Constitutional Law--State Taxation of Interstate Commerce--Commerce Clause Analysis

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STUDENT NOTES

CONSTITUTIONAL LAW—STATE TAXATION OF INTERSTATE COMMERCE—COMMERCE CLAUSE ANALYSIS

The extent of the power of the states to tax interstate commerce is an issue founded in the historical conflict between the requisites of a free-flowing, national economy and the revenue needs of the states. Because of congressional inability or unwillingness to legislate a solution to this conflict, the Supreme Court has assumed the task of restraining and delimiting the states' excursions into the field of extra-territorial taxation.¹ The Court has entered the fray armed with two potent restraints—the due process clause and the commerce clause of the Federal Constitution. These constitutional provisions have not been applied uniformly; they have been used jointly as well as severally, and, in some cases, the Court has interfused these two non-homogeneous clauses.²

The due process clause³ of the fourteenth amendment requires that some minimum amount of contact and activity exist between a state and the corporation it seeks to tax.⁴ This minimum connection or "nexus" is necessary to establish and maintain the taxing jurisdiction of states over interstate commerce.⁵ Due process requirements are satisfied when a fiscal relationship is shown to exist between the imposition of a tax on a corporation which has certain contacts within a state and the protection, opportunities and benefits afforded to that corporation by the taxing state. In other words, has the state given anything for which it can ask return?⁶

The purpose of the commerce clause⁷ is to sustain an open and

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¹Hellerstein & Hennefeld, State Taxation in a National Economy, 54 Harv. L. Rev. 949, 950 (1941).
³U.S. Const. amend. XIV, § 1. The amendment provides in part: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
⁷U.S. Const. art. I, § 8, cl. 3, states: "[T]he Congress shall have Power To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."
unified national economy. To achieve this end, state taxes must not have an undue burdening effect on interstate commerce. A state tax that falls more heavily upon an out-of-state business than upon an in-state business is discriminatory and impedes the free flow of interstate commerce. It is, therefore, unconstitutional as a de facto regulation of interstate commerce. The Supreme Court has had to reconcile the need to maintain interstate commerce unfettered by state taxes with the revenue needs of the states. The results have not been fruitful or auspicious, as the standards of the due process and commerce clauses of the United States Constitution have been compromised and impaired by changeable and increasingly complex national economic conditions, personal philosophies of individual Justices, and subtle political pressures.

I. Tracing the Judicial History

Throughout the first half of the nineteenth century, the Supreme Court strictly construed the due process and commerce clauses. In Brown v. Maryland, Chief Justice Marshall declared that any state tax upon interstate commerce was prohibited by the commerce clause. This holding stood unchallenged for half a century as the Supreme Court consistently held that state taxes in any form which impeded or otherwise interfered with interstate commerce were an unconstitutional encroachment on the power of Congress to regulate in the area. With the rise of big business and the surge of capitalistic fervor during the Industrial Revolution, beginning in the 1870s, subtle transformations of philosophy, influenced by the doctrine of laissez-faire, began to be felt among the judiciary. While this period can not be considered an era of permissiveness by the Supreme Court toward state taxation of interstate commerce, various inroads were made, primarily in the area of gross receipts taxes on interstate activities. Though not always guided by cogent legal principles, a visible trend developed toward upholding state taxes whose formal subjects were within the state's

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990 U.S. (12 Wheat.) 419 (1827).
11Willis Committee Report, supra note 10, at 1038.
power to tax but which were measured by gross receipts from interstate activities.\textsuperscript{12} Although such taxes were upheld on a distinction based primarily on semantics, their constitutional significance could not be overlooked, as the states' right to tax interstate commerce was increasingly brought to the forefront.\textsuperscript{13} By 1930, even though direct taxes on gross receipts which were allocated between intrastate and interstate business continued to be held invalid, the judicial branch had sustained state ad valorem property taxes, franchise taxes, and certain license, privilege, and occupation levies as only incidental burdens on the flow of interstate commerce.\textsuperscript{14} In addition, taxes based on the net income of businesses, which were both intrastate and interstate in character, were allowed if properly allocated to the income arising from the businesses' activities within the taxing state.\textsuperscript{15}

A further judicial trend toward enlarging the states' right to tax interstate commerce became evident in \textit{American Manufacturing Co. v. St. Louis}.\textsuperscript{16} Justice Pitney, speaking for the majority in that keynote decision, sustained a gross sales tax levied on manufactured goods, irrespective of whether the goods were sold within or without the state. The tax was not seen as a condition upon selling goods in interstate commerce but as a condition upon the manufacturing of goods within St. Louis.\textsuperscript{17} This type of tax was found to have only an incidental or "indirect" effect upon interstate commerce, since it attached to the manufactured goods before they entered the stream of commerce.\textsuperscript{18} In its commerce clause

\textsuperscript{12}Id. The subject of a tax is the activity, event, privilege or specific property right taxed. The measure of a tax is the yardstick or base to which the tax rate is applied. For example, the subject of a state business and occupation tax may be the privilege of doing business within the state, while the measure of the tax is the corporation's gross income from its sales within that state. The subject and measure of a tax are generally dissimilar but need not be, depending upon how the tax is characterized. J. Hellenstein, \textit{State and Local Taxation} 26 (3d ed. 1969).

\textsuperscript{13}A tax levied on the privilege of exercising a franchise within the state of Maine, which was measured by gross receipts from interstate commerce, was successfully defended in Maine v. Grand Trunk Ry., 142 U.S. 217 (1891). For an analysis of this case and others during the same era, see Powell, \textit{State Income Taxes and the Commerce Clause}, 31 Yale L.J. 799 (1922).

\textsuperscript{14}Pacific Tel. & Tel. Co. v. Tax Comm'n, 297 U.S. 403 (1936); Barrett, State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You?, 4 Vand. L. Rev. 496, 498-500 (1951).

\textsuperscript{15}Barrett, supra note 14, at 502.

\textsuperscript{16}250 U.S. 459 (1919).

\textsuperscript{17}Id. at 463.

\textsuperscript{18}Id. at 464. See Note, \textit{Developments in the Law, Federal Limitations on State Taxation of Interstate Business}, 75 Harv. L. Rev. 953, 967-68 (1962).
analysis of the St. Louis tax, the Court applied what is popularly known as the "local incidents" test.\(^\text{19}\) Continued application of this test in subsequent cases\(^\text{20}\) encouraged the implementation of such taxes in many states, including West Virginia.\(^\text{21}\)

As local and state governments struggled under the economic hardships of the Depression, the Court allowed these political entities more freedom to satisfy revenue needs by increased taxation on the local incidents of interstate commerce. The "direct-indirect" formula and the "local incidents" test were extended and applied to a variety of state taxes. A state or local tax that was found to have a direct effect upon interstate commerce was declared invalid, while if it was found to have only an indirect or remote effect, the tax was upheld.\(^\text{22}\) In addition to the manufacturing taxes previously mentioned, numerous other revenue producing measures, including ad valorem taxes, franchise taxes, net income taxes, and license, privilege and occupation taxes, were sustained by the Supreme Court under the "direct-indirect" test.\(^\text{23}\)

\(^\text{19}\)Under the "local incidents" test, the Court will analyze a tax based on its subject and measure (see note 12 supra). If the subject of the state's levy is found to be local in nature, then the tax is said not to unduly burden interstate commerce. See J. HELLERSTEIN, supra note 12, at 173-74. In American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919), the Court determined that the subject of the license tax in question was the privilege of manufacturing goods within the city of St. Louis, as measured by the amount of the gross sales of these goods. Under this analysis, and because it was not applied discriminatorily, the tax was found to be on a local incident and not burdensome to interstate commerce.

\(^\text{20}\)E.g., Utah Power & Light Co. v. Pfost, 266 U.S. 165 (1932) (tax on the manufacture, sale or exchange of electricity); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923); Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).


\(^\text{23}\)Barrett, supra note 14, at 499-502; Comment, 65 W. Va. L. Rev. 63, 66-67 (1962), and cases cited therein.
The Supreme Court moved in another direction in *Western Live Stock v. Bureau of Revenue*, in which it considered a state statute taxing gross receipts from the sale of magazine advertising space. The magazine, which had its sole place of business within the taxing state, solicited advertising contracts across state lines and circulated the magazine to subscribers outside the state. In upholding the tax, the Supreme Court cast aside the formalistic notion that gross receipts from interstate commerce could not be made the measure of a tax and opted for the more practical approach that has become known as the "multiple burdens" test. Justice Stone’s statement that "[e]ven interstate commerce must pay its way and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business" established the underlying premise of this new test. The Court, in formulating the "multiple burdens" test, stated that the incidents of the tax could not be taxed by other states so as to be a "multiple burden" on the interstate distribution of the magazine. A companion case, *J. D. Adams Manufacturing Co. v. Storen*, fully articulated the "multiple burdens" doctrine in striking down an Indiana gross income tax measured by a domestic corporation’s gross receipts. Because the tax was levied indiscriminately and without apportionment upon the corporation’s gross receipts, it was found to subject interstate commerce to a risk of a multiple tax burden.

*Western Live Stock* seemed to signal a new direction in the Court’s thinking, with the introduction of the "multiple burdens" test and the concern with apportionment of taxes affecting interstate commerce. The multiple burdens test was applied repeatedly in cases decided between *Western Live Stock* (1938) and *Freeman v. Hewit* (1946), but the war years also saw the revival of the
"local incidents" language from *American Manufacturing Co. v. St. Louis*, which had never been specifically overruled.\(^{31}\)

The Court returned to the direct-indirect analysis in *Freeman v. Hewit*, which stands as a symbol of an era of judicial confusion concerning state taxation of interstate commerce. The Court was faced with an Indiana gross income tax and its imposition on the proceeds of interstate sales. An Indiana broker sold securities of a trust estate on the New York Stock Exchange through New York brokers and delivered the proceeds to the trustee. The tax was imposed on the gross receipts of these sales.\(^{32}\) Writing for the Court in a five-four decision, Justice Frankfurter invalidated the Indiana tax by applying the "direct-indirect" test of nearly a decade before, stating that "not even an internal regulation by a state will be allowed if it directly affects interstate commerce."\(^{33}\) The Court accordingly returned to the formal "direct-indirect" analysis of *American Manufacturing Co.*\(^{34}\) Neglecting mention of the "multiple burdens" test and the need for apportionment, the Court reaffirmed the "direct-indirect" analysis and determined that *any* state action impeding the free-flow of trade among states would be precluded whether or not local commerce was subjected to a similar encumbrance.\(^{35}\)

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\(^{31}\)But see Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939) (Washington business activities tax applied to the entire gross receipts of an in-state firm held to contravene the commerce clause because of lack of apportionment). For general discussion, see Barrett, *supra* note 14, at 509, and Hellerstein & Hennefeld, *supra* note 1, at 959.

\(^{32}\)In International Harvester Co. v. Department of Treasury, 322 U.S. 340, 349 (1944), the Court, in conclusion, stated: "We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way." *See also* General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944); McLeod v. J.E. Dilorwoth Co., 322 U.S. 327 (1944). For a general discussion of the above cited cases, see Kust & Sale, *State Taxation of Interstate Sales*, 46 Va. L. Rev. 1290, 1293-94 (1960).

\(^{33}\)292 U.S. at 250-51.

\(^{34}\)Id. at 257-58.

\(^{35}\)See Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935), and Eastern Air Transp., Inc. v. South Carolina Tax Comm'n, 285 U.S. 147 (1932), for further application of the "direct-indirect" test. In *Freeman*, Justice Frankfurter distinguished the tax in *American Manufacturing* from the challenged tax by pointing out that the former was based on the contingency of local manufacture, while the latter was based explicitly on gross receipts from interstate commerce. 329 U.S. at 258.

\(^{36}\)329 U.S. at 252.
Decisions in the wake of Freeman v. Hewit did little to clarify the Court's position. In West Publishing Co. v. McColgan, a net income tax was critically examined on the basis of discrimination, reasonable apportionment, and the possibility of a multiple tax burden. This analysis was repeated in Interstate Oil Pipe Line Co. v. Stone, where a pipeline company, as agent for a Delaware oil corporation, transported oil and arranged with a railroad for its shipment into interstate commerce. These actions were subject to the Mississippi annual privilege tax on gross income. In upholding the tax, the Court cited the extensive growth of interstate commerce and the need for such commerce to bear the cost of facilities and services provided it by the individual states. Finally, in Memphis Natural Gas Co. v. Stone, the Court sustained a Mississippi franchise tax, using both "local incidents" and "multiple burdens" language.

The 1950s saw important new rulings in the field of state taxation of interstate commerce and redefinitions of the states' power to tax. In Spector Motor Service, Inc. v. O'Connor, a nondiscriminatory state franchise tax levied upon a foreign corporation for doing business within the state that was exclusively interstate in character was held to violate the commerce clause. Even though the tax was fairly apportioned between interstate and intrastate activities, it was held unconstitutional, because it was a tax on the privilege of doing interstate business.

The most noteworthy changes in Supreme Court thinking during the 1950s dealt with the due process clause of the Constitution. The previous jurisdictional standards were substantially al-

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337 U.S. 662 (1949).
3Id. See Barrett, supra note 14, at 528.
335 U.S. 80 (1948).
340 U.S. 602, 609 (1951). The net income tax was imposed on a trucking firm engaged exclusively in the interstate transportation of freight. The corporation had no authorization to engage in intrastate trucking and maintained but two terminals in the state. Even though the tax was non-discriminatory, and was not challenged on the basis of "multiple burdens," the Court invalidated the tax solely because it purported to be based on the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the state. Compare with Railway Express Agency v. Virginia, 358 U.S. 434 (1959), where a franchise tax measured by gross receipts was upheld as not violating the commerce clause since the express company, which did exclusively interstate business in Virginia, also owned property within the state. See also Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925).
tered, setting the stage for a period of relative permissiveness by the Court. Prior to 1945, states could obtain jurisdiction over nonresident corporations only if they were qualified to do business within the state or if sufficient constructive "presence" existed to warrant jurisdiction. These criteria for establishing jurisdiction were discarded in International Shoe Co. v. Washington, which set forth the "minimum contacts" test. Subsequent cases applied this standard and succeeded in establishing the requirement of "minimum contacts" as the "nexus" for ascertaining territorial due process jurisdiction and the right to tax.

Further evidence of this reappraisal and reinterpretation of due process requirements was manifest in Norton Co. v. Department of Revenue. The Court found the presence of a branch office and warehouse of a nonresident corporation within a state to be sufficient local incidents to subject the corporation to that state's taxing power, even though the branch office was only an intermediary in distributing products from the home office. Where the intrastate activities of a foreign corporation were mingled with its interstate activities, the corporation seeking to avoid taxation on sales to persons within the state was held to have the burden of showing that the sales were disassociated from and unfacilitated by local business. In Miller Brothers v. Maryland, general adver-

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326 U.S. 310, 316 (1945).

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950). Requirements for due process have fallen under the general heading of "nexus." That is, where the business activities of a foreign corporation are such that they fall within the scope of a state tax, a "nexus" has been formed between the tax and the transaction within the state for which the tax has been enacted. The controlling question then is whether the state has the right to tax, i.e., has there been a quid pro quo? Northwestern States Portland Cement Co. v. Minnesota, 368 U.S. 450, 465 (1959). For previous mention of "nexus" and "minimum contacts," see West Publishing Co. v. McColgan, 328 U.S. 823 (1946), aff'd 27 Cal. 2d 705, 166 P.2d 861 (1946); Wisconsin v. J. C. Penney Co., 311 US. 435 (1940).


Id. at 538.

Id. at 538-39. See also Cooney v. Mountain States Tel. & Tel. Co., 294 U.S.
tising and occasional delivery of goods sold at out-of-state store were found insufficient to establish adequate minimum connections to permit the imposition of the state's taxing power, but, in the same year, the Supreme Court upheld a Nebraska ad valorem tax on the flight equipment of an airline that made only eighteen stops per day within the state. 48

The greatest controversy was raised by the case of Northwestern States Portland Cement Co. v. Minnesota, 53 in which a non-discriminatory, properly apportioned net income tax, levied on the business activities of a foreign corporation, was sustained even though the only contact with the state was a sales office, which served as headquarters for the corporation's salesmen. Recognizing the inconsistency of past opinions, Justice Clark, writing for a bare majority of the Court, stated that such a fairly apportioned and non-discriminatory tax did not violate the commerce clause, and, furthermore, that sufficient minimum connections were present to satisfy due process requirements. 50 Spector Motor Service was distinguished on several grounds. The excise tax was imposed on the privilege of doing interstate business within the state; it was not a direct net income tax apportioned to business activities within the taxing state. 51 While the tax upheld in Northwestern and the tax invalidated in Spector Motor Service differed in subject-measure and incidence, in the final analysis, the differences between the two levies were more semantical than structural.

The Northwestern decision caused an immediate congresional furor, and, in 1959, after the long inactivity of Congress in regulating taxation of interstate commerce first cited in Gibbons

384 (1935). A business engaged in interstate commerce cannot operate through a local outlet in order to gain the advantage of local commerce and also retain the immunities of interstate commerce. WILLIS COMMITTEE REPORT, supra note 10, at 1044.


50"States other than those of the corporate domicile can tax an instrumentality of interstate commerce in accordance with their use in the taxing states, even though the corpus has no permanent location." Braniff Airways, Inc. v. State Bd. of Equalization and Assessment, 347 U.S. 590, 502 (1954). This implies that firms dealing in almost exclusively interstate commerce, with very minimal contacts within the state, such as airlines, trucking firms and railroads, have sufficient connections to satisfy due process, thus authorizing taxation by the state.


52Id. at 461, 465. See Kust & Sale, supra note 31, at 1298.

53358 U.S. at 463-64.
v. Ogden, Congress enacted Public Law 86-272. The law established certain minimum connections between the interstate business and the state that were to be satisfied before a state net income tax could be imposed. If the only business activity within the state was the solicitation of orders for sales of tangible personal property, subject to acceptance outside the state and to be filled by shipment or delivery from a point outside the state, the state or its political subdivision could not impose a net income tax. Public Law 86-272 was not, however, a comprehensive solution to the problem, as it restricted only net income taxes on interstate income—limitations on state gross receipts taxes with interstate ramifications were not included in the legislation.

The decade of the 1960s brought expanding budgets and new pressures to the states in the form of additional revenue needs, created by increased demand for improved public education, transportation, and housing. The Supreme Court and other federal and state courts, undeterred by the congressional limitation on net income taxes, expanded the states’ power to tax in other areas. A Georgia corporation, which sent no salesmen into Florida, had no branch office or warehouse in the state, and shipped merchandise f.o.b. Atlanta to customers in Florida via independent solicitors, was found to have sufficient “nexus” or “minimum connections” to be subject to Florida’s use tax.

52 U.S. (9 Wheat.) 1 (1824).
5Scripto, Inc. v. Carson, 362 U.S. 207 (1960). See Kust & Sale, supra note 31, at 1297. Compare with Miller Bros. v. Maryland, 347 U.S. 340 (1954). The Supreme Court later drew the line for “nexus” requirements concerning taxes other than net income taxes in National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). In that case, the Illinois Supreme Court had ordered the appellant, a mail order house with its principal place of business in Missouri, to collect and remit a state use tax on goods purchased by Illinois residents for use within the state. Appellant owned no tangible property in Illinois and had no sales outlets, telephone listings, or solicitors in that state. The corporation did not advertise in the state by radio, television, billboards or newspapers; its only contacts with its customers throughout the United States, including Illinois, was by its catalogues mailed twice a year and supplemented by “flyers.” Orders for merchandise were mailed to appellant’s Missouri plant, and the goods were sent to customers by mail or common carrier. Speaking for the majority in a 6-3 decision, Justice Stewart held that the state’s imposition of a tax upon a seller whose only connection with customers in the state was by common carrier or by mail was a violation of the commerce clause. Both Scripto and Miller Bros. were cited, but not as authority. The Court reasoned:
This ripening liberal attitude towards broadening the states' taxing powers, over due process and commerce clause objections, became most apparent in General Motors Corp. v. Washington. The General Motors Corporation manufactured motor vehicles, parts, and accessories in various states and sold them wholesale to independent dealers in Washington. Although some of the sales were channeled through a Seattle office, the majority were approved and processed through the corporation's large zone office in Portland, Oregon. These motor vehicles, parts, and accessories were then shipped to local dealers in Washington, who offered them for retail sale to the general public. General Motors had a limited number of sales representatives in Washington, who advised and trained local dealers and generally served as company representatives, but no business was conducted beyond the promotion of interstate sales to the dealers. The State of Washington, in addition to imposing a gross receipts tax on manufacturing, levied an unapportioned gross receipts tax on all wholesale sales within the state. An action was brought by General Motors challenging the constitutionality of the Washington tax on the sales from the Oregon office on four grounds—lack of apportionment, inherent discrimination, risk of a multiple tax burden, and violation of due process. In the majority opinion, Justice Clark dispensed with the appellant's four claims and substantially eased constitutional barriers to the taxation of gross receipts from the sale of goods shipped into the taxing state. The Court declined

"[I]t is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." Id. at 759. Thus, if Illinois were allowed to impose such a tax burden, Justice Stewart postulated that the resulting tax enactments in other states, municipalities, political subdivisions, etc., "could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" Id. at 759-60. The dissent, led by Justice Fortas, asserted that appellant's large-scale, systematic and continuous solicitation of the Illinois consumer market constituted a sufficient nexus. Id. at 761-62 (dissenting opinion).


WILLIS COMMITTEE REPORT, supra note 10, at 1018. Washington's business and occupation tax was modeled after West Virginia's.

WASH. REV. CODE ANN. § 82.04.270 (1961). For a ruling on apportionment of the West Virginia business and occupation tax, see Dravo Contracting Co. v. James, 114 F.2d 242 (4th Cir. 1940), in which the court distinguished between apportionment and separation of income by a court, the former being barred and the latter allowed. The case was commented on in 47 W. Va. L.Q. 236 (1941).

377 U.S. at 438.

WILLIS COMMITTEE REPORT, supra note 10, at 1032.
to prorate the tax, calling its lack of apportionment only "suspect," and refused to consider the claim of multiple taxation, since the corporation had not shown a definite burden in fact. Washington’s tax was also found non-discriminatory since it was based on activities or incidents within the State which the State could reach and since all businesses within the State were taxed equally on their wholesale sales. Finally, the Court asserted that the tax did not violate due process because the solicitation and services by General Motors’ sales representatives within the State, which were "decisive factors in establishing and holding this market," forged the necessary nexus between the State and the transaction sought to be taxed.

Separate dissenting opinions by Justices Brennan and Goldberg (with whom Justices Stewart and White joined) vigorously pointed out the weaknesses in the majority’s argument. Justice Brennan challenged the lack of apportionment of the tax and the failure of the Court to act upon that fact, claiming that the Court had confused two different issues. The Court had concluded that the tax was fairly apportioned based only on the “nexus” standard of the due process clause but failed to apply the commerce clause requirement of fair apportionment. To Justice Brennan, then, the Washington gross receipts tax was unconstitutional owing to lack of apportionment, as this case involved sufficient interstate commercial activity to warrant a fair apportionment under the commerce clause. Justice Goldberg, noting the debilitating effect of the decision on the free trade aspect of the commerce clause, recognized that while the measure of Washington’s tax was the quantity of wholesale sales within its boundaries, the majority had declared that the corporation’s activities provided the necessary basis for taxation. Considering the majority’s expansive definition of “activities,” it would be hard not to conceive of a state gross

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377 U.S. at 448.

Id. at 449.

In Pan Am. World Airways, Inc. v. Government of the Virgin Islands, 315 F. Supp. 746 (D. St. Thomas & St. John 1970), the federal district court upheld a gross receipts tax that was not apportioned. In tracing the history of the apportionment formula requirement, the court commented as follows: “In General Motors v. Washington, supra, the apportionment requirement was further relaxed, possibly to the point of abandonment.” 315 F. Supp. at 751.

Id. at 447.

Id. at 448.

Id. at 450-51 (dissenting opinion). See J. Hellerstein, supra note 12, at 185.

377 U.S. at 440.
receipts tax that would not be upheld, as "[e]very interstate sale invariably involves some local incidents—some 'in-state' activity."\(^6^7\)

Despite the forceful dissents in *General Motors* and the subsequent uproar in business circles, the decision retains its viability and shows a great willingness by the Supreme Court to allow the states the power to tax the incidents of interstate commerce.\(^6^8\) While narrowing the scope of the due process requirement of "some definite link, some minimum connection" by hinting only vaguely that solicitation in a state without more may be grounds for taxation, the Court did not institute any new guidelines.\(^6^9\) The Court, thus, refused to pass on the constitutionality of an unapportioned gross receipts tax until it could be shown that there was multiple taxation on interstate commerce *in fact*.\(^7^0\)

A large number of states,\(^7^1\) including West Virginia,\(^7^2\) have

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\(^6^7\)Id. at 456 (dissenting opinion). See also 12 U.C.L.A.L. Rev. 1207, 1213 (1965).

\(^6^8\)Though the United States Supreme Court has not had an occasion to employ *General Motors*, lower federal courts have cited the case no less than six times since 1964, and at least twenty state jurisdictions have cited the decision more than eighty times.

\(^6^9\)Note, *Commerce Clause: State Taxation of Interstate Commerce: Validity of Unapportioned Taxes Measured by Gross Receipts: General Motors Corp. v. Washington, 377 U.S. 436 (1964), 50 Cornell L.Q. 255, 259-60 (1965) [hereinafter cited as *Commerce Clause*]; 12 U.C.L.A.L. Rev. 1207, 1213 (1965). As the dissident in *General Motors* stated: "The test adopted by the Court today, if followed logically in future cases, would seem to mean that States will be permitted to tax wholly interstate sales by any company selling through local agents or traveling salesmen. Such a rule may leave only mail-order houses free from state taxes on interstate sales." 377 U.S. at 462 (dissenting opinion).

\(^7^0\)Contra, J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938), which held an unapportioned gross receipts tax invalid in that the danger of double taxation was inherent. But see *Commerce Clause*, supra note 69, at 261-62, where the author suggests that the burden should shift to the taxing state to prove the absence of multiple taxation. Several federal circuit courts have placed the burden of proof on the taxpayer to show the existence of multiple taxation. In *Asiatic Trans-Pacific, Inc. v. Maddox*, 371 F.2d 132 (9th Cir. 1967), a gross receipts tax was upheld because the taxpayer failed to demonstrate how much of its revenue was derived from interstate commerce. However, in *Pan American World Airways, Inc. v. Government of the Virgin Islands*, 315 F. Supp. 746 (D. St. Thomas & St. John 1970), the court noted by way of dicta that it was incumbent on the taxpayer to prove the "likelihood of multiple taxation," thereby lessening the taxpayer's burden of proof as stated in *Asiatic Trans-Pacific*.

\(^7^1\)Some examples of cases applying the tenets of *General Motors* include: *Asiatic Trans-Pacific, Inc. v. Maddox*, 371 F.2d 132 (9th Cir. 1967); *Pan Am. World Airways, Inc. v. Government of the Virgin Islands*, 315 F. Supp. 746 (D. St. Thomas
expressly or impliedly endorsed the tenets of General Motors. The Supreme Court has not issued any new definitive decision altering or reaffirming the existing status of state taxation of interstate commerce since 1964.73 However, some judicial vigilance has been seen in the area of apportionment.74
II. A Multiplicity of Doctrines

In retrospect, the history of state taxation of interstate commerce can be viewed as an accumulation of the following diverse factors: (1) Varying and sometimes conflicting Court philosophies; (2) alternating formalistic and pragmatic analyses devoid of concrete judicial rules; (3) incompatibility of the revenue requirements of the states and the need for an unencumbered national market; and (4) an increasingly sophisticated economy emphasized by historical events. Despite the trend toward allowing the states more freedom to tax interstate commerce, these factors have led to an inadequate judicial response to the problem.

Until the late 1930s, the Court was not generally receptive to state taxation of interstate commerce, especially in the form of gross receipts taxes. The "local incidents" test was first used in American Manufacturing Co. v. St. Louis, where a license tax was examined to see if it had an indirect or a direct effect on interstate commerce. New measuring rods of constitutionality were developed with Western Live Stock v. Bureau of Revenue and J. D. Adams Manufacturing Co. v. Storen. On the more practical premise that interstate commerce must pay its way, a tax was held valid if it was not "discriminatory" and did not present the risk of a "multiple burden" on such commerce; a tax on interstate commerce which is not fairly apportioned may subject the taxpayer to multiple taxation which is inherently discriminatory. Thus, a gross receipts tax, among others, was deemed invalid only if it placed a burden on interstate commerce not shared by local commerce. But the Court, in 1946, resurrected the formal "direct-

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applying the "local incidents" test and without citing General Motors, sustained a license tax assessment on transient photographers who, under contract with the J. C. Penney Co., solicited orders and took children's pictures. See Norfolk & W. Ry. v. State Tax Comm'n, 390 U.S. 317 (1968), where an ad valorem tax on rolling stock based on a mileage formula was found to be a gross overreaching of the due process clause. Cf. General Motors Corp. v. District of Columbia, 380 U.S. 553 (1965), in which an assessment formula for a net income tax not wholly based on sales was upheld as not inherently arbitrary. Nevertheless, the Court scrutinized the tax on the basis of apportionment.

250 U.S. 459 (1919).
303 U.S. 250 (1938).
304 U.S. 307 (1938).
250 U.S. 459 (1919).

WILLIS COMMITTEE REPORT, supra note 10, at 1040.
indirect” formula in Freeman v. Hewit, demonstrating that the doctrine still had viability.

While the Court was examining taxes on the basis of a risk of multiple taxation, the nexus requirements of due process were being substantially reduced. The new standard of “minimum contacts,” introduced in International Shoe Co. v. Washington, broadened the Court’s discretion to find sufficient business activities within a state for tax purposes. This redefinition of due process and the liberal interpretation of the commerce clause coalesced with differing Court philosophies in General Motors Corp. v. Washington, which gave the states a freer hand in taxing interstate commerce.

After more than three hundred cases on the subject of state taxation of interstate commerce, the Supreme Court has allowed taxation by the states in two situations—taxation of production activities (manufacturing and mineral extraction) by the state of origin and taxation of inshipments by the state of destination. From such a plethora of decisions, one would think that the Court would have established a series of cogent, cohesive guidelines for dealing with the varied tax situations. Such has not been the case, however. A multiplicity of doctrines has resulted, none explicitly overruling the others and each with its own significance. In the past half century, the Court has applied an assortment of distinguishable tests embracing either (and sometimes both) the due process or the commerce clause. Such tests include the concepts of “local incidents,” “direct-indirect taxation,” “discrimination,” “multiple burdens,” “doing business,” “minimum connec-

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\(^{32}\) 329 U.S. 249 (1946).


\(^{32}\) Willis Committee Report, supra note 10, at 1047. State taxation of the products of manufacturing and mineral extraction, which may enter the stream of interstate commerce, is constitutional, because such activities are separable local incidents. Taxes on interstate sales of tangible personal property are generally invalid as such sales are not considered separable local incidents. See Bluefield Produce & Provision Co. v. Bluefield, 120 W. Va. 111, 198 S.E. 568 (1938). However, a state may tax purely intrastate sales of tangible personal property by a mercantile business.

\(^{33}\) 377 U.S. 436 (1964).

\(^{31}\) Willis Committee Report, supra note 10, at 1047.
tions,” and “apportionment.” The use of these analyses has not followed any historical transition; the Court seemingly abandoned the rigid “direct-indirect” test in 1938, only to return to it in 1946. Judicial confusion was evident in General Motors, where the Court’s determination rested on the “multiple burdens” test, and, yet, part of the decision used the “local incidents” terminology coined by the Court in 1919. Additionally, in many cases in which factual situations were basically identical, the resolutions of the issues by the Court differed because of contrasting philosophies. Some judicial reasoning followed a strict formalistic approach, basing the constitutionality of a state’s tax on semantics. The majority of the members of the Court have favored a more pragmatic approach, but this approach is fraught with its own fallacies. Justice Frankfurter warned of the consequences of employing broad tests such as “multiple burdens,” stating in Wisconsin v. J. C. Penney Co.: “We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.” Such a verbal beacon has not been heeded by the Court.

Despite the multiplicity of doctrines and the conflicting judicial philosophies, the crux of the Court’s inadequate response to state taxation of interstate commerce problems lies in its adoption of vague standards, which ultimately give no true guidance as to what can and cannot be taxed. The results of cases in the past forty years have been generally regarded as a confusing mixture of extreme permissiveness and uncompromising prohibitiveness, especially towards gross receipts taxes. The Willis Subcommittee noted: “Students of the Court have found no coherent set of principles as to when a State might tax all of the receipts from an interstate activity and when it might tax none.” Possibly because of a disinclination to write opinions which may essentially legislate, the Supreme Court has never defined the breadth of the “minimum connections” concept, nor has it ever explicated the nuances of the “multiple burdens” doctrine. This deficiency is

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Willis Committee Report, supra note 10, at 1038.
most evident in the General Motors decision, where, though the court narrowed the grounds for taxation, it did not set up any new factual guidelines. It merely left a promise of a judicial examination of each factual situation thereafter to determine if a sufficient "nexus" exists.\textsuperscript{88} Thus, the Court has extended the jurisdiction of the states' power to tax over a wider spectrum of commercial activities than ever before, but, in so doing, it has used only vague generalizations, which have provided no definitive guidelines for lower courts, state legislatures or businesses engaged in interstate commerce.

III. Conclusion: The Need for a Congressional Solution

The problems created by the conflict between the need for a free-flowing economy and the revenue requirements of the states have been treated inadequately by the judiciary. Congress has previously intervened to define the limits of state net income tax laws in reaction to the pervasive decision in Northwestern States Portland Cement Co. v. Minnesota.\textsuperscript{89} It seems clear that Congressional action is again needed to remedy the inequities apparent in unclear Court decisions and in the diversity and inconsistency in present state taxation formulas.

The Subcommittee on State Taxation of Interstate Commerce of the Senate Finance Committee is presently conducting hearings and considering proposals that would significantly affect state taxation of interstate commerce. Senator Clifford P. Hansen (R., Wyo.), ranking minority member of the Subcommittee, recognized the current problems of state taxation of interstate commerce in a recent press release noting the urgency for reform: "Today . . . we have a situation characterized by non-conformity, burdensome and costly compliance procedures, and very substantial uncertainty as to total tax liabilities."\textsuperscript{90}

It is important to recognize the difficulties that any new legislation concerning state taxation of interstate commerce will have to confront and overcome, especially with respect to gross receipts taxes. Four interrelated problems face any legislative attempt to

\textsuperscript{88}U.C.L.A. Rev. 1207, 1213 (1965).
\textsuperscript{89}358 U.S. 450 (1959). The decision was nullified by Public Law 86-272, 15 U.S.C. § 381 (1971), enacted by a disturbed Congress under the prodding of business.
regulate multistate taxation: (1) Lack of uniformity among state laws, (2) absence of nexus guidelines, (3) potential for abuse, and (4) unpopularity.

State tax laws are multitudinous and dissimilar, and even with the same class of tax—such as gross receipts taxes—subject-measure discrepancies are numerous. To provide uniformity among state tax laws, federal legislation must either impose mandatory guidelines as to the formulation of tax laws for each class of tax or offer guidelines in the form of a uniform bill to be adopted by the states at their election. Related to the problem of the diversity of state tax laws is the lack of uniform apportionment of taxes among states. There is little apportionment among the states of taxes on interstate sales and, consequently, frequent overtaxation occurs.\(^3\) The need for uniform apportionment has been the subject of several model acts\(^2\) in the past decade, and proposed legislation contains an apportionment formula of limited application.\(^3\)

The absence of nexus guidelines for all taxes except net income taxes has led to a great expansion in the area of permissible taxation and often to diverse and inequitable court-litigated results. *Northwestern States Portland Cement*,\(^1\) which broadened the states' taxing power, was countered by Public Law 86-272, which restricted the imposition of the net income tax to certain nexus requirements. Public Law 86-272 has subsequently been very narrowly applied by the courts to situations that exactly con-

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\(^1\)Willis Committee Report, *supra* note 10, at 1047.

\(^2\)The Interstate Taxation Act and the Multistate Tax Compact are two of the more recent unsuccessful model acts. The Interstate Taxation Act, which was passed by the House of Representatives in May 1968, provided in substance that a state would be barred from applying a tax apportionment formula when the tax liability computed thereunder would exceed liability as computed under the bill's formula. H.R. 2158, 90th Cong., 2d Sess. §§ 201, 202 (1968). A counterproposal was the Multistate Tax Compact, 29 *State Tax Rev.* (No. 24) 2 (1968), drafted by the Council of State Governments in 1966 and providing for a three-factor apportionment formula. West Virginia is an associate member of the Compact. For an analysis of these efforts, see Hellerstein, *State Taxation of Interstate Commerce: Roadway Express, the Diminishing Privilege Tax Immunity and the Movement Toward Uniformity in Apportionment*, 36 *U. Chi. L. Rev.* 186, at 211-19 (1968). For a discussion of apportionment and related solutions dealing with sales and use taxes, see Kust & Sale, *supra* note 31, at 1308-24.


\(^3\)358 U.S. 450 (1959).
form to the requirements of the statute. General Motors further emphasizes the need for legislation similar to Public Law 86-272 to define more extensively the limits of interstate taxation in view of the due process requirements.

Federal legislation should also address itself to the fact that present state tax laws are frequently abused by both state tax officials and corporations, and any new statutes will create a similar potential for abuse. A Congressional study of taxation of interstate commerce in the mid-1960s discovered that precise and predictable statutory rules were lacking and "the uncertainties of constitutional law and state statutes and regulation [had] been perpetrated on the level of administrative practice." Thus, careful language and construction of any resulting legislation and subsequent regulations are essential.

An additional problem faced by statutory schemes that attempt to regulate gross receipts taxes is their lack of popularity among states. Only eight states have general gross receipts taxes, and, as a result, most sponsored legislation in Congress dealing with taxation of interstate commerce involves the more popular revenue measures, such as net income taxes, capital stock taxes, and sales and use taxes.

Solutions to the above-mentioned issues are compounded by the differences of opinion that exist among representatives of businesses of various types and sizes and between the various states themselves, as well as splits of opinion between business and the states. There are no clearly aligned interests. Rather, the situation is dominated by shifting alliances of combined state and business interests. Thus, legislative draftsmen must be able to balance these competing interests without weakening the effects of any proposed bills. In order for the variance and inconsistency of Court decisions and state tax statutes to be remedied, Congress must be

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36Willis Committee Report, supra note 10, at 1046.
37Id. at 1061.
38Alaska, Delaware, Hawaii, Indiana, Louisiana, Mississippi, Washington, and West Virginia have taxes of general applicability on the gross receipts of a business. Id. at 1099.
39S. 1245 deals with net income taxes or capital stock taxes. S. 2092 concerns only net income taxes and sales and use taxes.
4034 STATE TAX REV. (No. 33) 2 (1973).
cognizant of these various interrelated factors in order to formulate workable solutions, via legislation, to the problems involved in state taxation of interstate commerce.

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