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STATE TAXATION OF INTERSTATE COMMERCE: AN APPRAISAL AND SUGGESTED APPROACH

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A. THE NATURE AND SCOPE OF COMMERCE CLAUSE PROTECTION

As long as there are independent federal and state governments there will remain questions as to their appropriate relations with each other. The maintenance and promotion of the national interest in commerce among the states and at the same time bringing that interest into an effective harmony with the local interests of the states is one of the continuing problems in any federal system. The need for national economic unity unaffected by state borders and untrammeled by discriminatory and retaliatory state action against commerce from sister states was one of the chief reasons for abandonment of the Articles of Confederation and the adoption of our Federal Constitution, by which Congress was entrusted with power to regulate interstate commerce.[1] The removal of trade barriers erected by the states, both regulatory and tax measures, has evoked repeated and strong appeals to this fundamental reason for the adoption of the Constitution. Each new means of interstate transportation and communication has engendered commerce clause controversy relative to the taxing power of the states. If one state, in order to

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1. See THE FEDERALIST, Nos. 7, 11, 22 (Hamilton); THE FEDERALIST, No. 42 (Madison); 1 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 106-118 (2d ed. 1888); 2. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 308 (Rev. ed. 1937); 3 *id.* 478, 547-48; MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 10, 11 (1920); Passenger Cases, 7 How. 283, 445 (U.S. 1848); Brown v. Maryland, 12 Wheat. 419, 445 (U.S. 1827).

promote the economic welfare of her citizens, may guard them against competition from a sister state by the taxing process, the door has been opened to reprisals that were meant to be averted by subjecting commerce among states to the power of the nation.

In our federal system, however, there must be an appraisal and accommodation of the competing constitutional demands of the nation that commerce between the states shall not be unduly impeded by state action, and that the power of the states to lay taxes for the maintenance of their governments shall not be unduly curtailed. Whether the impediment to harmful state action springs from the commerce clause itself, or whether it has been found in the "will" of Congress,[2] to the Supreme Court of the United States has fallen the delicate duty to hold "with a steady and even hand the balance"[3] between these great conflicting demands of the states and nation. Although at times over a militant and persistent dissent,[4] it is now settled that the commerce clause, without implementation by Congress, limits the power of the states to tax.

In its zeal to preserve an unfettered flow of interstate commerce, during most of our constitutional history, including the present, the predominant doctrinal declaration of the Court has

2. Under one view that has had some recognition, no prohibition to state action was found to inhere in the commerce clause itself, but an impediment to state action might arise from the implied "will" of Congress. The failure of Congress to regulate interstate commerce was taken by the Court to signify a congressional purpose to leave undisturbed the authority of the states to take action affecting the commerce in matters of peculiarly local concern. State action concerning a phase of the commerce requiring uniform control would be invalidated, because of a presumed congressional negative, even if Congress had not acted. *See* Philadelphia & Southern S.S. Co. v. Pennsylvania, 122 U.S. 326, 336 (1887); Robbins v. Shelby County Taxing District, 120 U.S. 489, 493 (1887). This operative will of Congress doctrine also found acceptance in the field of state regulatory measures, as well as in taxation. Leisy v. Hardin, 135 U.S. 100 (1890). For a general discussion of the effect of the "silence of Congress," see Sholley, *The Negative Implications of the Commerce Clause*, 3 U. OF CHI. L. REV. 556, 583 (1936).

3. Slaughter-House Cases, 16 Wall. 36, 82 (U.S. 1872).

4. During various periods sharp debate has divided members of the Court as to the judicial function under the commerce clause. Chief Justice Taney apparently was the first member to advocate a judicial "hands-off" policy in the absence of a conflict of state action with congressional legislation. See License Cases, 5 How. 504, 579 (U.S. 1846). In modern times Justice Black has taken up the cudgel to oppose judicial action on state action in the absence of discrimination against interstate commerce. *See, e.g.*, Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938) (dissenting opinion). For a while Justices Frankfurter and Douglas were in the same camp with Justice Black. *See* McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 183 (1940) (dissenting opinion).

been an adherence to the philosophy that interstate commerce cannot be taxed at all by the states.[5] This view of constitutional power has been considered as a corollary of the proposition that the power of Congress to regulate interstate commerce is exclusive.[6] Justice Marshall's thinking, of course, is the fountainhead of this philosophy.[7] To him the "nature of the power" given to Congress was such as to make it exclusive.

There have been periods, however, when the Court has departed from the view of the exclusive nature of the power of Congress to control interstate commerce, particularly as to regulatory matters, and has followed the views of Chief Justice Taney, which reached fruition in a modified form in *Cooley v. Board of Wardens.*[8] Taney, who was Marshall's successor, stood at the other extreme from Marshall. In the absence of a conflict of a state law with congressional legislation Taney thought there was no function for the Court to perform with respect to laws interfering with interstate commerce.[9] The *Cooley* doctrine was to the effect that the nature of the subjects should be the pole star by which to steer in determining the validity of state action as it affects interstate commerce. Looking to the subject of the power as determinative, the *Cooley* doctrine permitted state and nation to deal with the same subjects. Accordingly, the followers of this view conceived of a "concurrent" power in the Federal Government and states to regulate interstate commerce. Those facets of interstate commerce requiring uniform control came within the exclusive province of Congress, but the states would have concurrent power with Congress over those aspects of interstate

5. Norton Co. v. Dep't of Revenue of Illinois, 340 U.S. 534, 537 (1951); Freeman v. Hewit, 329 U.S. 249, 256-57 (1946); Minnesota v. Blasius, 290 U.S. 1 (1933); Helson and Randolph v. Kentucky, 279 U.S. 245, 252 (1929); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 562 (1925); Kansas City, F.S. & M. Ry. v. Botkin, 240 U.S. 227, 231 (1916); Stockyard v. Morgan, 185 U.S. 27, 37 (1902); Brennan v. Titusville, 153 U.S. 289, 308 (1894); Lyng v. Michigan, 135 U.S. 161, 166 (1890); Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888); Robbins v. Shelby County Taxing District, 120 U.S. 489, 497 (1887).

6. *See, e.g.*, Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

7. In Brown v. Maryland, 12 Wheat. 419 (U.S. 1827), Chief Justice Marshall all but committed the Court to the view that the commerce clause impliedly prohibits all state taxation of interstate commerce, just as there was a "total failure" of power in the states to tax the operations of a federal instrumentality, as declared in McCulloch v. Maryland, 4 Wheat. 316 (U.S. 1819). In *Brown v. Maryland*, the *McCulloch* doctrine was brought over and declared to be "entirely applicable" to state taxation of interstate commerce.

8. 12 How. 299 (U.S. 1851).

9. License Cases, 5 How. 504, 579 (U.S. 1846).

commerce adapted to a diversity of control.[10] The *Cooley* approach suggested, in resolving the commerce clause controversy, the necessity for the weighing of the advancement of local interests as against interference with national interests. This was a job for the courts to do. Too, it is evident from the *Cooley* doctrine that the Court had ceased to look to the exclusive "nature of the power" as Marshall conceived of the grant of power to Congress to regulate commerce; instead, the Court began to look to that upon which the power operated—the "subjects of the power." The essence of the judicial search shifted from the nature of the power to the target at which the legislative arrow was shot. The concurrent power theory has been much easier to state than to apply to any particular state action. The Court has gotten itself into considerable difficulty at times trying to decide whether a particular phase of the commerce lent itself to concurrent control or whether it was of such nature as to demand exclusive congressional control.[11]

The dispute between the two great schools of constitutional doctrine as to whether the power of Congress to regulate interstate commerce is "exclusive" or "concurrnt" was, by and large, a battle of words since even the view holding to the "exclusive" power conceded that state action could very materially affect the commerce. The possession of the commerce power by Congress has never been deemed to cut the states off from all legislative relation to interstate commerce, even though the state action unavoidably involved some interference with interstate commerce. Ever since Marshall's day it has been recognized, even by the Justices who thought the power of Congress to regulate interstate commerce is "exclusive," that, in the absence of conflicting action by Congress, there is power in the states to pass

10. *E.g.*, Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945); South Carolina State Highway Dep't v. Barnwell Brothers, Inc., 303 U.S. 177 (1938). The *Cooley* doctrine divided the subjects of interstate commerce into essentially the same categories as the implied "will" of Congress doctrine. The *Cooley* doctrine found the impediment to state action in the commerce clause itself, whereas the operative will of Congress view found the impediment in the supposed intention of Congress. See note 2 *supra*.

11. Although the Court has been committed to the *Cooley* doctrine during various periods, much less certain or established have been the considerations by which the Court determined which branch of that doctrine to apply in a particular case. See Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 10 (1940).

statutes to safeguard their people from injurious local effects that may attend interstate traffic, which nevertheless in some measure affect interstate commerce.[12]

In the field of taxation there are, of course, many valid taxes upon local events whose burdens, when distributed through the play of economic forces, suppress or curtail interstate commerce to an extent equal to a prohibited exaction imposed directly upon the commerce itself. They have, nevertheless, been sustained under even the "exclusive" power view, although interstate activity was induced or occasioned by the taxed event, and however drastic the consequences on interstate commerce, with the Court taking the position that such state action was neither taxation of interstate commerce nor a regulation of it. The exactions were upheld on the ground that they were levied on a "local incident" or "local activity," or that the burden of the tax on the commerce was "indirect" or "incidental."[13] "No doubt every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."[14] Generally, the economic consequences of a tax have not been thought by the Court to be of any significance in determining whether the tax was proscribed by the commerce clause.[15] At intervals that have been entirely too infrequent, some consideration has been given to the economic burden in deciding the commerce clause

12. *See* Savage v. Jones, 225 U.S. 501, 524-25 (1912); Asbell v. Kansas, 209 U.S. 251, 255 (1908); Plumley v. Massachusetts, 155 U.S. 461, 473 (1894). Willson v. The Black Bird Creek Marsh Co., 2 Pet. 245 (U.S. 1829) is, of course, the historic example. There Chief Justice Marshall recognized the existence of the reserved power of the states to provide for such local matters as the safety, health and morals of their own people (the police power), which was thought by him to coexist with the commerce power of Congress. In the effort to accomplish those proper purposes, Marshall would permit the states to enact statutes which necessarily would impinge on the conduct of interstate commerce; but, under his understanding of the term "to regulate" this did not involve state regulation of interstate commerce.

13. Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935); Postal Telegraph-Cable Co. v. City of Richmond, 249 U.S. 252 (1919). *Compare* Eastern Air Transport, Inc. v. South Carolina Tax Comm'n, 285 U.S. 147 (1932), *with* Nashville, C. & St.L. Ry. v. Wallace, 288 U.S. 249 (1933). See McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940), for a comprehensive treatment of this point.

14. State Tax on Railway Gross Receipts, 15 Wall. 284, 293 (U.S. 1872).

15. *See* Southern Pacific Co. v. Gallagher, 306 U.S. 167, 177-78 (1939); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 217 (1925).

question.[16] In determining what constitutes interstate commerce for tax purposes the Court has concerned itself primarily with such matters as when interstate movement begins, when it ends and what constitutes an interruption.[17] The tests resorted to by the Court have thus been mechanical.[18] Economic similarity as an exclusive test of constitutionality of a tax would make pertinent precedents out of many cases otherwise in conflict with each other.[19]

The doctrinal declaration of the division of subjects of interstate commerce into those demanding national and those admitting of state control, which evolved in the *Cooley* case as a compromise of the views of Marshall and Taney, have continued much in evidence in the regulatory field of state action but have appeared much less often in tax cases. In the tax opinions the Court has talked much more often in terms of the exclusive power of Congress over interstate commerce. As a result, the Court has employed a dual standard of constitutionality much of the time. When regulatory measures have been contested the Court generally has spoken in terms of the "concurrent" power of Congress and the states over interstate commerce; and at the same time, when a tax measure was before the Court, it spoke in

16. *See* United States Glue Co. v. Oak Creek, 247 U.S. 321, 329 (1918); Robbins v. Shelby County Taxing District, 120 U.S. 489, 494-96 (1887). As we presently will see, under the guidance of Justice Stone the Court gave more attention to the economic consequences of the tax.

17. See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 192 (1937).

18. *See* Parker v. Brown, 317 U.S. 341, 360 (1943), where the Court recognizes the mechanical nature of the test.

19. Striking examples supporting this proposition can be found in the sales and use tax cases. In Helson and Randolph v. Kentucky, 279 U.S. 245 (1929), the Court nullified as a direct burden on commerce an attempt by the state to levy a tax on the consumption of gasoline by an instrumentality engaged exclusively in interstate commerce. On the other hand, a sales tax imposed on gasoline used by airplanes that operated only in interstate commerce was upheld in Eastern Air Transport, Inc. v. South Carolina Tax Comm'n, 285 U.S. 147 (1932). The Court thought the burden of the sales tax on interstate commerce was innocuously incidental. There is, of course, a difference in the sales and use tax in that the sales tax occurred at a stage more removed from interstate movement than the use tax. Thus, from a time or geographical standpoint the sales tax is not so closely connected with the subsequent interstate movement as is the use tax on articles used in that movement. But from a dollars and cents viewpoint it would seem that the two taxes would have an equal effect on the interstate commerce, since the burden of the sales tax was passed on to the consumer. Concerning the tests of constitutionality, Professor Powell of Harvard has remarked that "names were made to matter more than mathematics or economics." See Powell, *More Ado about Gross Receipts Taxes*, 60 HARV. L. REV. 501, 503 (1947).

terms of the "exclusive" power of Congress, and generally has declared that there is no local power to tax interstate commerce.[20] That odd dual standard is employed by our present Court.[21] By using this curious dichotomy the Court may have been implying that the states can impinge upon interstate commerce more by the police power than by the taxing power. The 1946 pronouncement by the Court in *Freeman v. Hewit*[22] let it be known, without equivocation, that the present Court considers that the states can do much more that hampers or constricts the flow of interstate commerce under their regulatory powers than under the taxing power.

It is a bit difficult to understand how the Court finds a basis in the commerce clause to warrant this double standard of constitutionality. What is there in the commerce clause that justifies the Court's deciding that the states have a concurrent power with Congress to regulate interstate commerce, but, at the same time, concluding that the commerce clause forbids state taxation of interstate commerce?

Whatever the nature of the protection from taxation the commerce clause has afforded, it has not been limited to the actual

20. Thus, covering the period from the middle 1880's until around the middle 1930's, the Court uniformly declared that interstate commerce could not be taxed at all, because the power of Congress over the commerce is exclusive. The following cases illustrate this approach: Robbins v. Shelby County Taxing District, 120 U.S. 489, 497 (1887); Lyng v. Michigan, 135 U.S. 161, 166 (1890); Crutcher v. Kentucky, 141 U.S. 47, 58-59 (1891); Brennan v. Titusville, 153 U.S. 289, 308 (1894); Stockard v. Morgan, 185 U.S. 27, 37 (1902); Kansas City, F.S. & M. Ry. v. Botkin, 240 U.S. 227, 231 (1916); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 562 (1925); Helson and Randolph v. Kentucky, 279 U.S. 245, 252 (1929); Minnesota v. Blasius, 290 U.S. 1, 9 (1933). During much of this same period of time, however, when a regulatory measure was contested, the Court spoke of the *Cooley* doctrine of the division of power over interstate commerce into those subjects national in character, which could only be regulated by Congress and those local in character admitting of state regulation. Leisy v. Hardin, 135 U.S. 100, 108-09 (1890); Minnesota Rate Cases, 230 U.S. 352, 399-400 (1913); California v. Thompson, 313 U.S. 109, 113 (1941). The Court either used the dual standard of constitutional doctrine as suggested—applying the *Cooley* doctrine to regulatory measures and the "exclusive power" doctrine to tax measures—or else the Court reversed its field quite frequently, sometimes even in the same term of Court. See *e.g.*, Lyng v. Michigan, *supra*, (tax statute) and Leisy v. Hardin, *supra*, (regulatory measure).

21. Freeman v. Hewit, 329 U.S. 249, 256-57 (1946), made it emphatically clear that interstate commerce cannot be taxed at all. California v. Zook, 336 U.S. 725, 728 (1949) and Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186 (1950) just as unequivocally declare that the *Cooley* doctrine of "concurrent power" is the gauge by which the validity of a regulatory measure is determined.

22. 329 U.S. 249, 253 (1946).

movement of commodities in interstate channels. Commerce clause protection has forbidden taxes levied on the privilege of engaging in that commerce,[23] taxes levied on gross proceeds from the commerce,[24] and, with the exception of property taxes, it has, until late years, insulated from taxes the means and instrumentalities employed in connection with that commerce.[25] Moreover, taxes which are aimed at or discriminate against interstate commerce fall before the commerce clause.[26]

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23. Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925). *See* Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U.S. 160, 162-63 (1903) for a large collection of early cases on this point.

24. Freeman v. Hewit, 329 U.S. 249 (1946); Matson Navigation Co. v. State Board of Equalization, 297 U.S. 441 (1936); Philadelphia & Southern S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887). Taxes on "net" income have withstood an attack on commerce clause grounds. Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942); Wisconsin v. Minnesota Mining & Mfg. Co., 311 U.S. 452 (1940); Atlantic Coast Line R.R. v. Daughton, 262 U.S. 413 (1923); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).

25. Helson and Randolph v. Kentucky, 279 U.S. 245 (1929); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925). Whatever the particular form of a tax levied on the means and instrumentalities, if the Court concluded that it was essentially only local property taxation, it would not be struck down as an infringement of the commerce clause. *E.g.*, St. Louis S.W. Ry. v. Arkansas, 235 U.S. 350 (1914); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897); Western Union Tel. Co. v. Attorney General of Massachusetts, 125 U.S. 530 (1888). The Court will now sustain a privilege tax on the means and instrumentalities of commerce in addition to an *ad valorem* property tax. Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938).

26. One means of discrimination that became widespread at a fairly early date was that of exempting from the tax in question the local goods or events, thus leaving only interstate business subject to the tax. The Court made short work of such taxes. Darnell & Son v. Memphis, 208 U.S. 113 (1908); Walling v. Michigan, 116 U.S. 446 (1886); Webber v. Virginia, 103 U.S. 344 (1880); Tiernan v. Rinker, 102 U.S. 123 (1880); Welton v. Missouri, 91 U.S. 275 (1875). Another form of discrimination equally obnoxius from the standpoint of the commerce clause is that of subjecting non-resident business to higher tax rates than local business. Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Ward v. Maryland, 12 Wall. 418 (U.S. 1870). A party complaining of a tax does not, however, establish discrimination merely by showing that the tax to which he is subjected is different in form, or adopts a different method of assessment, or that he is subject to a greater number of taxes than is a taxpayer doing wholly a local business. A tax does not discriminate against interstate commerce if other related taxes impose equal burdens on local commerce. To show discrimination the complaining taxpayer is under the necessity of showing that in actual practice the tax complained of falls with disproportionate economic weight on him. *See* Henneford v. Silas Mason Co., 300 U.S. 577, 584-85 (1937); Gregg Dyeing Co. v. Query, 286 U.S. 472, 480 (1932); Interstate Busses Corp. v. Blodgett, 276 U.S. 245, 251 (1928).

There is some reason to think that the Court has occasionally felt that the commerce clause places a limitation on the amount of an otherwise valid tax. A few of the capital stock franchise tax cases rather clearly made the pivotal point of constitutionality the smallness in the amount of the tax. When the statute was revised, increasing the amount, it was upset.[27] Though taxes for the use of public facilities are limited by the commerce clause to a reasonable rental, they are not true revenue measures and would not, of course, support the proposition that the commerce clause limits the amount of a tax.[28] The Court generally has tried to adhere to the idea that the commerce clause does not place a limit on the amount of a tax.[29]

Prior to 1938, when the Court was declaring that interstate commerce was exempt from local taxation, a tax was saved by declaring that the effect of the tax on interstate commerce was "indirect," which is a fashion in judicial speech tantamount to the conclusion that the taxed event was not considered interstate commerce.[30] A tax levied on the actual movement of interstate commerce, or on the privilege of engaging in, or on gross receipts from that commerce, or on the means and instrumentalities used in interstate commerce (property taxes permitted) was struck down as having a "direct" effect or being a "direct" burden upon the commerce, which was another way of saying that there is no local power to tax interstate commerce.[31] The vice of the condemned tax was not its potentialities for interfering with the commerce, but its "direct" bearing on the commerce, whatever that meant. That brand of doctrinal declaration, of course, as-

27. A Massachusetts capital stock franchise tax with a maximum limit imposed for the privilege of doing business was sanctioned in Baltic Mining Co. v. Massachusetts, 231 U.S. 68 (1913). The same tax statute with the limitation removed was upset in International Paper Co. v. Massachusetts, 246 U.S. 135 (1918). The *International Paper* opinion points out that the maximum placed on the amount of the *Baltic* case tax was a "material factor" in that decision.

28. Ingles v. Morf, 300 U.S. 290 (1937); Interstate Transit, Inc., v. Lindsey, 283 U.S. 183 (1931); *see* Capitol Greyhound Lines v. Brice, 339 U.S. 542, 545 (1950).

29. *See* dissent of Justices Stone, Brandeis and Cardozo in Great Northern Ry. v. Weeks, 297 U.S. 135, 157 (1936); see Helson and Randolph v. Kentucky, 279 U.S. 245, 250 (1929).

30. *See* Wiloil Corp. v. Pennsylvania, 294 U.S. 169, 175 (1935); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 563 (1925); Postal Telegraph-Cable Co. v. City of Richmond, 249 U.S. 252, 257-58 (1919).

31. Helson and Randolph v. Kentucky, 279 U.S. 245, 252 (1929); Lyng v. Michigan, 135 U.S. 161, 166 (1890); Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

sumed a trustworthiness in the test which did not exist. It gave very little help to the legislator, the lower courts or the taxpaying business men in predicting whether a particular tax would be valid. This test simply implied the impotence of state power; it described a result reached, not the reasons for that result.

Decisions of the magnitude of the constitutionality of a tax should not be made by resort to labels or virtually meaningless formulas. As Justice Cardozo once put it "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective."[32] Justice Stone, however, was apparently one of the first members of the Court to spearhead an assault on the "direct-indirect" effects and burdens test in his dissent in *Di Santo v. Pennsylvania* in 1927.[33] This test, declared Justice Stone, is "too mechanical, too uncertain in its application, and too remote from actualities to be of value," and to employ it was "little more than using labels to describe a result rather than any trustworthy formula by which it [was] reached."[34]

After an interlude of about eight years beginning in 1938 under Justice Stone, during most of which time sounder constitutional doctrines prevailed,[35] an unrealistic approach again reappeared and unreliable tests of taxability, similar to the pre-1938 ones, again crept into the opinions.[36]

During much of our constitutional history, the Court has been overzealous in protecting interstate commerce from state taxation. The protection often has been given at the expense of local interests without being needed for preservation of the national interests involved. When the Court has adopted the view that interstate commerce is exempt from local taxation, it has seemed impervious to the fact that to the extent it granted preferential tax treatment to interstate business, it thereby placed taxable local business at a competitive disadvantage with interstate business. There have been a few occasions, fortunately, when more realistic views prevailed and there has been judicial awareness that curtailment of state taxing power "would be to make local in-

32. Dissenting in Carter v. Carter Coal Co., 298 U.S. 238, 327 (1936).
33. 273 U.S. 34, 43 (1927) (dissenting opinion).
34. *Id.* at 44.
35. Presently we will have something to say about Justice Stone's efforts along this line.
36. This regrettable recrudescence will be mentioned in some detail a bit later. See text supported by notes 71, 72, 73, 74, 75 *infra*.

dustry suffer a competitive disadvantage."[37] Unfortunately, this wholesome philosophy has found its way into the decisions at intervals that have been entirely too infrequent.

Likewise, when the Court adhered to the view that interstate commerce is free from local taxation, it has failed to show sufficient concern with the essential fairness that those engaged in interstate commerce should pay an appropriate share to the local governments under whose protection they operate. Too few have been the times when the Court has recognized that it "is important to prevent that clause [commerce] being used to deprive the states of their lifeblood. . . ."[38]

Implicit in some of the cases is a concern for local revenue needs. When valuing property used in connection with interstate commerce or when valuing local activity for the purpose of state taxation, the Court has approved a valuation of the property, activities or events in their organic interstate relations and not merely as an aggregation of unrelated items. The taxing authority has been permitted to look beyond its territorial borders to determine the true value of taxed subjects within its borders when the subjects are part of a multi-state system. The law values property, activities and events within a taxing jurisdiction according to their nature and in the light of the advantage of those activities and events, considered not as unrelated items but in their setting as integral parts of the much larger multistate organization.[39] The Court has thus permitted the taxed valuation of the property, activities and events to take account of their increase in value resulting from their relation to the extra-state operations of the taxpayer. To that extent interstate commerce could fairly be said to be contributing a share for the

37. International Harvester Co. v. Dep't of Treasury, 322 U.S. 340, 349 (1944) (per Justice Douglas).

38. Justice Holmes, speaking for the Court in Superior Oil Co. v. Mississippi *ex rel.* Knox, 280 U.S. 390, 395 (1930).

39. This is known as the "unit rule" of valuation. This rule was originally developed to apportion property or earnings of such unitary enterprises as communication or transportation companies. *E.g.*, St. Louis, S.W. Ry. v. Arkansas, 235 U.S. 350 (1914); Western Union Tel. Co. v. Gottlieb, 190 U.S. 412 (1903). Those, of course, are companies whose property does have real tangible value above its physical worth owing to its use as part of one enterprise, and whose earnings are incapable of separation into the respective portions derived from intrastate and interstate business. This "unit rule" has been extended to corporations engaged in production and selling activities. International Harvester Co. v. Evatt, 329 U.S. 416 (1947); Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939); Great A. & P. Tea Co. v. Grosjean, 301 U.S. 412 (1937).

maintainance of the local governments. Unfortunately, at the same time the Court was being unrealistic in the matter by insisting that interstate commerce could not be taxed at all. Thus, there was considerable substance in the observation that the "[s]tates can tax interstate commerce if they go about it in the right way."[40]

Also, apparently with an eye to the essential fairness that interstate commerce should bear its share of the tax load, the Court has permitted the local governments to single out various "local" events closely related to interstate commerce as the incidence of valid taxes. The various sorts of exactions for the privilege of employment of articles, such as installation, maintainance of pipe lines in the ground,.use, storage, withdrawal and other consumption taxes levied on a great variety of activities and privileges are among sanctioned taxes of this variety.[41] But they are never regarded as taxes on the privilege of engaging in interstate commerce, irrespective of the fact that the event taxed is indispensable to an interstate operation. By and large, the legislative phraseology made the difference.[42] The incidence of the tax is considered a "local" activity or event. One might well question, as a certain member of the present Court has done by way of trenchant dissent, whether there is any "reasonable warrant for cloaking a purely verbal standard with constitutional dignity."[43] Unfortunately, no trustworthy criterion for determining what events can be segregated so as to serve as the fulcrum of the tax has been forthcoming from the Court. Oftimes the distinctions seem arbitrary.[44] The conclusion that the tax is levied on a "local"

40. Powell, *Contemporary Commerce Clause Controversies over State Taxation*, 76 U. OF PA. L. REV. 773, 774 (1928).

41. Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948) (maintenance of pipe lines); Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939) (installation of railroad equipment); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933) (storage and withdrawal of gasoline).

42. In Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925), the taxpaying corporation maintained in the taxing state offices, telephone and telegraph lines, automobiles, and it purchased supplies and employed labor. Yet the privilege tax was struck down because the legislative phraseology permitted the tax to be treated as one for the privilege of engaging in interstate business. In a later case the Court pointed out that in-the-state activities of the Ozark Corporation could be subject to a privilege tax. See Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 94 (1948).

43. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 614 (1951) (dissenting opinion of Justice Clark).

44. In Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932), the Court treated as a taxable local event the generation of electricity for out-of-state transmission, although the production and transmission processes were

event gave guidance that is no more reliable or meaningful than the "direct-indirect" burdens test.

A lesson in statutory draftsmanship can be learned here, however. The drafters of the tax statute can often achieve tax validity by phrasing the tax in such terms that it bears on one or more of these so-called local events, rather than casting it in terms which will more easily permit the Court to treat it as a tax on the privilege of engaging in interstate commerce.

While the Court has given some recognition that interstate commerce should accommodate itself to the revenue needs of the state as well as to the fairness that local business should not suffer tax disadvantages, there still remain large areas where inequities do exist—areas in which the Court has permitted interstate business to escape its fair share of the tax load. A tax levied on items in transit[45] or a tax thought to have as its operative incidence the privilege of engaging in interstate commerce has never been able to get past the commerce clause roadblock, even though the tax in each instance was fairly measured according to the connections of the objecting taxpayer with the taxing State.[46] To this day the "constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."[47] The fact that the taxing state afforded opportunities to the commerce has not been grist which the Court has thrown into the constitutional hopper. Thus, taxes measured by income, whether net or gross, capital stock, or in other ways, have uniformly been nullified where the Court felt that the subject of the tax was the privilege of engaging in interstate commerce. Such taxes have been banned "without regard to measure or amount."[48]

In no other instance is the singularly mechanical nature of the

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virtually simultaneous. In Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938), the activity of advertising in a magazine with an interstate circulation was considered a taxable local event. But in Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U.S. 650 (1936) the activity of advertising by radio was treated as interstate commerce and the tax was nullified.

45. Hughes Brothers Timber Co. v. Minnesota, 272 U.S. 469 (1926); Champlain Realty Co. v. Brattleboro, 260 U.S. 366 (1922).

46. Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218 (1933); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925).

47. Spector Motor Service v. O'Connor, 340 U.S. 602, 609 (1951).

48. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 217 (1925).

Court's approach in handling tax litigation more conspicuously demonstrated than in taxes involving gross receipts from interstate operations. In determining the validity of the gross receipts tax, generally the legislative description of the tax has had a good deal more to do than the economic effects of the tax or the local revenue needs. That was particularly true prior to 1938 and again beginning in 1946. Thus, taxes levied "on" a subject and "measured by" the gross proceeds from an interstate sale of the subject matter were more likely to be treated as fairly valuing a "local" event with only a remote or indirect effect on the commerce itself than if the taxes were levied directly "on" the gross receipts from the transaction. Taxes levied on an event which the Court considered as "local" and measured by the gross receipts were unscathed by the commerce clause.[49] Prior to 1938 when the legislature aimed the tax directly at the proceeds from the interstate transaction, there was thought to be much more likelihood that the tax would cause injurious interference with the commerce than when the gross proceeds derived from the transaction were used as a measure of the value of the local event. When the tax was imposed on gross receipts from multistate transactions as the subject, it had great difficulty in getting across the commerce clause hurdle.[50] Perhaps the Court felt that there was more danger of reaching proceeds from out-of-state values, when the tax was levied "on" the proceeds of the transaction, although the Court generally struck down the tax on some artificial and formalistic ground which obscured whatever value was preserved by its decision.

From the viewpoint of the economic consequences of the tax, the distinction drawn by the Court in gross receipts taxes, as well as in other taxes, has no useful significance. Thus, while the Court denied the power of the states to levy a privilege tax "on" unapportioned gross receipts, nevertheless it was competent to impose the tax on a local event and measure the value by gross

49. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919); Ficklen v. Shelby County, 145 U.S. 1 (1892); Maine v. Grand Trunk Ry., 142 U.S. 217 (1891). Gross receipts taxes as a fair substitute for all other permissible taxes ("in lieu of") became a familiar and sanctioned tax. Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929); Pullman Co. v. Richardson, 261 U.S. 330 (1923); Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918).

50. New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U.S. 338 (1930); Meyer v. Wells, Fargo & Co., 223 U.S. 298 (1912).

proceeds, although a tax measured by the volume of gross receipts would seem to have, in practical results, the same consequences for suppressing or curtailing the flow of the commerce as one laid "directly on" the receipts. It is extremely difficult to get away from the thought that the stuff that will create a trade barrier, such as the commerce clause was designed to prevent, is the disproportionate economic weight of a tax on interstate business as compared with the tax consequences on local business, and not some legislative departure from a judicially created mechanical formula, barren in its economic results. Perhaps no other tax illustrates better the view that the Court generally has considered the dominant test of constitutionality to be the subject taxed rather than economic effects of the tax. The "measure may be found," says the Court, "in property or in the receipts from property not in themselves taxable."[51]

Sometimes, however, the Court has seen fit to make the measure of a tax a factor on which constitutionality hinged. This has occurred occasionally in connection with a tax for the privilege of doing business when measured by gross receipts,[52] and also when a tax for the privilege of engaging in local business has been measured by capital stock of the taxpaying foreign corporation. This exaction is commonly called a corporate franchise tax. When corporate franchise taxes, measured by the total authorized capital stock of the corporation, have been contested, the Court has adopted a curious technique with respect to the measure. When this tax has been imposed on a foreign corporation already engaged in business within the state for the privilege of doing a local business mingled with its interstate business, it has been thrust down in several cases as violating both the due process and the commerce clauses, on reasoning of dubious soundness. The Court has taken the position that, although the tax was imposed for the privilege of doing local business, nevertheless by reason of the fact that the tax was measured by all the capital stock, it was laid on all of the corporation's property, both within and without the taxing state.[53] This, of course, is not true,

51. Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 87 (1913).
52. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939). Another case where the Court goes far in indicating that a privilege tax is an infringement of the commerce clause because of the impropriety of gross receipts as a measure is New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U.S. 338 (1930).
53. Cudahy Packing Co. v. Hinkle, 278 U.S. 460 (1929); International

since there is no necessary relationship between capital stock and the property of the corporation.[54] It is not clear whether the Court treated the measure of the tax as, in reality, the subject, or whether it held the tax bad on the ground that the measure itself transcended commerce and due process limitations. Confusion is added when we notice that capital stock franchise taxes, measured by the total capital stock of the foreign corporation, are sustained when the measure is used to determine the price a state will charge for permitting a foreign corporatoin to enter the state for the purpose of engaging in local business in the first instance.[55] There the Court does not question the appropriateness of the measure. Nor does it question the suitability of the measure when the total capital stock of a foreign corporation engaged in interstate business is used to determine the amount of the tax where there is local business separable from the interstate business, even though the corporation was engaged in business when the levy was imposed.[56]

The Court likely has treated the legislatively prescribed measure of the tax as the operating incidence or subject of the tax in some of the cases where it is indicated that the measure was the feature that offended commerce clause requirements.[57] The

Paper Co. v. Massachusetts, 246 U.S. 135 (1918); Western Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1 (1910).

54. The actual value of the property of the corporation may be many times greater than its capital stock, or the value of the property may be less than the capital stock of the corporation. See 11 FLETCHER, CORPORATIONS, §§ 5080, 5082 (Perm. ed. 1932), citing a long, unbroken line of authority supporting this position. The lack of a realistic relationship between authorized capital stock and the value of the corporation's property becomes all the more evident in light of the now common practice of having no-par shares authorized. For evidence that some members of the Court have recognized that there is no necessary relationship between the authorized capital stock of a corporation and its property, see Atlantic Refining Co. v. Virginia, 302 U.S. 22, 28 (1937); Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 87 (1913) (corporation had assets of 5 to 1 of authorized capital).

55. Atlantic Refining Co. v. Virginia, 302 U.S. 22 (1937); Horn Silver Mining Co. v. New York, 143 U.S. 305 (1892).

56. Cheney Brothers Co. v. Massachusetts, 246 U.S. 147 (1918); Baltic Mining Co. v. Massachusetts, 231 U.S. 68 (1913).

57. Thus, in Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 438 (1939), in striking down the tax, the Court said "that the tax, though nominally imposed upon appellant's possessive activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume." This statement that though the tax is "nominally imposed" upon taxpayer's business, when followed by the remainder of the statement, suggests that the Court is using the measure as a factor in deciding what really is the subject or incidence of the tax.

measure of a tax (if it is truly a "measure") generally has not been thought by the Court to raise a constitutional question. Once the taxing state has based a tax on a taxable subject, that is the end of the constitutional inquiry in so far as the commerce clause is concerned. No "constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."[58]

We should not lose sight of the fact, however, that if the legislatures were given a completely free rein in selecting the measure of a tax, they would be left free to exert their taxing power to the detriment of the national commerce just as certainly as if they used an out-of-state value as the subject of the tax, which they cannot do. There are troublesome problems, therefore, in connection with the measure of the tax and some control over the selection of a measure likely is needed. Perhaps that is why the Court, at times, will conclude that the legislatively designated measure of a tax is really the subject and will nullify the tax as having its operating incidence in property or values located beyond the jurisdiction of the state or in some integral part of interstate commerce.

The draftsmen of a tax statute can learn a lesson from this artificial subject-measure concept of taxes. Since the "measure may be found in property or in the receipts from property not in themselves taxable,"[59] astute draftsmen, by using the proper formula in regard to the subject and measure of the tax, may be able to reap a harvest of revenue which would be denied to the state had the item used as the measure of the tax been used as the subject.

Even though the legislature has levied the tax "on" an activity or event that was nominally local and has computed its value by some innocuous measure, that legislative designation has not always saved the tax from commerce clause condemnation. Taxability has not always been achieved by the simple device of casting the tax in terms of some selected local event. As we have had occasion to observe, the tax will be held bad if the event taxed is thought by the Court to be an integral part of interstate com-

58. Home Ins. Co. v. New York, 134 U.S. 594, 600 (1890). To the same effect, see Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 87 (1913).
59. Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 87 (1913).

merce or the privilege of engaging in that commerce, even though the legislature had treated the subject of the tax as a "local" event. Unfortunately, the Court has never developed any dependable guide by which it can be predicted when the Court will disregard the legislative description that the tax is imposed on a local event. The ascertainment of the scope of the tax is a question for the state courts and will not be reviewed by the Supreme Court of the United States.[60] But neither the characterization of the tax by the legislature nor the state court is determinative of the issue whether the tax is forbidden by the commere clause. The Supreme Court will decide the question whether the legislature or the state court erroneously classified the taxed event as local business, when it is interstate business.[61] The taxpayer claiming immunity supposedly has the burden of establishing his exemption,[62] but the presumption of constitutionality of a tax statute has been so judicially watered down that many times the complaining taxpayer does not have much trouble in dislodging the presumption.[63]

Justice Stone's *Di Santo* dissent[64] showed his dissatisfaction with the mechanical approach to the question of tax validity. In 1938, he began to chart a course which would give more consideration to the possible economic effects of the particular tax on interstate business and less consideration to the formal aspects of the tax. In resolving the constitutional question, the dominant concern of Justice Stone was with whether the tax would place interstate business at a competitive disadvantage with local business. The development of this realistic approach began in *West-*

60. Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); Watters v. Michigan, 248 U.S. 65 (1918); Armour Packing Co. v. Lacy, 200 U.S. 226 (1906); Kehrer v. Stewart, 197 U.S. 60 (1905).

61. Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948); Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265 (1921).

62. Norton Co. v. Dep't of Revenue of Illinois, 340 U.S. 534 (1951).

63. In Freeman v. Hewit, 329 U.S. 249 (1946), the Court declared that "any interference" with interstate commerce by way of taxation is repugnant to the commerce clause. If this language is taken at face value, the end product virtually results in a presumption against the validity of a tax which appears to have an appreciable effect on interstate commerce. A regulatory measure is buttressed by a much stronger presumption in favor of its validity. See Railway Express Agency, Inc. v. Virginia, 282 U.S. 440, 444 (1931); Interstate Busses Corp. v. Holyoke Street Ry., 273 U.S. 45, 51 (1927).

64. In Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927), Justice Stone stated: "In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."

ern Live Stock v. Bureau of Revenue.[65] Justice Stone was there concerned with two main propositions in answering the commerce clause question: (1) Interstate comerce should bear its just share of state tax burdens; (2) state taxes on interstate commerce should be sustained when not involving danger of "cumulative burdens not imposed on local commerce." The Court got away from the subject-measure ritual. The major development of this wholesome approach took place in the field of taxes on sales and gross receipts. For a period under Justice Stone's influence, the Court abandoned the mechanical distinction between a tax levied "on" gross receipts and taxes imposed on some other subject and "measured by" gross receipts. The exaction would be sustained if the proceeds taxed, whether from sales transactions or from services, were fairly attributable to activities and events having a substantial connection with the taxing state. That was true whether the subject of the tax was some local event measured by gross proceeds, or whether the tax was laid directly on gross proceeds as the subject of the tax.[66] Whatever the subject or the legislatively designated measure of the tax, it would be struck down, however, if it threatened to result in a heavier tax burden on interstate business than on a local transaction.[67] The Court increasingly emphasized the consequence and effects, either actual or threatened, of the questioned tax to hamper or hinder interstate operations. The emphasis and stress upon formulae were greatly reduced. A pragmatic approach to the problem had been adopted and interstate commerce was required to "pay its way."[68]

As the Court, even under Justice Stone, continued to develop the "cumulative burdens" test, it began to make some modifications of the doctrine. At times the Court came to speak in terms of "local" events. Privilege taxes, use taxes and sale taxes on

65. 303 U.S. 250 (1938). There the Court sustained a New Mexico tax on the business of publishing a magazine having an interstate circulation, measured by its gross receipts from advertising.

66. International Harvester Co. v. Dep't of Treasury, 322 U.S. 340 (1944); Department of Treasury of Indiana v. Ingram-Richardson Mfg. Co., 313 U.S. 252 (1941); Department of Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62 (1941).

67. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).

68 Justice Holmes expressed this thought in his famous dissent in New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U.S. 338, 349 (1930) (dissenting opinion).

the full proceeds of interstate transactions were upheld on reasoning that seemed to seek aid from the pre-1938 doctrine. There could be no multiplication of a privilege, sales or use tax, because the tax was on the "local" activity of exercising a privilege or incident to delivery or use within the taxing state.[69] Thus, the risk of multiple taxation was not fatal so long as the tax was peged on an "in-the-state' event or activity, which could not be the basis of taxation in another state. The tax could not be repeated elsewhere.

Although the Court under Justice Stone resorted to the pre-1938 terminology to aid it in its task, a very significant development had taken place. The concept of a taxable "local" event was very different from the pre-1938 meaning of that terminology. Under Justice Stone, "local" event was virtually synonomous with an "in-the-state" event, even though that event was an integral and indispensable part of an interstate operation. The tax burden was thus equalized between local and interstate business by making such "in-the-state" segments of interstate commerce taxable, so long as the tax did not place interstate commerce at a competitive disadvantage with local business.

In essence, the use of the term "local" event, even as Justice Stone employed that term, still stated a conclusion without showing on its face the reasons that led to that conclusion. Nevertheless when "local" event is used to mean only that the taxed event has some factual connection with the taxing state, irrespective of whether the event is part of interstate or intrastate business, then that terminology is meaningful and also salutary in that it permits the states to exact from interstate commerce its fair share of the tax load with a forthright recognition that such is being done. Under this definition, it is not necessary for the Court to engage in mental gymnastics trying to find an event which is not a part of interstate commerce, which can be used as a subject for a tax. Factually, of course, it is most difficult, if not impossible, to find such an event in modern multi-state business.

To be sure, the task of determining whether a particular tax does give local business a competitive advantage over interstate business may be difficult, but it should not be any more so than

69. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) (sales tax); Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939) (use tax); Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938) (tax on privilege of operating engines used to propel gas through pipe line).

the job of weighing all the varied and complicated factors in arriving at a judgment whether a particular tax discriminates against interstate commerce. Both jobs appear to be essentially the same. The Court has always been willing to wrestle with the problem of tax discrimination. In fact, in *Gwin, White & Prince, Inc. v. Henneford,*[70] the Court concluded that a tax which places interstate business at a competitive disadvantage with local business does discriminate against interstate commerce.

Soon after Chief Justice Stone's death, *Freeman v. Hewit*[71] marked the end of this brief cycle when practical considerations were factors influencing constitutionality. Many of the cases since then have not paid attention to the potentialities or actualities of the tax for placing interstate commerce at a competitive disadvantage with local business. Moreover, the present Court does not seem to concern itself with whether interstate commerce should pay its way. The Court is again talking in terms of the freedom of interstate commerce from local taxation.[72] The tests used to determine whether the states have invaded that judicially established privilege sanctuary are cast, once more, in language not unlike the mechanical, meaningless language of the pre-1938 cases.[73] The Court is again declaring that the states are powerless to tax unless the tax is laid on a "local" incident and it is using "local" in a narrow and uncertain meaning, as something separate and apart from interstate commerce,[74] when factually such events rarely exist in our modern multi-state business. Even the "cumulative burdens" test, which was developed to make interstate commerce pay its way, has been so twisted and tortured that it is now used to express the view that interstate commerce is immune from local taxation.[75]

70. 305 U.S. 434 (1939).
71. 329 U.S. 249 (1946).
72. Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951); Norton Co. v. Dep't of Revenue of Illinois, 340 U.S. 534 (1951).
73. *E.g.*, Freeman v. Hewit, 329 U.S. 249 (1946) (tax invalid because laid "directly on" and "on the very processes" of interstate commerce).
74. *E.g.*, Norton Co. v. Dep't of Revenue of Illinois, 340 U.S. 534 (1951); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947).
75. In Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947) the Court invalidated a tax on gross receipts as applied to stevedoring because it feared the risk of a "multiple tax burden"; but then the Court went on to declare that the risk of a multiple burden could not be avoided since stevedoring was not a "local event" distinct from the commerce. Clearly, the Court is using the "cumulative burden" test to decide that an

It is clear that the absence of the risk of tax multiplication that would place interstate business at a competitive disadvantage with local business is not now enough to sustain a tax thought to be levied on interstate commerce. Although there is actually no risk that the tax could be repeated elsewhere, if the event made the operating incidence of the tax is considered interstate commerce, the states are now denied the power of imposing a tax. It requires but a brief mention of only a few late cases to establish that proposition. Ready support can be found in *Norton Co. v. Dep't of Revenue of Illinois,*[76] *Spector Motor Service, Inc. v. O'Connor,*[77] and *Memphis Steam Laundry Cleaner, Inc. v. Stone.*[78] In none of these cases was it possible for any other taxing authority to repeat the tax, either in form or in substance. Yet in each instance the tax was struck down.

This appraisal of local taxation of interstate commerce has undertaken to develop two main themes: interstate commerce should not escape its fair share of taxation, and more attention should be given economic consequences in determining tax validity. The writer has tried to emphasize that there are two tremendous, practical policy considerations favoring a narrowing of the present scope of tax immunity given interstate commerce. First, locally produced goods that have shouldered a tax must meet in the local market and compete with goods carried interstate. To the extent that tax immunity is given to a taxpayer whose goods have reached the market by an interstate journey, to that extent a preference is granted to interstate commerce. Thus, the law gives interstate business a competitive advantage over local business. The purpose of the commerce clause was to prevent the erection of local barriers against interstate business, not to give interstate business preferential treatment over local business. In the second place, interstate commerce should "pay its way"; it should bear its just and fair share of the tax burdens of the local governments under whose protection it is carried on. "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."[79]

event is not taxable unless it is "local," separate and apart from interstate commerce.

76. 340 U.S. 534 (1951).
77. 340 U.S. 602 (1951).
78. 342 U.S. 389 (1952) (also nullified because it was discriminatory).
79. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

At the same time, of course, the states should not be permitted to utilize their taxing power as an impediment to the country's economic welfare. There must be a reconciliation of the conflicting demands of the state and national interests. In so doing more attention should be given to the economic effects of a questioned tax in determining its validity. That is the stuff out of which trade barriers are made.

Interstate commerce "receives adequate protection when state levies are fairly apportioned and nondiscriminatory." In those words Justice Clark of the Supreme Court stated the pith of the matter in his *Spector Motor* dissent,[80] which upset a tax on the ground that it was imposed upon the privilege of engaging in interstate commerce, although the tax was fairly based upon the business connections of the objecting taxpayer with the taxing state. Measuring a tax on interstate commerce according to the business connections of the taxpayer with the taxing state satisfies due process and prevents tax multiplication, thus keeping a state from subjecting interstate commerce to an unfair competitive advantage with local business. Interstate commerce is entitled to no more; it is not entitled to preferential treatment. For a short interval under Justice Stone the Court used this wholesome approach, but a majority of the present Court has again resurrected the view that interstate commerce cannot be taxed at all.

To achieve the desired objective two alternate routes are open. The Court can either abandon its present position of arbitrarily granting tax immunity; or Congress, by giving consent, can clear the constitutional path for local taxation. The remainder of this treatment will be concerned with a congressional solution of the problem.

B. A Suggested Approach

The problem of an effective coordination of taxes has become particularly pronounced in late years. Our state governments are now confronted with constantly increasing demands that they shoulder additional functions. That means urgent needs for added revenue, particularly as prices soar under the pressure of meting out domestic and foreign military and civilian commit-

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See McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 46 (1940) to the same effect. Justice Stone was speaking in both cases.

80. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 614-15 (1951).

ments. It is thus costing the states and their political subdivisions more to do existing jobs, let alone undertake increased jobs. Consequently, the states are becoming more sensitive about and jealous of their revenue yields, present and prospective, from interstate commerce.

On the other hand, the Federal Government is being saddled with colossal military and civilian expenditure obligations at home and abroad. Thus, the maintenance of a high rate of economic activity with resultant high revenue yield is a grim necessity. Hence it is of vital importance that there be a removal of barriers to optimum employment and production. The economic unity of our nation, from which revenue must come, gives impelling reason for insistence against action by one state to gain commercial advancement at too great cost to sister states and to the Federal Government. There must be, therefore, a wise appraisal of these conflicting demands of the state and national interests involved.

In view of these tremendously complex and important problems it is to be wondered whether the process of recourse to the Court alone for guidance can keep abreast of the present day dynamic situation that squarely must be faced. A great deal can be said concerning the practical impossibility of a satisfactory judicial solution of this problem of maintaining the national interest and at the same time bringing it into an effective harmony with the local interests—a problem calling for vigilance and regulation on a national scale. It is to be doubted whether over-all policies, fair alike to the states and the nation, can be devised within the framework of the judicial process.

"Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation."[81] Only by "a comprehensive survey and investigation of the entire national economy—which Congress alone has power and facilities to make"[82] can it be determined whether a tax on interstate commerce is consistent with the best interests of our national economy. By the same token, it

81. Dissenting opinion of Justices Black, Frankfurter and Douglas in McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 188-89 (1940).

82. Dissenting opinion of Justice Black in Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 449 (1939).

is only "on the basis of full exploration of the many aspects" of this complicated problem that Congress alone can "devise a national policy fair alike to the States and our Union."[83]

There seems little doubt that congressional machinery for investigation and determination of the effects of state taxes on our national economy is superior to that of the judiciary and that Congress has power and facilities to provide a more adequate and complete remedy than the courts.[84]

Thus, because of the inherent limitations on the judicial process and because of the past performance of that process, it seems that recourse to the courts alone to solve this troublesome fiscal problem does not offer a satisfactory solution. It is suggested that one way to alleviate this problem, in so far as state taxation of interstate commerce is concerned, is for Congress to take a hand in the matter. By legislation Congress could give a declaration as to permissive limits of local taxation by means of *authorization* and *prohibition* of various local taxes. Congress could consent to taxation of certain phases of interstate commerce, and it could curb certain taxing activities, although they have met constitutional approval. These limitations and authorizations would be made, of course, only after a thorough investigation of the whole problem to determine what kinds of taxes would be fair alike to the states and the nation. Local and national interests would thus be balanced in reaching a practical value judgment as to permissible local taxes on interstate commerce. Congress is, after all, the policy making body of our nation and the duty and power to regulate interstate commerce has been entrusted by the Constitution to Congress, not to the courts.

It is fairly certain that Congress does possess the requisite constitutional power for such an undertaking. While there has been no common agreement on the Court as to whether the impediment to state action affecting interstate commerce stems from the commerce clause itself or whether it arises only from the will of Congress, there has been common agreement that Congress itself can do something about clearing that obstacle from the path of

83. Dissenting opinion of Justices Black, Frankfurter and Douglas in McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 189 (1940).

84. See Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253, 1260 (1940) (Mr. Lockhart takes the position that judicial relief should act as a stop-gap until Congress has acted).

state action. "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it."[85] Into this single sentence from the opinion in *International Shoe Co. v. Washington,*[86] Chief Justice Stone compressed one of the most sweeping and unequivocal declarations to be found in the Court's opinions on the subject of congressional consent to state action that otherwise could not withstand the impact of the commerce clause, although he had just as unequivocally declared that the commerce clause of its own force is a check on state action.[87] Chief Justice Stone's confidence was abundantly justified. Congressional permission to states "to regulate the [interstate] commerce in a manner which would otherwise not be permissible"[88] runs through the whole fabric of constitutional doctrine. It is almost as old as the Constitution itself. It has many legislative illustrations and has received unbroken judicial approval.[89]

The undoubted power of Congress to "redefine the distribution of power over interstate commerce"[90] has found lodgment in the field of taxation, as well as in regulatory matters. In *International Shoe,* apparently for the first time, the Court squarely held that Congress has power to permit the states to levy an otherwise forbidden tax on interstate commerce. This case involved a state unemployment tax, and Congress had provided that the employer

85. International Shoe Co. v. Washington, 326 U.S. 310, 315 (1945). To the same effect, see California v. Zook, 336 U.S. 725, 728 (1949).

86. 326 U.S. 310 (1945).

87. Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

88. *Id.* at 769.

89. As early as 1789 Congress enacted a statute which put pilots for interstate commerce under state law. This pilotage law was sustained in the famous case of Cooley v. Board of Wardens, 12 How. 299 (U.S. 1851). Some of the best known illustrations of congressional consent to state action have been in connection with efforts to control interstate liquor traffic. The first instance of such consent to state control of liquors was upheld in *In re* Rahrer, 140 U.S. 545 (1891). Later Congress enlarged the scope for the operation of state laws by "divesting" liquors of their interstate commerce character. This was upheld in Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311 (1917). Congress likewise "divested" oleomargarine of its interestate commerce attributes, and the statute was sustained in United States v. Green, 137 Fed. 179 (N.D.N.Y. 1905). The same pattern of congressional consent to state control was used with respect to convict-made goods as the laws with regard to intoxicating liquors. The convict-made goods law was sustained in Whitefield v. Ohio, 297 U.S. 431 (1936), and in Kentucky Whip & Collar Co. v. Illinois Central R.R., 299 U.S. 334 (1937).

90. Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945).

should not be "relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce."[91] So confident was the Court that Congress possessed the power to consent to state taxation that it refused to be detained by the argument against the power. In sustaining the state unemployment tax the Court disposed of the argument against it in the single sentence just quoted from the opinion.

Prudential Insurance Co. v. Benjamin[92] represents the latest and now perhaps the most conspicuous example of judicial acceptance of congressional consent to an otherwise prohibited state tax on interstate commerce. That case involved the validity of a South Carolina statute imposing a tax on the premiums of insurance policies written by foreign insurance companies. The tax statute was supported by an act of Congress giving consent to taxation.[93] The act had been passed to remove doubts as to the continued operation of state laws after the Supreme Court decided that the business of insurance is interstate commerce.[94] The act of Congress subjecting insurance to state control was attacked in the *Prudential* case. In sustaining the act, the Court observed that Congress simply had released state powers held in restraint by the power of Congress over interstate commerce, and had thus permitted the states to legislate in a manner previously forbidden to them.

Not only can Congress expand the limits of the power of the states to control or affect interstate commerce by means of regulatory or tax measures, but Congress also has power to determine that interstate commerce shall be free from shackles of state action, although the particular state action would otherwise be valid in the absence of the congressional action. In formulating national policy over the commerce, Congress may sweep away state action that interferes with congressional policy. In *South-*

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91. 49 STAT. 642 (1935), 26 U.S.C. § 1606 (a) (1946).

92. 328 U.S. 408 (1946). For a recent pronouncement by the courts to the effect that Congress can authorize the states to tax interstate commerce, see Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 608 (1951).

93. The congressional enactment, variously referred to as Public Law 15 or the McCarran Act, was passed on March 9, 1945. It provided, in part, as follows: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 59 STAT. 33 (1945), 15 U.S.C. § 1012 (1946).

94. United States v. South Eastern Underwriters Ass'n, 332 U.S. 533 (1944).

ern Pacific Co. v. Arizona ex rel *Sullivan*[95] Chief Justice Stone declared that "Congress has undoubted power to redefine the distribution of power over interstate commerce," and then he significantly added that "[i]t may either permit the States to regulate the commerce in a manner which would otherwise not be permissible" or "exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce."[96] It is familiar learning that Congress may, to employ terminology in accord with some of the Court's opinions, "occupy the field" which the commerce clause gives Congress power to regulate and state action in conflict with congressional occupation must go down. In the exercise of "its plenary power to regulate interstate commerce" Congress "may determine whether the burdens imposed" upon the commere "by state regulation; otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory powers."[97]

The power of Congress over interstate commerce is so "complete and paramount" in character that Congress may supersede state action even in fields which are admittedly intrastate, where Congress uses that power as the basis for the affirmative establishment of national policy over interstate commerce; and where Congress exercises its power, so as to conflict with state action, either specifically or by implication, the state action becomes inoperative.[98]

This doctrine of federal supersession of state action where Congress has acted in connection with the same subject matter has found judicial acceptance where the questioned state action is taxation, as well as regulation. *McGoldrick v. Gulf Oil Corporation*[99] furnishes a good example of the deference the Court will

95. 325 U.S. 761 (1945).
96. *Id.* at 769.
97. Justice Stone in South Carolina State Highway Dep't v. Barnwell Brothers, Inc., 303 U.S. 177, 189-90 (1938). For a discussion of developments of the predomination of congressional power over state power in fields where Congress has power, see Braden, *Umpire to the Federal System*, 10 U. OF CHI. L. REV. 27 (1942); Bickle, *The Silence of Congress*, 41 HARV. L. REV. 200 (1927).
98. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); New York v. United States, 257 U.S. 591 (1922); Houston, E. & W. Texas Ry. v. United States, 234 U.S. 342 (1914).
99. 309 U.S. 414 (1940).

pay in order to carry out the purpose of congressional legislation for promoting the national interest in expanded commerce. There the Court curbed, as an infringement of a congressional regulation of commerce, the tax activities of the City of New York so that the operations of the "free-port" of Staten Island would not be impaired by local taxation. The tax in question was nullified, not because it conflicted with the commerce clause, but because it was in conflict with the congressional policy expressed through legislation.[100]

The decisions clearly indicate that the hands of Congress are practically unfettered in regard to preempting control not only of interstate commerce, but also of subjects in purely local areas which are interrelated with, or have an appreciable affect upon, interstate commerce.[101] The grant of the commerce power to Congress is now established as full and complete. The decisions establish that the "federal commerce power is as broad as the economic needs of the nation,"[102] and that any restraints on the exercise of the commerce power by Congress "must proceed from political rather than from judicial processes."[103]

There seems no good reason to doubt, therefore, that, under its power over interstate commerce, Congress can delimit permis-

100. In People of the State of New York v. Compagnie Generale Transatlantique, 107 U.S. 59 (1882), one reason for striking down the tax law was that Congress had occupied the field.

101. United States v. Darby, 312 U.S. 100 (1941) established the competence of Congress to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages were less than a prescribed minimum, or whose weekly hours of labor were greater than the prescribed maximum, and it also established the power of Congress to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. *Cf.* Wickard v. Filburn, 317 U.S. 111 (1942), which sanctioned the power of Congress, under the commerce power, through quotas for marketing, to impose its regulation on a single farmer with respect to the amount of wheat grown on his farm solely for consumption there. No element of production of goods for market, either interstate or intrastate was present. These two cases, of course, gave the quietus to such cases as Carter v. Carter Coal Co., 298 U.S. 238 (1936), United States v. Butler, 297 U.S. 1 (1936), and Hammer v. Degenhart, 247 U.S. 251 (1918). For an elaborate analysis of the power of Congress to prohibit commerce, written before the fullblown doctrine of the *Wickard* and *Darby* cases, see Corwin, *Congress's Power to Prohibit Commerce: a Crucial Constitutional Issue*, 18 CORNELL L. Q. 477 (1933). For a survey of the significance of the doctrine of the *Wickard* and *Darby* cases, and other cases of the same period, widening the compass of congressional power, see Dowling, *Constitutional Developments in Five War Years*, 32 VA. L. REV. 461, 467 *et seq.* (1946).

102. American Power & Light Co. v. Securities & Exchange Comm'n, 329 U.S. 90, 104 (1946).

103. Wickard v. Filburn, 317 U.S. 111, 120 (1942).

sively state taxation of interstate commerce. It can either authorize such taxation by the states as Congress deems appropriate, or it can prohibit various kinds of state taxation, otherwise valid, when Congress uses its power as the basis for the establishment of national policy over interstate commerce.[104]

It should be kept in mind, however, that an overall revamping of tax policies by Congress could entail much more than a solution of the commerce clause problems of local taxation of interstate commerce. Congress likely would be concerned also with formulating sound fiscal policy, which would envisage the problems of permitting those taxes thought desirable from the viewpoint of national economy and economics, and the prohibition, perhaps, of some taxes now sustained by the Court, but thought undesirable from the standpoint of economics and trade. That is to say, the local interest for revenue might not be commensurate with the trade barrier consequences of the particular type of tax. More accurately, the local interest might be outweighed by the national interest in the unhampered operation of interstate commerce. In this connection Congress might see fit to prohibit those flat fee privilege taxes which bear no relationship to the volume of the business done. Thus, privilege or franchise taxes on the *undertaking* of a business might be thought undesirable and taxes on *results* of business more preferable. Of course, many franchise or privilege taxes are computed by the volume of business actually done by the activity tax and are therefore based on *results*, but flat fees that bear no relation to the fluid basis of business done might be banned by Congress, although such taxes have been unassailable under the commerce clause. Congress might limit the incidence of any taxes on interstate commerce to the external manifestations of wealth *creation* and *utilization*. Wealth creation would be the production of raw materials,[105] the

104. "Congress, through the commerce clause, possesses the . . . power of control of state taxation of all merchandise moving in interstate or foreign commerce." Chief Justice Stone speaking for the majority in Hooven & Allison Co. v. Evatt, 324 U.S. 652, 679 (1945).

105. To lessen the competition among the states to become sites for industries of production, if such check is thought desirable, Congress could levy a production tax and give credits to the states for taxes which Congress levies based on similar taxes paid to the states. To insure maximum effectiveness, the credit could be up to 100%. This would enable a state to tax without fear of losing industries to states giving more favorable tax treatment to production. This device would also induce the states to meet standards set up by Congress for sound fiscal policy. This device has judicially sanctioned precedent, especially in the field of unemployment taxes. Stewart

increase in the value of the raw materials through fabrication, or the storage of materials. Wealth utilization as occasions for taxation would be concerned with sales to ultimate consumers.

While troublesome problems inevitably would arise in connection with an "apportionment" formula in order to permit each state to reach only its fair share of revenue attributable to an interstate operation, nevertheless such formulae could be worked out. "Apportionment" formulae were easily conceived and worked well where miles of trackage or communications lines were concerned, but the apportionment of proceeds from such interstate operations as broadcasting appears to present a more difficult problem. There are, however, formulae that could be acceptable and equitable, such as location of percentage of population served, based on the Federal Communications Commission's convenience and necessity area allocation. Where the sale of goods is concerned, there has been a good deal of sentiment favoring action that would limit the taxation of interstate sales to the state of the buyer.[106] By permitting a tax only by the buyer's state equality of competition between local and out-of-state goods is preserved. The buyer's state is the place where the out-of-state goods would enter competition with goods sold locally and which would be subject to the same sales tax. Thus, the tax burden would necessarily fall equally on both interstate and local trade. These are simply suggestive of the type of policy decisions Congress would find it necessary to make in determining the appropriate part of an interstate organism which should be taxed by particular states.

In formulating its fiscal policy, Congress might be more mind-

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Machine Co. v. Davis, 301 U.S. 548 (1937). After Congress enacted the unemployment tax statute, allowing credit to states which enacted unemployment statutes conforming to congressional standards, there was widespread enactment of state unemployment tax statutes to meet the federal standards in order to entitle the taxpayers of the states to the credits allowed by Congress. For a fuller discussion of this point, see Hellerstein and Hennefeld, *State Taxation in a National Economy*, 54 HARV. L. REV. 949, 969 (1941); Corwin, *National-State Cooperation—Its Present Possibilities*, 46 YALE L. J. 599 (1937).

106. This objective could be accomplished either by a federal statute or by a uniform law adopted by all of the states. The delays encountered in achieving this objective by state adoption of uniform state laws by all forty-eight states does not make the "uniform statute" solution seem very promising, however. For a discussion of both methods of achieving this result and a proposed uniform law, which is set forth in detail as a suggestion, see Snell, *Sales Taxes and Interstate Commerce*, 27 TAXES 37, 47 *et seq.* (1949).

ful of the cost of compliance with tax laws by the taxpayer. Along this line, Congress could consider the wisdom of insulating interstate transactions from tax levies by political subdivisions of a state. The smaller, distant interstate competitor undoubtedly is at a disadvantage in keeping informed as to the tax laws of political subdivisions of a state. For the larger corporation, keeping abreast of tax measures of distant municipalities is simply another chore for the staff of lawyers and other specialists already employed. But in smaller organizations, especially when sales are spasmodic, there may not be room in the overhead for such specialists. Moreover, there is not much uniformity in regard to municipal taxes, which is an undesirable feature of tax law administration.[107]

The removal of trade barriers consisting of local taxes, although now constitutionally valid, which tend to operate to the disadvantage of persons, products and business coming from sister states, to the advantage of local residents, products and business, appears properly as a problem to be solved by the national legislature and others who influence and determine legislative policy.[108]

The power of Congress to displace state action touching interstate commerce would seem to afford Congress an ample basis of power to do the sort of thing herein recommended in the establishing of a national policy over interstate commerce.

It is not the purpose of the writer to go into any detail to recommend what specific taxes on interstate commerce should be permitted and what should be forbidden. The foregoing suggestions on that facet of the subject are merely illustrative of the kind of action that Congress might conceivably take in areas where some action is needed. The types of taxes that should be

107. For a discussion of some of the problems in the imposition of municipal taxes, see Graubard, *Special Problems in the Levy of Municipal Excise Taxes*, 8 LAW & CONTEMP. PROB. 613 (1941). For a late recommendation that political subdivisions should refrain from imposing net or gross income taxes and general sales taxes, see report of the Joint Committee of the American Bar Association, the National Tax Association and the National Association of Tax Administrators, THE COORDINATION OF FEDERAL, STATE AND LOCAL TAXATION 83, 97 (1947).

108. For a comprehensive discussion of taxes of this nature, see a report of the U.S. Treasury Department's Committee on Intergovernmental Fiscal Relations, FEDERAL, STATE, AND LOCAL GOVERNMENT FISCAL RELATIONS, SEN. DOC. No. 69, 78th Cong., 1st Sess. 252 (1943). This Committee favors a closer coordination of local and federal agencies as a solution to the problem.

permitted or forbidden is a judgment which can properly be made only after Congress has all the facts at hand resulting from competent research and investigation. It would be presumptuous of the writer to undertake to make that value judgment before Congress has made the investigation.

If Congress should, as it constitutionally may, enact a statute permitting the states to impose non-discriminatory and reasonable taxes on certain phases of interstate commerce and, perhaps, forbidding certain types of taxes, there seem to be two alternative forms of action which could be taken to achieve these objections: (a) broad legislation (Sherman Act type) with the detailed enforcement of the act left to the courts; (b) a detailed act (Interstate Commerce Act or a Code type). It might be necessary to establish an administrative agency for the proper implementation of this last type of statute. Or, the "code" might be worked out in such detail that it could be administered directly by the courts without a catalytic administrative agency intervening.[109]

From the drafting point of view there exists a certain amount of legislative history that should be helpful. If state taxation without any curbs is desired, the federal statute removing the commerce clause impediment from state unemployment taxes would furnish a guide. It is a very short, simply-worded, clear statute, which reads:

> No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.[110]

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109. Both (a) and (b) type alternative forms of action by Congress have been suggested. See Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COL. L. REV. 547, 558 (1947). See Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 501, 532 (1947). Others have proposed the creation of a Federal-State Fiscal Authority to work out better fiscal relations. See report of the U.S. Treasury Department's Committee on Intergovernmental Fiscal Relations, FEDERAL, STATE, AND LOCAL GOVERNMENT FISCAL RELATIONS, SEN. DOC. NO. 69, 78th Cong., 1st Sess. 41-45 (1943). On this same matter see report of the Joint Committee of the American Bar Association, the National Tax Association and Association of Tax Administrators, THE COORDINATION OF FEDERAL, STATE AND LOCAL TAXATION 103 (1947).

110. 53 STAT. 187 (1939), 26 U.S.C. § 1606(a) (1946).

Likewise, the McCarran Act which subjects the business of insurance to state regulation and taxation is simplicity personified. It provides, in part:

> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.[111]

While both the unemployment tax statute and the McCarran Act have been judicially approved, a tax statute patterned after either of them would probably not prevent taxes that are discriminatory or taxes that otherwise unreasonably interfere with the commerce. State taxation of national bank shares has a closer relevancy to the problem at hand. Federal statutes permitting taxes on national bank shares have been enacted[112] and reenacted revisedly[113] into federal legislation. The technique resorted to was to set aside to a limited degree the tax immunity granted to national banks in *McCulloch v. Maryland*,[114] and further to protect the national banks from discriminatory taxes favoring local financial institutions with which they might compete. No effort was made to place quantitative ceilings on the state tax. To prevent discriminatory state taxation of the national bank shares, the permission to tax is embellished with a provision that the shares should not be taxed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the taxing state coming into competition with the business of national banks, and to prevent the "multiple risk" of taxation, it provides that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere.[115] Of course, in one respect the taxation of interstate commerce presents a problem not so often found in connection with the taxation of bank shares. Items of commerce are migratory and are exposed in this manner to a greater risk of multiple taxation than bank shares. A tax statute modeled after the National

111. 59 STAT. 34 (1945), 15 U.S.C. § 1012(a) (1946).
112. 13 STAT. 112 (1864).
113. 44 STAT. 223 (1926), 12 U.S.C. § 548 (1946).
114. 4 Wheat. 316 (U.S. 1819).
115. The statute of 1864 was sustained by the Court in Van Allen v. The Assessors, 3 Wall. 573 (U.S. 1865). For a late case where the Court dealt with congressional consent to state taxation of national banks, see Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Comm'n, 309 U.S. 560 (1940).

Bank Shares Act would fall under the broad "Sherman Act" type of legislation, which is one of the alternatives already set forth. The detailed enforcement of the act could be left to the courts.

At least one bill has been introduced into Congress for the purpose of regulating taxation of interstate commerce. That is the Harrison Bill.[116] While it would permit some taxation of interstate commerce, one of its purposes is also that of cutting down, in some respects, taxation now valid. The Bill reads:

> *Be it enacted, etc.,* That all taxes or excises levied by any State upon sales of tangible personal property, or measured by sales of tangible personal property, may be levied upon, or measured by, sales of like property in interstate commerce, by the State into which the property is moved for use or consumption therein, in the same manner and to the same extent, that said taxes or excises are levied upon or measured by sales of like property not in interstate commerce and no such property shall be exempt from such taxation by reason of being introduced into any State or Territory in original packages, or containers, or otherwise: *Provided,* That no State shall discriminate against sales of tangible personal property in interstate commerce, nor shall any State discriminate against the sale of products of any other States: *Provided further,* That no State shall levy any tax or excise upon, or measured by, sales in interstate commerce of tangible personal property transported for the purpose of resale by the consignee: *Provided further,* That no political subdivision of any State shall levy a tax or excise upon, or measured by, sale of tangible personal property in interstate commerce. For the purposes of this act a sale of tangible personal property transported, or to be transported, in interstate commerce shall be considered as made within the State into which such property is to be transported for use or consumption therein, whenever such sale is made, solicited, or negotiated in whole or in part within that State.[117]

This bill would have cleared the path for state taxation of interstate transactions saving only: first, no discrimination against out-of-state and interstate products, by permitting the interstate products to be taxed only if a similar tax is applied to intrastate products; second, the state could not subject to tax items intended for resale by consignees; third, interstate transactions are immunized from tax levies by political subdivisions of states. The Harrison Bill, like the National Bank Shares Act, would fall

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116. S. 2897, 73d Cong., 2nd Sess. 78 CONG. REC. 4597 (1934).
117. *Ibid.*

within the broad "Sherman Act" type of legislation as previously discussed. The Harrison Bill does not appear, however, to have as an objective the prevention of tax duplication to the same extent as the National Bank Shares Act. Thus, any legislation adopted by Congress, if it was thought wise economically, could incorporate a provision taking care of the tax duplication concerning interstate transactions.

By resorting to the double-barrelled legislative devise of permitting a state tax on interstate commerce "only if" a similar tax is applied to intrastate items, like the Harrison Bill and the National Bank Shares Act, and further by *prohibiting* any other than the congressionally permitted modes of taxing interstate commerce, the states could be influenced into adapting their own intrastate tax policies to conform to interstate standards. The alternative to non-conformance by the states would be that the intrastate transaction would bear the heavier tax load—for, in order to tap interstate sources of revenues, the intrastate transaction would have to be subjected to identical tax scales, and, of course, would bear any additional tax burdens that existed within the state.

Recourse to Congress, rather than to the courts alone, for guidance in solving the problem of state taxation of interstate commerce in our economy that is national in scope is worth considering in view of the tremendous needs for high revenue yields by Congress as well as by the states. While there is a most pressing need for the removal of local tax barriers to optimum employment and production which will produce that needed revenue, at the same time there exists a conflicting need for local revenue. These two great conflicting demands hardly admit of an absolutely logical solution. They call for a wise adjustment; and Congress has better machinery for making that adjustment than the courts.

This approach to the problem would provide flexibility in the adjustment and accommodation of national and local interests, and at the same time it would preserve the judicial and amplify the legislative function. From the judicial point of view it would preserve to the Court the role of determining whether the local tax measures were in harmony with congressional policy. From the legislative viewpoint, the fullest power of Congress would be guaranteed. In no event could the Court forestall or obstruct congressional action. If the judicial decision with respect to a particular state law was not in harmony with the will of Congress, it could step in and take corrective action.

Affirmative congressional control over state taxing activities would entail no sharp break with precedent, and its exercise would be in line with some of the best efforts of the Court during the past hundred years. It is a significant doctrine, too, making for flexibility in the adjustment and accommodation of national and state interests, which is one of the finest phases of our federal system. This doctrine gives fullest scope to the power delegated to the national government for dealing with the entire, tremendously important problem of commercial and fiscal relations among the states. It recognizes that in the exercise of its power over commerce, Congress, by legislating for the nation as a whole, may formulate its own policies to promote national economic unity, or it may so devise its actions as to enable the states to effectuate their own policies through their own laws. By the exercise of this plenary power to protect national interests Congress may clear away hobbling tax restrictions which the states might otherwise impose upon the national interests in expanded commerce, even though the state tax may be of such nature that it might otherwise be upheld by the Court. Congress, the policy making body of our government, is thus entrusted with the commerce power "as broad as the economic needs of the nation" by which to preserve and promote the national interest in commerce among the states and at the same time bring that interest into an effective harmony with local interests and the principles of local government.