of the same rule in *Robinson* and that no balancing of the equities under the *Chevron Oil* test was required. *Robinson*, 119 Wash.2d at 80, 830 P.2d 318. The same reasoning applies here.

[18] ¶ 32 Our decisions of law apply retroactively to all litigants not barred by procedural requirements unless we expressly limit our decision to purely prospective application. *Id.* Therefore, our failure to address whether strict product liability applies retroactively in *Ulmer*, *Tabert*, and subsequent

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decisions is not relevant to whether strict product liability applies to Lunsford's claim. *Robinson*, 119 Wash.2d at 77, 830 P.2d 318. Because we applied strict product liability to the litigants before this court in *Ulmer* and *Tabert*, strict product liability also applies to all subsequent claims against manufacturers and suppliers of products not barred by procedural requirements, regardless of whether those claims arose prior or subsequent to our adoption of section 402A. It follows that strict product liability applies to Lunsford's claim as well.

IV. CONCLUSION

¶ 33 Pursuant to *Robinson*, this court has already determined that strict product liability applies retroactively to *286 all cases not barred by procedural requirements or governed by the tort reform act, including Lunsford's strict product liability claims against Saberhagen. No balancing of the equities is necessary. We affirm the Court of Appeals and hold the trial court erred by dismissing Lunsford's strict product liability claims **1104 against Saberhagen. We remand for further proceedings consistent with this opinion.

WE CONCUR: SUSAN OWENS, CHARLES W. JOHNSON, RICHARD B. SANDERS, DEBRA L. STEPHENS and TOM CHAMBERS, Justices.
 MADSEN, J. (concurring).

¶ 34 I concur in the majority's conclusion that the principles of strict liability set out in *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 452 P.2d 729 (1969), *Seattle-First Nat'l Bank v. Tabert*, 86 Wash.2d 145, 542 P.2d 774 (1975), and their progeny, apply retroactively in this case.

¶ 35 However, I do not agree that the court's discretion should be curtailed by strict application of the rules respecting retroactivity set out in *Robinson v. City of Seattle*, 119 Wash.2d 34, 830 P.2d 318 (1992). In particular, I disagree with the majority's unwise edict that the only exception to the general rule of retroactivity is pure prospectively which can be determined only in the case in which the new rule is announced. We have not, in the years since *Robinson* was decided, followed

such a rigid approach, and for good reason.

¶ 36 In fact, in *In re Detention of Audett*, 158 Wash.2d 712, 719-23, 147 P.3d 982 (2006), we explicitly and deliberately applied the *Chevron Oil* factors to determine whether a rule regarding mental evaluations of alleged sexually violent predators announced in a prior case should be given prospective application or selective prospectivity rather than retroactive application. See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), *overruled in part by Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).

¶ 37 The majority cannot reconcile *Audett* with *Robinson*, and so it says instead that the discussion of *Chevron Oil* *287 was "unnecessary to reach the holding" in *Audett* and that the result was "consistent with *Robinson*." Majority at 1101. The majority says the same is true of *State v. Aisbeha*, 142 Wash.2d 904, 16 P.3d 626 (2001). Majority at 1101.

¶ 38 Regardless of the majority's after-the-fact recharacterization, our analysis in *Audett* was not mere window-dressing. It was deliberate and deliberative. *Audett* plainly directs that in a case following the case in which the rule at issue is announced, the issue of retroactivity may be considered with prospective application remaining a possibility even though the rule was applied in the case in which it was announced.^{FN1}

FN1. Under the *Chevron Oil* standard, a court considers whether the rule should be given prospective or selectively prospective application by (1) considering whether the rule at issue is a new principle of law, either because it overruled clear past precedent upon which litigants relied or decided an issue of first impression and the decision was not clearly foreshadowed; (2) considering the prior history of the rule, its purpose and effect, and whether its operation would be furthered or retarded by ret-

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roactive application; and (3) weighing any inequity involved in retroactive application. *Chevron Oil*, 404 U.S. at 106-07, 92 S.Ct. 349.

¶ 39 The majority allows that the *Chevron Oil* factors have a place in determining the question of pure prospectivity, which the majority says must be determined in the very same case in which the rule is announced, but they cannot be used to determine prospectivity in any succeeding case. *Audett* is completely to the contrary. Clearly abandoning the absolutes of *Robinson*, we recognized in *Audett* that fairness concerns may demand that we exercise our discretion and apply a prior decision prospectively.

¶ 40 In addition, the issue of retroactivity-prospectivity is often not addressed or even mentioned in the parties' briefing in the case in which a judicially determined rule is first set out and it is often not addressed by the court in that case. This was exactly what happened (or did not happen) in *In re Detention of Williams*, 147 Wash.2d 476, 55 P.3d 597 (2002), the case announcing the rule that was at the center of the retroactivity-prospectivity question in *Audett*. Frequently, the issue of retroactivity or prospectivity first comes to the court's attention in a subsequent case. At that point *288 forceful arguments might be made showing unacceptable unfairness in applying the rule retroactively. Yet under the majority's decision overruling *Audett*, our hands are now tied. We cannot do justice.

**1105 ¶ 41 It is our responsibility, when developing the common law, "to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law." *Sayward v. Carlson*, 1 Wash. 29, 41, 23 P. 830 (1890). If we reason that *solely because the new rule has once been applied it must always be applied*, we do not carry out this responsibility. There is nothing reasonable about retroactively applying a rule of law, no matter the reliance, surprise, hardship, or unfairness involved in retroactive application, merely because it has once been applied, and it is particularly unjust to do

so if there has never been a considered decision on the issue of its retroactivity or prospectivity.

¶ 42 It is true that in *Audett* the *Chevron Oil* analysis did not lead us to the conclusion that retroactivity was fundamentally unfair. But another case, with another set of facts, and another new rule of law could lead us to an entirely different conclusion.

¶ 43 It must be remembered that the reason the court adopted the rule of retroactivity and abrogated selective prospectivity in *Robinson* was because we perceived that the United States Supreme Court had "recently limited the *Chevron Oil* ... rule regarding retroactive application" in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), a split decision. *Robinson*, 119 Wash.2d at 73, 830 P.2d 318. It is obvious that the court found great significance in the fact that the United States Supreme Court altered its own retroactivity analysis—the analysis that we had been applying as well. Our court ultimately concluded that the reasoning in *Beam Distilling* was sound and accepted the premise that similarly situated litigants must always be treated equally. *Id.* at 77, 830 P.2d 318.

*289 ¶ 44 Then, a year after *Robinson* was decided, the Court explicitly held in *Harper*, 509 U.S. at 97, 113 S.Ct. 2510, that when it applied "a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate" the court's announcement of the rule. However, the Court also explicitly distinguished between rules of federal law and rules of state law. While a state court must follow *Harper* with regard to rules of federal law, state courts retain freedom to limit retroactive application of their interpretations of state law. *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-66, 53 S.Ct. 145, 77 L.Ed. 360 (1932); see *Harper*, 509 U.S. at 100, 113 S.Ct. 2510.

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¶ 45 As the Montana State Supreme Court explained, many state courts responded negatively to *Harper's* retroactivity analysis, and of these a number continued to apply the *Chevron Oil* analysis or a similar analysis for determining whether a decision should apply prospectively. *Dempsey v. Allstate*, 325 Mont. 207, 215, 104 P.3d 483 (2004). The Montana court also explained its own history in this area, which included adoption of *Chevron Oil* in 1978, its subsequent application of *Harper*, and then its reversion to *Chevron Oil* without reference to the line of cases following *Harper*. *Dempsey*, 325 Mont. at 210-11, 104 P.3d 483.

¶ 46 The Montana court's history and ours are similar, in that this court adopted *Chevron Oil's* analysis, then purportedly adopted *Beam* (*Harper* made *Beams'* split decision explicitly the law), and then in *Audett* and other cases reverted to *Chevron Oil*. Montana ultimately decided to apply retroactivity as the presumptive rule but retained *Chevron Oil's* prospectivity analysis as an exception when all of its factors favor prospectivity.

¶ 47 In *Beavers v. Johnson Controls World Services, Inc.*, 118 N.M. 391, 881 P.2d 1376 (1994), cited in *Audett*, 158 Wash.2d at 722, 147 P.3d 982, the New Mexico court acknowledged the "compelling force of the desirability of treating similarly situated parties alike" and accordingly adopted a "presumption*290 of retroactivity for a new rule imposed by a judicial decision in a civil case." *Beavers*, 118 N.M. at 398, 881 P.2d 1376. However, the court retained the *Chevron Oil* analysis because it did not find this "reason so powerful that it requires a rule of blanket retroactivity." *Id.* at 397, 881 P.2d 1376. Rather, the court reasoned that in some cases the *Chevron Oil* factors, "particularly the factor **1106 or subfactor of the parties' reliance on the old rule-will argue so strongly for nonretroactivity that the factor ... of similar treatment of similarly situated parties will simply be outweighed." *Id.*

¶ 48 Significantly, and in marked contrast to the majority's harsh analysis here, the New Mexico

court "decline[d] to follow the Supreme Court's lead" and pointedly concluded that it could apply a rule prospectively "even though (as in this case) the decision announcing the new rule has already been applied retroactively to the conduct of the litigants in the case in which the rule was announced." *Id.*

¶ 49 Like Montana, the Ohio Supreme Court recently surveyed case law respecting states' analyses for retroactive or prospective application of rules announced in judicial decisions, observing that *Harper* overruled *Chevron Oil* only insofar as it applied to federal law. *DiCenzo v. A-Best Prods. Co.*, 120 Ohio St.3d 149, 897 N.E.2d 132 (2008). The court stated that in Ohio the general rule is that a decision applies retrospectively unless a party has contract or vested rights under the prior decision. *Id.* at 156, 897 N.E.2d 132. However, an Ohio court "has discretion to apply its decision" prospectively under the *Chevron Oil* factors and under exceptional circumstances prospective application is justified. *Id.* at 157, 897 N.E.2d 132.

¶ 50 Like the New Mexico State Supreme Court, the Ohio court rejected the argument that if the case announcing the rule does not contain language imposing only prospective application, the rule was and continues to be retroactive. *Id.* at 156, 897 N.E.2d 132. The court *did not* agree that "the passage of time and appellate cases that have applied [the new rule] retrospectively preclude" a court from applying the rule prospectively. *Id.* The court said that "[t]he mere passage of time, *291 without more, does not diminish our authority to impose a prospective-only application of a court decision." *Id.* at 157, 897 N.E.2d 132.

¶ 51 Thus, the Ohio Court held that whenever the issue of retroactivity-prospectivity is first addressed, the court may exercise discretion and apply a rule prospectively if the *Chevron Oil* factors show this is appropriate. The court refused to give up its authority and discretion to decide that a decision may be prospective where the issue of prospectivity-retroactivity had not previously been determined.

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¶ 52 Like these courts, in *Audett* we clearly recognized that retroactivity is the general rule. However, we also recognized that this general rule must yield in the face of compelling reasons favoring prospectivity, regardless of the fact that the new rule of law was applied in the announcing case. In accord with the views expressed by the New Mexico and Ohio courts, in *Audett* we considered whether the rule at issue should be applied in *Audett* or instead should be applied prospectively, even though the rule had been applied in the case in which it was announced (*Williams*, 147 Wash.2d 476, 55 P.3d 597).

¶ 53 Unlike the inflexible analysis of *Robinson*, which was, as noted, founded on changes to federal retroactivity law, our decision in *Audett* respects the importance of treating similarly situated litigants alike while retaining the court's discretion to apply a state rule prospectively if the injustice of retroactive application outweighs the interest in similar treatment.

¶ 54 I believe *Audett* can be fairly read to mean only one thing: Even if a state rule is applied in the case in which it is announced, i.e., it is applied "retroactively" in that case, the court may consider in a subsequent case whether under the *Chevron Oil* factors the rule should nevertheless be given prospective effect. Because it fails to follow this analysis, the majority decision fails to follow our precedent-for *Audett* is precedent just as *Robinson* was, and it is *Audett* that is the later case. We did, in fact, sub silentio overrule *Robinson* insofar as it was intended to abrogate *292 the possibility of any selective or modified rule of prospectivity.^{FN2}

FN2. In a strange statement about this court's power, the majority says, "Because we have not overruled *Robinson* and decline to do so now, selectively prospective application of strict product liability is not an option." Majority at 1102. We have overruled *Robinson*, in part, albeit sub silentio. But even if we had not, there is no bar to our doing so now.

**1107 ¶ 55 I believe the better rule is that there should be a presumption that a new rule applies retroactively, but this presumption can be overcome if an analysis under the *Chevron Oil* factors favors prospectivity. Prospectivity does not have to be determined in the same case that announces the new rule, but may be determined in a subsequent case.

Conclusion

¶ 56 The majority decides that we must surrender our discretion to apply a judicially based state rule of law prospectively even if would be inequitable and unjust to apply it retroactively. I believe the majority fails to carry out our responsibility to administer justice with the reason and common sense necessary to development of the common law. I would follow *Audett* and retain the courts' discretion to decide whether a judicially determined rule of law should be prospectively applied, regardless of whether the rule was applied in the case in which it was announced.

WE CONCUR: GERRY L. ALEXANDER, Chief Justice, and JAMES M. JOHNSON, Justice.

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v

Supreme Court of Washington,
En Banc.
STATE of Washington, Petitioner,
v.

Keith Bennett STUDD, Respondent.
State of Washington, Respondent,
v.

Lee Ernest Cook, Jr., Petitioner.
State of Washington, Respondent,
v.

Daun Leon Bennett, Petitioner.
State of Washington, Respondent,
v.

Raymond D. McLoyd, Petitioner.
State of Washington, Petitioner,
v.

William Henry Ameline, Respondent.
State of Washington, Petitioner,
v.

Vincent Lavelle Fields, Respondent.

Nos. 65943-5, 65948-6, 65956-7, 65995-8,
65999-1, 66108-1.

Argued June 16, 1998.

Decided April 1, 1999.

As Amended July 2, 1999.

First defendant was convicted in the Superior Court, Spokane County, Thomas Merryman, J., of second-degree felony-murder, but the Court of Appeals reversed, 87 Wash.App. 385, 942 P.2d 985. Second defendant was convicted in the Superior Court, Pierce County, of second-degree murder, and the Court of Appeals affirmed. Third defendant was convicted in the Superior Court, Snohomish County, Ronald Castleberry, J., of first degree attempted murder while armed with deadly weapon, and the Court of Appeals affirmed, 87 Wash.App. 73, 940 P.2d 299. Fourth defendant was convicted in the Superior Court, King County, Arthur Piehler, J., of second-degree felony-murder while armed with deadly weapon, and the Court of Appeals af-

firmed, 87 Wash.App. 66, 939 P.2d 1255. Fifth defendant was convicted in the Superior Court, Pierce County, Terry D. Sebring, J., of second-degree murder, but the Court of Appeals reversed. Sixth defendant was convicted in the Superior Court, King County, Joan E. DuBuque, J., of second-degree murder, but the Court of Appeals reversed, 87 Wash.App. 57, 940 P.2d 665. Review was granted for consolidated appeals. The Supreme Court, Alexander, J., held that: (1) defendants who requested erroneous instructions on self-defense invited the trial court's error, and thus, they could not challenge such errors on appeal, but (2) defendants whose requests were denied for curative instructions for the erroneous self-defense instruction did not invite the trial court's error, and thus, they were entitled to new trials.

Decisions of the Court of Appeals affirmed in part, reversed in part.

Madsen, J., concurred in the result and filed an opinion.

Sanders, J., concurred in part, dissented in part, and filed an opinion.

West Headnotes

[1] Homicide 203  787.

203 Homicide

203VI Excusable or Justifiable Homicide

203VI(B) Self-Defense

203k785 Danger

203k787 k. Real or Apparent Danger.

Most Cited Cases

(Formerly 203k116(2))

Homicide 203  795

203 Homicide

203VI Excusable or Justifiable Homicide

203VI(B) Self-Defense

203k792 Apprehension of Danger

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203k795 k. Reasonableness of Belief or Apprehension. Most Cited Cases (Formerly 203k116(2))

A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim, and thus, there need be no finding of actual imminent harm.

[2] Homicide 203 1483

203 Homicide

203XII Instructions

203XII(E) Excuses and Justifications

203k1471 Self-Defense

203k1483 k. Danger and Imminence

Thereof. Most Cited Cases

(Formerly 203k300(5))

Criminal pattern jury instruction on self-defense is not the manifestly clear instruction that jurors require, as jurors could be misled that justifiable homicide requires actual imminent harm instead of defendant's subjective, reasonable belief of imminent harm from the victim. WPIC 16.02.

[3] Criminal Law 110 1137(3)

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)11 Parties Entitled to Allege

Error

110k1137 Estoppel

110k1137(3) k. Instructions. Most

Cited Cases

Defendants in murder prosecutions invited the trial court's error by requesting jury instructions on self-defense that were clearly erroneous in stating that justifiable homicide required actual imminent harm, though the instructions were modeled on criminal pattern jury instruction for which the Supreme Court had previously given its general approval, and thus, under invited error doctrine, defendants could not challenge the error on appeal. WPIC 16.02.

[4] Criminal Law 110 1130(2)

110 Criminal Law

110XXIV Review

110XXIV(I) Briefs

110k1130 In General

110k1130(2) k. Specification of Errors. Most Cited Cases

Appellate court is not in the business of inventing unbriefed arguments for parties sua sponte.

[5] Homicide 203 1478

203 Homicide

203XII Instructions

203XII(E) Excuses and Justifications

203k1471 Self-Defense

203k1478 k. Conduct or Circumstances Surrounding Incident. Most Cited Cases

(Formerly 203k300(6))

Instruction on justifiable homicide that the "right of self-defense does not permit action done in retaliation or revenge" did not unfairly emphasize state's theory that defendant, who had been robbed at gunpoint by the victim in the course of drug transaction, killed the victim for revenge.

[6] Criminal Law 110 1947

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1945 Instructions

110k1947 k. Offering Instructions.

Most Cited Cases

(Formerly 110k641.13(2.1))

Counsel was not ineffective in requesting jury instruction on self-defense that erroneously suggested that justifiable homicide required actual imminent harm, as the instruction was based on a then-unquestioned criminal pattern jury instruction. U.S.C.A. Const.Amend. 6; WPIC 16.02.

[7] Criminal Law 110 1137(3)

110 Criminal Law

110XXIV Review

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110XXIV(L) Scope of Review in General
 110XXIV(L)11 Parties Entitled to Allege
 Error

110k1137 Estoppel
 110k1137(3) k. Instructions. Most

Cited Cases

Defendant who requested jury instruction on self-defense that permitted erroneous interpretation that justifiable homicide required actual danger, but who also requested curative instruction that the trial court refused to give, did not invite the trial court's error, and thus, invited error doctrine did not preclude the defendant from challenging the error on appeal.

[8] Criminal Law 110  1137(3)

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)11 Parties Entitled to Allege

Error

110k1137 Estoppel
 110k1137(3) k. Instructions. Most

Cited Cases.

Defendant who requested criminal pattern jury instruction on self-defense that erroneously suggested that justifiable homicide required actual imminent harm, but whose request for clarifying criminal pattern jury instruction was successfully opposed by the state, did not invite the trial court's error, and thus, invited error doctrine did not preclude the defendant from challenging the error on appeal. WPIC 16.02, 16.07.

**1051 *537 George Ahrend, Spokane, for Respondent Studd.

Eric Broman, Eric Nielsen, Seattle, for Petitioner Cook.

Kelly Curtin, Seattle, for Petitioner Bennett.

Kimberly Gordon, Seattle, for Petitioner McLoyd.

Kimberly Gordon, Shannon B. Marsh, Stella S. Buder, Seattle, for Respondent Fields.

Clayton Dickinson, Fircrest, for Respondent Ameliné.

Honorable Jim Sweetser, Spokane County Prosecutor, Kevin Korsimo, Deputy, Spokane, for Petitioner State.

John Ladenburg, Pierce County Prosecutor, Barbara Corey-Boulet, Deputy, Tacoma, Jim Krider, Snohomish County Prosecutor, Breck Marsh, S. Aaron Fine, Deputies, Everett, Norm *538 Maleng, King County Prosecutor, Brian McDonald, Deputy, Seattle, for Respondent State.

ALEXANDER, J.

The principal question that is presented by these six consolidated appeals is the same: Whether a jury instruction that erroneously states the law of self-defense furnishes a basis for a new trial when the erroneous instruction is requested by the defendant. The defendants, all six of whom were convicted at a jury trial, each argue that it was not made clear to jurors that a defendant need not be in actual danger of imminent harm in order to act in self-defense against a perceived aggressor, provided the defendant reasonably believes himself to be in danger. We conclude that while it is error for a trial court to fail to make this standard clear in a jury instruction, such error does not furnish a basis for a new trial when the defendant invites the error by requesting the instruction. We, therefore, affirm the Court of Appeals in two cases where it upheld the conviction, recognizing that the error had been invited. We also affirm the Court of Appeals in another case where it held that requesting the erroneous instruction did not constitute ineffective assistance of counsel. We further affirm the Court of Appeals in two cases where it reversed the defendant's conviction due to the fact that the defendant's efforts to correct the error complained of were *539 rebuffed by the trial court, and we reverse it, in a case where it failed to recognize that the error was invited.

FACTS

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State v. Studd

Keith Studd killed David Castle with a single stab wound from a knife during a fight. Studd was thereafter charged in Spokane County Superior Court with second degree felony murder. At trial, Studd argued that he had stabbed Castle in self-defense because he feared that Castle was reaching for a weapon. Studd proposed two jury instructions on self-defense, which were given almost completely unchanged by the trial court. One of these instructions, which was taken verbatim from *Washington Pattern Jury Instructions: Criminal* § 16.02 (1994) (WPIC), read as follows:

It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer when:

- (1) The slayer reasonably believed that the person slain intended to inflict death or great personal injury;
- (2) There was imminent danger of such harm being accomplished; and
- (3) The slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 130 (emphasis added). The other *540 instruction was not taken verbatim from WPIC 16.07 and it stated as follows:

A person is entitled to act on appearances in defending HIMSELF, IF THAT PERSON believes

in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is *not* necessary for a homicide to be justifiable.

CP at 132 (emphasis added).

Studd was convicted of second degree felony murder, and appealed. Following Studd's conviction this court concluded in another case that a jury instruction similar to WPIC 16.02 was erroneous in that it did not make clear to the jury that, in order to sustain the defense of self-defense the defendant must have a subjectively reasonable belief of imminent harm, as determined from the surrounding facts and circumstances. *State v. LeFaber*, 128 Wash.2d 896, 913 P.2d 369 (1996). Citing *LeFaber*, the Court of Appeals, Division Three, reversed Studd's conviction, holding that the self-defense instructions set forth above were in irreconcilable conflict and did not, therefore, accurately state the law of self-defense. *State v. Studd*, 87 Wash.App. 385, 389, 942 P.2d 985 (1997), review granted, 134 Wash.2d 1010, 954 P.2d 276 (1998). The State sought review, arguing that under the "invited error" doctrine Studd cannot complain about an instruction that he proposed. We granted review. In doing so, we consolidated this case with the five that are discussed hereafter.

State v. Cook

Lee Cook shot and killed Troy Robinson. Cook had been robbed at gunpoint by Robinson during the course of a *541 drug transaction, and Cook argued that his charged in pierce county superior court with first degree murder and unlawful possession of a short firearm.^{FNI} Cook proposed, and the trial court gave, self-defense instructions nearly identical to the two given in *Studd* above. Cook was convicted of second degree murder and appealed. The Court of Appeals, Division Two, affirmed Cook's conviction in an unpublished opinion. *State v. Cook*, No. 19020-6-II, slip op., 1997 WL 404059

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(Wash.Ct.App. July 18, 1997). It held that the two self-defense instructions are "complementary, not contradictory" and that "read together, these instructions make the relevant legal standard manifestly apparent to the average juror." *Cook*, slip op. at 5. The Court of Appeals further held that Cook had also "invited the trial court to give the flawed instruction." *Cook*, slip op. at 6. Cook sought review, which we granted.

FN1. Cook pleaded guilty to the latter charge.

State v. Bennett

Daun Bennett stabbed his former girlfriend, JoLayne Boston, 14 times and then shot her with her own gun. *State v. Bennett*, 87 Wash.App. 73, 75-76, 940 P.2d 299 (1997), review granted by *State v. Studd*, 134 Wash.2d 1010, 954 P.2d 276 (1998). Boston survived the attack. Bennett was thereafter charged in Snohomish County Superior Court with first degree attempted murder while armed with a deadly weapon. Bennett contended that he had acted in self-defense in an altercation with Boston during which he had tried to take Boston's gun away from her. As in *Studd* and *Cook*, Bennett requested instructions identical to WPIC 16.02 and 16.07 and the trial court acceded to his request. Bennett was convicted as charged and appealed. The Court of Appeals, Division One, affirmed, holding that the invited error doctrine did not preclude the defendant from raising the instructional error claim, because Bennett raised it under the guise of ineffective assistance of counsel due to *542 his trial counsel having proposed an erroneous self-defense instruction. It BECAUSE THE law on self-DEFENSE. Bennett sought review, and we granted it.

State v. McLoyd

Raymond McLoyd shot and killed Charles Blatchford. McLoyd claimed that he had **1053 acted in self-defense in response to Blatchford's efforts to "car jack" his automobile. McLoyd was thereafter charged in King County Superior Court with first degree murder and second degree felony

murder while armed with a deadly weapon.^{FN2} Like the defendants in the preceding three cases, McLoyd requested, and the trial court provided the jury, instructions modeled on WPIC 16.02 and WPIC 16.07. McLoyd was convicted of committing second degree felony murder while armed with a deadly weapon. He appealed to the Court of Appeals, Division One, which affirmed his conviction. *State v. McLoyd*, 87 Wash.App. 66, 939 P.2d 1255 (1997), review granted by *State v. Studd*, 134 Wash.2d 1010, 954 P.2d 276 (1998). It held that although McLoyd had invited the error complained of by proposing an instruction based on WPIC 16.02, the invited error doctrine did not bar his challenge to the instruction because McLoyd had also proposed a clarifying instruction. However, the Court of Appeals concluded that when read together the instruction based on WPIC 16.07 cured any ambiguity that would arise from reading the instruction based on WPIC 16.02 alone. We granted discretionary review.

FN2. The State subsequently moved for dismissal of the first charge.

State v. Ameline

William Ameline killed Barbara Hunsaker by beating her with an iron pipe. Ameline argued that he had acted in self-defense, asserting that Hunsaker had demanded money *543 from him and was threatening him with a knife. Ameline admitted that he buried Hunsaker's body in a remote area after attempting to make the killing look like the work of the "Green River Killer." Ameline was thereafter charged in Pierce County Superior Court with second degree murder. In response to Ameline's request the trial court gave the jury the following self-defense instruction:

It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer when the slayer reasonably believes that the person slain intends to

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inflict death or great personal injury and there is imminent danger of such harm being accomplished.

The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the slayer at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable.

CP at 72. Ameline argued that it needed to be made clearer to the jury that "behaving as a reasonably prudent person" he was entitled to defend himself against the apparent threat of injury, even if he was mistaken about the threat. Verbatim Report of Proceedings (VRP) at 493. Consistent with that contention, Ameline requested the following jury instruction:

If a person acting as a reasonably prudent person, mistakenly believes himself to be in danger of injury or of an offense being committed against him or his property, he has the right to defend himself by the use of lawful force against that apparent injury or offense even if he is not actually in such danger.

CP at 48. The trial court refused to give this instruction. Ameline was convicted of second degree murder and appealed. After first affirming the conviction in an unpublished opinion, the Court of Appeals, Division Two, upon *544 reconsideration, reversed and remanded in an unpublished opinion. *State v. Ameline*, No. 17339-5-11, 1997 WL 417958 (Wash.Ct.App. July 25, 1997). The Court of Appeals held that because the trial court had rejected Ameline's efforts to clarify the law of self-defense in the jury instructions, he had not invited the instructional error. The State sought review in this court, which we granted.

State v. Fields
 Vincent Fields stabbed and killed Scott Holm

with a kitchen knife. Fields testified that he had acted in self-defense, stabbing Holm only after Holm pulled out a gun during**1054 an argument over stereo speakers that Fields had been in the process of buying from Holm. Fields was thereafter tried in King County Superior Court on a charge of first degree murder and other charges that are not before this court.

Fields requested a jury instruction substantially similar to the one disapproved of in *LeFaber*. The trial court gave WPIC 16.02 verbatim instead. Fields also proposed an instruction that was almost identical to WPIC 16.07 in order to clarify the law on self-defense for jurors. The State objected and the trial court refused to give the instruction, which read:

A person is entitled to act on appearances in defending himself, herself, or another, if that person in good faith and on reasonable grounds believe [sic] that he, she, or another is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

CP at 29. Fields had argued in support of this instruction that "they might say he was mistaken in his belief that he was in danger, that he wasn't really in any danger, and therefore he overreacted. This instruction is aimed directly *545 at that situation." VRP at 823. Fields was convicted of second degree murder and appealed.^{FN3}

FN3. Fields did not appeal convictions for second degree theft, possession of methamphetamine, and possession of cocaine with intent to deliver. *State v. Fields*, 87 Wash.App. 57, 61 n. 1, 940 P.2d 665 (1997).

The Court of Appeals, Division One, reversed and remanded. *State v. Fields*, 87 Wash.App. 57,

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940 P.2d 665 (1997), review granted by *State v. Studd*, 134 Wash.2d 1010, 954 P.2d 276 (1998). It held that the instruction given by the trial court allowed the jury to interpret the law as requiring "an imminent danger of actual harm in order to accept Fields' self-defense claim." *Fields*, 87 Wash.App. at 61, 940 P.2d 665 (emphasis added). The Court of Appeals also concluded that although Fields had proposed essentially the same instruction, his proposal to also give WPIC 16.07 "would have cured the ambiguity by clarifying that actual danger is not an element of self-defense." *Fields*, 87 Wash.App. at 63, 940 P.2d 665. It determined, therefore, that Fields did not invite error. The State sought review in this court, which we granted.

ANALYSIS

[1] In Washington, "[a] jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim." *LeFaber*, 128 Wash.2d at 899, 913 P.2d 369 (emphasis added) (citing *State v. Janes*, 121 Wash.2d 220, 238-39, 850 P.2d 495, 22 A.L.R.5th 921 (1993)). Given this subjective component, there need be no finding of actual imminent harm. See *LeFaber*, 128 Wash.2d at 899, 913 P.2d 369 (citing *State v. Theroff*, 95 Wash.2d 385, 390, 622 P.2d 1240 (1980); *State v. Miller*, 141 Wash. 104, 105, 250 P. 645 (1926)).

[2] The question shared by each of these six cases is whether a jury instruction that was clearly erroneous in its statement of self-defense law should alone be grounds for a new trial. The instruction complained of by *Studd*, *Cook*, *McLloyd*, *Bennett* and *Fields* is based on WPIC 16.02. In *LeFaber* we reversed a conviction due to the erroneous impression of self-defense law created by an instruction *546 that we wrote was similar to, but "lacking the glaring structural difficulties of," WPIC 16.02. *LeFaber*, 128 Wash.2d at 902, 913 P.2d 369. Our holding was based upon the fact that "[a] jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." *LeFaber*, 128

Wash.2d at 900, 913 P.2d 369 (citing *State v. McCullum*, 98 Wash.2d 484, 487-88, 656 P.2d 1064 (1983); *State v. Warrow*, 88 Wash.2d 221, 237, 559 P.2d 548 (1977)). Although WPIC 16.02 was not challenged in *LeFaber*, we noted in dicta that it was actually a more erroneous statement of self-defense law than the instruction at issue there. "The structure of WPIC 16.02 could mislead a jury because the imminent danger requirement is set off by a separate number and thus lacking connection to the reasonable belief qualifier." **1055 *LeFaber*, 128 Wash.2d at 902, 913 P.2d 369 (citing *State v. LeFaber*, 77 Wash.App. 766, 771, 893 P.2d 1140 (1995), rev'd on other grounds by, 128 Wash.2d 896, 913 P.2d 369 (1996)). We now make explicit what was implicit in that commentary: WPIC 16.02 is not the "manifestly clear instruction" that jurors require. *LeFaber*, 128 Wash.2d at 902, 913 P.2d 369 (citing *State v. Allery*, 101 Wash.2d 591, 595, 682 P.2d 312 (1984)). Moreover, the instruction complained of by *Ameline* contains the same offending language as the instruction invalidated in *LeFaber*.

[3] Unhappily for *Studd*, *Cook*, *McLloyd* and *Bennett*, however, the fact that a clearly erroneous jury instruction was given is not the end of the story. For the first three of these defendants, that is so because we have also held that "[a] party may not request an instruction and later complain on appeal that the requested instruction was given." *State v. Henderson*, 114 Wash.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted) (quoting *State v. Boyer*, 91 Wash.2d 342, 345, 588 P.2d 1151 (1979)). *Henderson* also involved erroneous WPIC instructions proposed by a defendant and later complained of, and we held there that "even if error was committed, of whatever kind, it was at the defendant's invitation and he is therefore precluded from claiming on appeal that it is reversible error." *547 *Henderson*, 114 Wash.2d at 870, 792 P.2d 514 (emphasis added). *Henderson* is directly on point. There can be no doubt that this is a strict rule, but we have rejected the opportunity to adopt a more-flexible approach. See *Henderson*, 114 Wash.2d at

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872, 792 P.2d 514 (dissent argues that "the doctrine should be applied prudently, with respect to the facts of each case," but acknowledges that "[t]his court's history of applying the doctrine of invited error with little analysis or discussion implies that the doctrine is strictly applied regardless of circumstances.") (Utter, J., dissenting) (citations omitted).

[4] The dissent seeks to avoid confronting the invited error doctrine by assigning significance to the fact that "in *LeFaber* this court reviewed the erroneous self-defense instruction without attaching any importance to the question of whether the defendant had proposed the incorrect jury instruction." Dissenting op. at 1052. This argument overlooks the fact that the invited error issue was never reached in *LeFaber* because there the record was "somewhat unclear as to whether defense counsel merely failed to except to the giving of the instruction, or whether he affirmatively assented to the instruction or proposed one with similar language." *LeFaber*, 128 Wash.2d at 904 n. 1, 913 P.2d 369 (Alexander, J., dissenting). Because we are not in the business of inventing unbriefed arguments for parties *sua sponte*, there certainly was no significance in our not doing so in *LeFaber*.

Here, the record is quite clear with regard to defendants Studd, Cook, and McLoyd that these defendants requested instructions modeled after WPIC 16.02. Consequently, the doctrine of invited error prevents them from now complaining about the trial court acceding to their request to give a certain instruction. The Court of Appeals in *McLoyd* wrongly concluded otherwise,^{FN4} although it went on to affirm McLoyd's conviction anyway. Although Justice Madsen*548 indicates in her concurrence that she "cannot conceive" of how the invited error doctrine applies to defendants requesting jury instructions modeled on WPIC instructions that have met "with this court's *general approval*,"^{FNS} we are satisfied that there is authority for such a result. Indeed, we have previously refused to address the retroactivity of a United States Supreme Court opinion where a legal pre-

sumption declared unconstitutional had been used, four years earlier, in a jury instruction requested by a criminal defendant. See *In re Personal Restraint of Griffith*, 102 Wash.2d 100, 101-02, 683 P.2d 194 (1984) (citing **1056 *Sandstrom v. Montana*, 442 U.S. 510, 512, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)). We reached this conclusion despite the fact that "the unconstitutional instruction was standard in this state, *In re Hagler*, 97 Wash.2d 818, 819, 650 P.2d 1103 (1982), and had been *expressly approved* by this court." *Griffith*, 102 Wash.2d at 104, 683 P.2d 194 (Utter, J., dissenting) (emphasis added) (citing *State v. Mays*, 65 Wash.2d 58, 66, 395 P.2d 758 (1964)). We will not overrule such binding precedent *sub silentio*.

FN4. Had McLoyd sought, and been denied, a clarifying instruction, the error would not have been invited. However, here his request for a clarifying instruction-WPIC 16.07-was, in fact, acceded to. McLoyd is prohibited from "setting up an error at trial and then complaining of it on appeal. The present case does exactly that." *State v. Pam*, 101 Wash.2d 507, 511, 680 P.2d 762 (1984) (citation omitted), *overruled on other grounds by, State v. Olson*, 126 Wash.2d 315, 321, 893 P.2d 629 (1995).

FN5. Concurrence at 1058 (emphasis added).

The dissent next attempts to distinguish our long-standing invited error doctrine on the strength of two opinions from the Court of Appeals. See Dissenting op. at 1061. One of those opinions, *State v. Studd*, we are reversing today. As for the other opinion, *State v. Young*, 48 Wash.App. 406, 739 P.2d 1170 (1987), the error there did "not arise from the giving of the instruction, *but the refusal to clarify it*" despite a request to do so. *Young*, 48 Wash.App. at 415, 739 P.2d 1170 (emphasis added). The error, therefore, was not truly invited. *Young*, 48 Wash.App. at 415, 739 P.2d 1170. Finally, with no Washington law to support it, the

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dissent is reduced to making policy arguments, based upon language from cases in other jurisdictions, for abandoning our invited error doctrine. We decline the invitation.

In light of *Griffith*, where the error was invited we need not address the issue, as the Court of Appeals in *McLoyd* *549 did, of whether WPIC 16.07 cures the defects in WPIC 16.02 in conformity with *LeFaber*. See *Griffith*, 102 Wash.2d at 102, 683 P.2d 194. We have, however, recently held that where “presumptively prejudicial” ambiguity was created by giving an instruction based upon a then-existing version of WPIC 16.02 it was cured by providing an instruction based upon the then-existing WPIC 16.07. *State v. Hutchinson*, 135 Wash.2d 863, 884, 959 P.2d 1061 (1998). This was because “[t]he jury is presumed to read the court's instructions as a whole, in light of all other instructions. The jury is also to presume each instruction has meaning.” *Hutchinson*, 135 Wash.2d at 885, 959 P.2d 1061 (citing *McLoyd*, 87 Wash.App. at 71, 939 P.2d 1255) (emphasis added). For the reasons stated above, the Court of Appeals is reversed in *Studd*, and *Studd*'s and *McLoyd*'s convictions are affirmed.

Although Cook invited error by requesting an instruction based on WPIC 16.02, he has also raised two other issues that merit our attention. He argues that the trial court erred in not providing a “no duty to retreat” instruction, based upon WPIC 16.08, that he had requested. Pet. for Review at 11. We have previously held that “[n]o duty to retreat exists when one is feloniously assaulted in a place where [one] has a right to be.” *Allery*, 101 Wash.2d at 598, 682 P.2d 312 (citing *State v. Hiatt*, 187 Wash. 226, 60 P.2d 71 (1936); *State v. Lewis*, 6 Wash.App. 38, 491 P.2d 1062 (1971)). A defendant is entitled to a jury instruction to this effect if sufficient evidence in the record supports it. See *Allery*, 101 Wash.2d at 598, 682 P.2d 312 (citing *State v. King*, 92 Wash.2d 541, 599 P.2d 522 (1979)). However, the Court of Appeals in *Cook* found that retreat was simply not an issue: “The State asserted

that Cook shot Robinson after any subjective risk of imminent danger had passed. The defense theorized that Robinson still held Cook at gunpoint at the time of the shooting. *Neither* scenario raises an inference that Cook could have avoided the use of force through a timely retreat.” *Cook*, slip op. at 8 (emphasis added). Cook's response is that the deputy prosecutor put the opportunity for retreat into issue during her closing argument. He, for example, *550 notes that she said of Cook that “[h]e certainly wasn't going to run away from trouble. He was going to finish it.” VRP at 1174. Cook takes these remarks completely out of context. The deputy prosecutor, in our view, was merely trying to establish premeditation, the prior example being used to show Cook's mental state in bringing the gun to a drug deal in the first place. We do not believe that the deputy prosecutor was suggesting that Cook could have run away during the ensuing altercation with the victim.

[5] Even less persuasive is Cook's argument that by giving the jury instruction 22, a non-WPIC instruction, over defense objections, the trial court “improperly emphasized the state's theory of the case” that Cook killed Robinson for revenge. Instruction 22 read as follows: “Justifiable homicide committed**1057 in the defense of the slayer, or ‘self-defense,’ is an act of necessity. The right of self-defense does not permit action done in retaliation or revenge.” CP at 105. Cook admits that this language comports with our reasoning in *Janes*, where we wrote that

[t]he objective aspect ... keeps self-defense firmly rooted in ... necessity. No matter how sound the justification, revenge can never serve as an excuse for murder. “ ‘[T]he right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge.’ ”

Janes, 121 Wash.2d at 240, 850 P.2d 495 (quoting *People v. Dillon*, 24 Ill.2d 122, 125, 180 N.E.2d 503 (1962)). Cook argues, however, that this jury instruction has never been approved-

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without citing any authority for what "approval" is necessary. Pet. for Review at 14. We find that the instruction correctly stated the law, and did not unfairly emphasize the State's theory of the case or, in any way, comment upon the evidence. Cook's conviction is affirmed.

[6] With regard to Bennett, the Court of Appeals cited a decision of this court in holding that "[t]he invited error doctrine generally forecloses review of an instructional error.... But invited error does not bar review of a claim of ineffective assistance of counsel based on such an *551 instruction." *Bennett*, 87 Wash.App. at 76, 940 P.2d 299 (citing *Henderson*, 114 Wash.2d at 870, 792 P.2d 514; *State v. Gentry*, 125 Wash.2d 570, 646, 888 P.2d 1105 (1995)). In *Gentry* we held that although we would "adhere to our normal use of the invited error doctrine" in capital cases, we would review challenges to invited jury instructions through ineffective assistance of counsel claims. *See Gentry*, 125 Wash.2d at 646, 888 P.2d 1105; *see also State v. Doogan*, 82 Wash.App. 185, 188, 917 P.2d 155 (1996) (applying this rule where defendant was charged with second degree promotion of prostitution).

By framing his argument this way, Bennett avoids one thicket only to become entangled in another. We strongly presume that counsel's representation was effective. *See State v. McFarland*, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995). A two-prong test must be met to demonstrate ineffective assistance of counsel. *See, e.g., State v. Thomas*, 109 Wash.2d 222, 225-26, 743 P.2d 816 (1987) (applying test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984)). Bennett must first show that his "counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances." *McFarland*, 127 Wash.2d at 334-35, 899 P.2d 1251 (citing *Thomas*, 109 Wash.2d at 225-26, 743 P.2d 816). However, "[d]eficient performance is not

shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wash.2d 61, 77-78, 917 P.2d 563 (1996) (emphasis added) (citing *State v. Garrett*, 124 Wash.2d 504, 520, 881 P.2d 185 (1994)). *LeFaber* had not been decided at the time of Bennett's trial, so his counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02. Thus we do not even reach the second part of the test, where Bennett would have had to also prove that "defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wash.2d at 335, 899 P.2d 1251 (citing *Thomas*, 109 Wash.2d at 225-26, 743 P.2d 816). Bennett's conviction is affirmed.

[7] *552 The jury instructions complained of by Ameline and Fields were given in circumstances different from those involving Studd, McLoyd, Cook and Bennett, and result in simple applications of our holding in *LeFaber*. In Ameline's case the jury was charged with an instruction containing the same language that we found to be unconstitutional in *LeFaber*. The instruction in both cases stated that homicide is justifiable when the slayer "reasonably ... intends to inflict death or great personal injury and there is imminent danger of such harm being accomplished." Ameline CP at 72; *LeFaber*, 128 Wash.2d at 898-99, 913 P.2d 369 (emphasis added). In *LeFaber* we held that this language permits "an erroneous interpretation of the law as requiring actual danger." **1058*LeFaber*, 128 Wash.2d at 902, 913 P.2d 369. The fact that Ameline proposed much the same instruction is no bar to his challenge to it, for he also proposed a curative instruction that was not given and, thus, did not invite the error that he complains of now. Therefore, *LeFaber* controls here because "constitutional rulings in criminal cases apply retroactively to all cases not yet finally decided on direct review." *State v. Campbell*, 125 Wash.2d 797, 800, 888 P.2d 1185 (1995). We affirm the Court of Appeals' decision reversing Ameline's conviction and remanding for a new trial.

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[8] The trial court in *Fields*' case gave WPIC 16.02 verbatim to the jury, consistent with *Fields*' request. *Fields* had, however, additionally requested an instruction identical to WPIC 16.07 as a curative instruction, and the trial court rejected that request. Thus the ambiguous language of WPIC 16.02 was unmitigated, and "the jury might have understood a self-defense claim to require a showing that actual harm was imminent." *Fields*, 87 Wash.App. at 65, 940 P.2d 665. Because "the fatal ambiguity resulted from the State's successful objection to the clarifying instruction that *Fields* proposed," *Fields* cannot be said to have invited the error he complains of and *LeFaber* applies. *Fields*, 87 Wash.App. at 65, 940 P.2d 665. Accordingly, the Court of Appeals properly reversed *553 his conviction and remanded for a new trial. We affirm the Court of Appeals.

CONCLUSION

In conclusion, we affirm the decisions of the Court of Appeals in *Cook*, *Bennett*, and *McLoyd*, which upheld convictions, and also affirm the decisions in *Ameline* and *Fields* wherein the convictions were reversed and new trials were ordered. Finally, we reverse the Court of Appeals in *Studd*, and remand to that court so that it might consider the other issues that *Studd* had raised on appeal that it failed to address in light of its holding in his favor. See *RAP* 13.7(b).

GUY, C.J., and DURHAM, SMITH, JOHNSON, TALMADGE, JJ., and DOLLIVER, J.P.T., concur. MADSEN, J. (concurring).

The invited error doctrine should not be applied to preclude claimed error resulting from a pattern jury instruction proposed by the defense. The pattern jury instructions are the result of considerable work of the Washington Supreme Court Committee on Jury Instructions which was created in 1963 by order of this court. See 6 WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL Preface, at VII (3^d ed. 1989) (WPI). In remarks addressing the third edition of the civil Washington pattern jury instructions, the members of this court

observed that the pattern instructions reduce

The time and effort which must be expended on the preparation of jury instructions in the day to day trial of cases. Furthermore, these pattern instructions have greatly enhanced the quality of justice in our courts by improving the quality of instructions given to juries. The intention is to present patterns for simple, brief, accurate and unbiased statements of the law We recommend the use of these pattern instructions.

Letter from Justices to Members of the Washington Bench and Bar (Jan.1989), *In* 6 WPI at V. The Committee Chair noted the aim of the Committee "to present patterns for *554 simple, brief, accurate and unbiased statements of the law . . ." 6 WPI, Preface at VII (Judge George T. Shields, Chair).

Clearly, the criminal pattern instructions have been formulated with the same goals in mind. Further, the importance this court attaches to the pattern instructions is evident in the many cases where the court refers to the instructions or to the Committee's comments. Indeed, this court has specifically referred prosecutors to the criminal pattern instructions for the purpose of identifying, in many cases, the essential elements that must be included in a charging document. *State v. Kjorsvik*, 117 Wash.2d 93, 102 n. 13, 812 P.2d 86 (1991).

This court has said the invited error doctrine serves to avoid a defendant's misleading the trial court. *State v. Henderson*, 114 Wash.2d 867, 868, 792 P.2d 514 (1990). I cannot conceive how that purpose is furthered by condemning the defendant for doing exactly what most attorneys do, with this court's general approval, in proposing instructions - rely on the Committee's pattern **1059 jury instructions. The Court of Appeals sensibly refused to apply the invited error doctrine in a criminal case where, in the absence of a criminal pattern instruction on superseding intervening cause, the civil pattern instruction proposed by the defense was given. *State v. Young*, 48 Wash.App. 406, 414-15, 739

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P.2d 1170 (1987). Although it is now apparent that criminal pattern instruction 16.02 on self-defense could lead to fatal ambiguity should it be given alone, defendants should not be faulted for proposing the instruction.

The injustice in applying the invited error doctrine in these circumstances is underscored in the majority's analysis. While the majority applies the doctrine where defendants have proposed pattern jury instructions, the majority also holds that giving of a pattern instruction is not ineffectiveness of counsel because it is not deficient performance for counsel to rely upon the pattern instructions.

I would hold the invited error doctrine does not apply where the instructions proposed are pattern jury instructions.

*555 I would, nevertheless, affirm the convictions in four of these CONSOLIDATED CASES. In a decision filed shortly after oral argument in this matter, the court held that while 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.02, at 176 (2d ed. 1994) (WPIC) is ambiguous and presumptively prejudicial, the jury is nevertheless adequately instructed on the law of self-defense where WPIC 16.07 is given along with WPIC 16.02. *State v. Hutchinson*, 135 Wash.2d 863, 884-85, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999). The two instructions, "taken in their entirety, properly state[] the law." *Id.* at 885, 959 P.2d 1061. Because both of these instructions were given in *State v. Studd*, 87 Wash.App. 385, 942 P.2d 985 (1997), *State v. Cook*, No. 19020-6-II, 1997 WL 404059 (Wash.Ct.App. July 18, 1997), *State v. Bennett*, 87 Wash.App. 73, 940 P.2d 299 (1997) and *State v. McLoyd*, 87 Wash.App. 66, 939 P.2d 1255 (1997), I would affirm in these cases on the basis that no instructional error occurred. In two of the cases, *State v. Ameline*, No. 17339-5-II, 1997 WL 417958 (Wash.Ct.App. July 25, 1997) and *State v. Fields*, 87 Wash.App. 57, 940 P.2d 665 (1997) instructional error did occur because WPIC 16.02 was given alone, and reversal for new trials is

proper.

I concur in the result reached by the majority.

SANDERS, J. (concurring in part, dissenting in part).

I agree with the majority that the conviction of Daun Bennett must be affirmed because he has not shown his counsel was deficient and, thus, cannot prevail on his ineffective assistance of counsel claim. I also agree with the majority that the convictions of William Ameline and Vincent Fields should be reversed and remanded for retrial because the jury instructions used in their trials were clearly erroneous. However, I disagree with the majority's dispositions as to Keith Studd, Lee Cook, and Raymond McLoyd. The majority affirms their convictions even though the jury instructions used in procuring their convictions contained fatal flaws which may have resulted in criminal convictions of innocent men.

The majority correctly frames the issue as to Studd, *556 Cook, and McLoyd as "[w]hether a jury instruction that erroneously states the law of self-defense furnishes a basis for a new trial when the erroneous instruction is requested by the defendant." Majority at 1051. The answer to this question is undeniably "yes." In *State v. LeFaber* we held "A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial" and requires reversal. *State v. LeFaber*, 128 Wash.2d 896, 900, 913 P.2d 369 (1996).

Here, defendants Studd, Cook, and McLoyd each admitted the killing but each raised self-defense at trial. Further, each defendant raised the specter that he reasonably, but mistakenly, feared for his life when he slayed the victim. The issue at each of the three trials in question was the validity of each defendant's claim of self-defense. In particular the critical question was whether each defendant may have reasonably, albeit **1060 mistakenly, believed he was in mortal danger when he killed the victim.

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In *LeFaber* we established that a defendant may successfully prevail on a claim of self-defense if he reasonably, but mistakenly, believed he was in imminent danger when he slayed the victim. 128 Wash.2d at 899-900, 913 P.2d 369. When such a defense is raised, the instructions "must more than adequately convey the law of self-defense" and "must make the relevant legal standard 'manifestly apparent to the average juror.'" *Id.* at 900, 913 P.2d 369 (quoting *State v. Allery*, 101 Wash.2d 591, 595, 682 P.2d 312 (1984)). Thus, a self-defense jury instruction is erroneous if it does not make it manifestly apparent to the average juror that a person is entitled to use self-defense even though he is not in actual danger so long as he reasonably (but mistakenly) believes he is in danger. *State v. Theroff*, 95 Wash.2d 385, 390, 622 P.2d 1240 (1980). The instruction is likewise erroneous if it leaves ambiguous whether actual danger is required. *LeFaber*, 128 Wash.2d at 902, 913 P.2d 369.

Here the court issued the approved Washington Pattern Jury Instruction 16.02 verbatim, which stated there must be actual danger in order for the defendant to invoke self-defense. *557 See Majority at 1051 (self-defense is AVAILABLE ONLY IF "[t]here was imminent danger of such harm being accomplished") (quoting WPIC 16.02). As the majority notes, this instruction was invalidated shortly after the three trials by this court in *LeFaber* because it fails to make manifestly apparent that a mistaken but reasonable belief will suffice. Majority at 1054. In fact, the instruction does the opposite by unambiguously providing that there must be actual imminent danger of such harm being accomplished. As such the instruction is clearly inadequate.^{FN1} Here, the juries might have found that the defendants reasonably, but mistakenly, feared for their lives when they acted in self-defense. In such case the instructions require the jury to convict while the law says acquit. Under *LeFaber* a conviction procured under such circumstances is constitutionally defective and reversal is mandated.

FN1. As an aside the majority references

the curing instruction, WPIC 16.07, and suggests that this instruction cured the "ambiguity" in WPIC 16.02, rather than created one. Majority at 1056 (citing *State v. Hutchinson*, 135 Wash.2d 863, 884, 959 P.2d 1061 (1998)). However, WPIC 16.02 is *not* ambiguous. It is a clear misstatement of the law. A clear misstatement may not be cured by another instruction as we have squarely held any attempt to cure a misstatement results in an impermissible ambiguity. *State v. Walden*, 131 Wash.2d 469, 478, 932 P.2d 1237 (1997). Since I cannot reconcile this court's well-reasoned and long-standing rule as articulated in *Walden* with its erroneous application in *Hutchinson*, I would give these defendants the benefit of the rule in *Walden*- a rule which *Hutchinson* does not purport to abandon except by its mistaken application. Compare *Hutchinson*, 135 Wash.2d at 885, 959 P.2d 1061 ("While instruction 24 could have been interpreted to require actual imminent danger, instruction 30 explicitly informed the jury the defendant was entitled to act on appearances") with *Walden*, 131 Wash.2d at 478, 932 P.2d 1237 ("[T]he rule requiring instructions to be considered as a whole does not save the internally inconsistent instruction in this case.").

But the majority denies these defendants the new trial which our law requires on the ground that the defendants invited the error. Majority at 1055. But in each of these three cases the defendants merely requested pattern jury instructions verbatim which were accepted and approved at the time.

The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Pam*, 101 Wash.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by* *558 *State v. Olson*, 126 Wash.2d 315, 893 P.2d 629 (1995). For example, in *Pam* the

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STATE HAD INTENTIONALLY created the appealable issue simply as a test case to push an appeal. *State v. Pam*, 101 Wash.2d at 511, 680 P.2d 762. Because the State had set up the error at trial only to challenge it on appeal we rightly closed the appellate court doors. In the present cases, however, the defendants did not set up the error in this sense. The defendants were simply trying to make an accurate statement of the law using approved pattern jury instructions. The majority emphasizes this point when it denies Bennett's ineffective assistance of counsel claim on the grounds counsel acted properly in relying on accepted pattern jury instructions. See Majority at 1057 ("LeFaber had not been decided**1061 at the time of Bennett's trial, so his counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02."). The majority cannot have it both ways.

The majority concedes it applies a "strict rule." Majority at 1055. It does indeed. The majority sends three men to prison for life even though the jury instructions used in procuring their convictions were erroneous on the critical point. We cannot say how the jury would have ruled under proper instructions on self-defense. Indeed, it is conceivable that under correct jury instructions at least one of these defendants would be found not guilty and acquitted by reason of self-defense. The integrity of the system as well as the fates of three men imprisoned for life cry for a retrial.

I note that application of the invited error doctrine is not as inflexible as the majority suggests. For example, in *LeFaber* this court reviewed the erroneous self-defense instruction without attaching any importance to the question of whether the defendant had proposed the incorrect jury instruction. The critical question in *LeFaber* was whether the instruction, and thus the conviction, was erroneous. Even more on point is *State v. Young*, 48 Wash.App. 406, 415, 739 P.2d 1170 (1987) wherein the court found the invited error doctrine inapplicable because "the proposed *559 instruc-

tion was a Washington pattern civil instruction." The Court of Appeals did the same in *State v. Studd*:

Generally, defendants are not allowed to request an instruction at trial and later seek reversal on the basis of claimed error relating to the same instruction. *State v. Henderson*, 114 Wash.2d 867, 868, 792 P.2d 514 (1990). The policy underlying this rule is the courts do not want to encourage defendants to mislead the court and, therefore, provide a reason for appeal. *Id.* at 868 [792 P.2d 514]. However, this case poses a unique situation. Defendants offered a Washington Pattern Jury Instruction which at the time was upheld by this court, only later to be struck by the Supreme Court as an ambiguous and erroneous statement of the law. *LeFaber*, 128 Wash.2d at 901-02 [913 P.2d 369]. This case presents circumstances which justify an exception to the invited error rule.

87 Wash.App. 385, 389-90, 942 P.2d 985 (1997).

We should allow a defendant to challenge erroneous jury instructions in cases where the defendant sought an approved pattern jury instruction in good faith only to have the same instruction invalidated as erroneous after defendant's trial but before his appeal is finalized. Such a rule would be in keeping with the general rule that "constitutional rulings in criminal cases apply retroactively to all cases not yet finally decided on direct review." *State v. Campbell*, 125 Wash.2d 797, 800, 888 P.2d 1185 (1995). Cf. *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (actual innocence may be shown notwithstanding procedural bar in habeas proceeding).

Additionally, such rule would be in keeping with that used in sister jurisdictions. For example, in the Ninth Circuit a defendant may challenge jury instructions even if he proposed or assented to them unless he knew or had reason to know they were faulty. *United States v. Perez*, 116 F.3d 840, 845

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(9th Cir.1997) (en banc). California follows a similar rule: "For the doctrine of invited error to apply, it must be clear from the record that counsel had a deliberate tactical purpose in suggesting or acceding to an instruction, and did not act simply out of ignorance or mistake *560 This is because important rights of the accused are at stake, and it is the trial court's duty fully to instruct the jury." *People v. Maurer*, 32 Cal.App.4th 1121, 1127, 38 Cal.Rptr.2d 335 (1995). See also *State v. Griffith*, 110 Idaho 613, 716 P.2d 1385, 1386 (1986) (invited error doctrine inapplicable where counsel sought the instruction "without any apparent tactical purpose").

To adhere to the majority's strict rule under the unusual facts of the three cases at issue here sacrifices justice and sends three men to prison under an erroneous charge to **1062 the jury. The integrity of our system instead demands retrial for Studd, Cook, and McLoyd.^{FN2}

FN2. Additionally, the majority's treatment of the no-duty-to-retreat issue raised by Cook is unpersuasive. Cook asked for a no-duty-to-retreat instruction but was denied one even though such is an accurate statement of the law and the facts supported such instruction. See *State v. Allery*, 101 Wash.2d 591, 598, 682 P.2d 312 (1984) (Washington follows the no-duty-to-retreat rule); *State v. Theroff*, 95 Wash.2d 385, 389, 622 P.2d 1240 (1980) ("Each side is entitled to have the trial court instruct upon its theory of the case if there is evidence to support that theory.").

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