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COMMENT/Recent Constitutional Developments
in State Taxation—Reduction by
Constitutional Merger?

It was as true ... as turnips is.
It was as true ... as taxes is.
And nothing's truer than them.*

INTRODUCTION

THE CONSTITUTIONALITY OF A STATE TAX affecting interstate commerce is a question of perennial recurrence.1 The facets of the problem are innumerable and the solutions often muddled and inarticulate.2 The difficulty is one of attempting to conform legal theory in the construction of constitutional provisions to economic reality and as a result to achieve a smoothly operating federal system.

The purpose of this comment is to analyze the manner in which the due process clause3 and the commerce clause4 of the federal constitution have been applied in the resolution of questions concerning a state's ability to tax a foreign business engaged in multistate activities. The most recent Supreme Court decision regarding this double constitutional question remains General Motors Corp. v. Washington,5 however, the problem is now before the

* DICKENS, DAVID COPPERFIELD.
1 The problem of state taxation of interstate commerce has been argued before the Supreme Court more than three hundred times. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457-58 (1959).
Despite the increasing frequency with which the question arises, little constructive discussion can be found in responsible commentary as to the grounds on which to rest a state's power to reach extraterritorial transactions or on nonresidents with tax liabilities. Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law.
That there is a 'need for clearing up the tangled underbrush of past cases' with reference to the taxing power of the States is a concomitant to the negative approach resulting from a case-by-case resolution of 'the extremely limited restrictions that the Constitution places upon the states. . . .'
3 U.S. CONST. amend. XIV, § 1.
Court once again. The General Motors decision was heralded as a “thumping blow” to the “tax free sanctity on interstate commerce.” In the words of dissenting Mr. Justice Goldberg “...it is difficult to conceive of a state gross receipts tax on interstate commerce which could not be sustained under the rationale adopted today.”

The State of Washington levied a tax for the privilege of engaging in business activities within the state, measured by the gross receipts of wholesale sales. General Motors, a Delaware corporation, manufactured motor vehicles, parts, and accessories in California, Missouri, and Michigan, which it sold at wholesale to independent retail dealers in Washington. The taxpayer did have a number of sales representatives or district managers and service representatives in the State acting in a promotional and supervisory capacity with regard to the retail dealers. However, these managers had no offices in the State, but worked with the dealers in furtherance of the corporation’s interstate business. Four General Motors’ divisions were involved in the tax dispute. Two of them engaged in no intrastate business in Washington, and operated entirely through a Portland, Oregon, zone office and the various local sales representatives in Washington. A third division maintained a one-man branch office in Seattle, Washington. This office was operated under the direction of the Portland zone office for the purpose of facilitating the management and handling of sales and orders from the dealers in the northern counties of Washington. The remaining sales to the dealers in the southern counties were on a par with the two divisions previously mentioned. The fourth division sold motor parts within the State of Washington and also maintained warehouses in Portland and Seattle. Taxes levied with respect to the sales made to Washington customers from the Seattle warehouse were not disputed by General Motors, however it did contest Washington’s ability to tax sales from the Portland warehouse to the Washington buyers.

The taxpayer contended that the tax levied on the unapportioned gross receipts from all wholesale sales in the State constituted a tax on the privilege of engaging in interstate commerce, was inherently discriminatory, resulted in the imposition of multiple tax burdens and was a deprivation of property without due process of the law. The Supreme Court, in a five to four decision, upheld the tax as a constitutionally fair exaction for the privilege of carrying on business activities within the State.

* General Motors Corp. v. Washington, *supra* note 5, at 456 (dissenting opinion).
* WASH. REV. CODE §§ 82.04.060-.270 (1961).
* General Motors Corp. v. Washington, *supra* note 5, at 443-44.
* Id. at 452-53 (dissenting opinion).
* Id. at 458 (dissenting opinion).
The effect of this decision cannot be simply stated. It represents the emergence, as a majority opinion, of the reasoning of a long line of dissents.\(^1\) Its thrust is a more liberal approach to state taxation of interstate commerce by a suppression of formal distinctions and by an economically realistic evaluation of the effect of a tax. It appears to be an attempt to set the stage for more immediate and effective action by Congress, by placing the present burden on the taxpayers and by de-emphasizing the applicability of the due process clause in favor of the commerce clause, Congress having discretion to legislate with respect to the latter clause but not the former.\(^1\)4

**DUE PROCESS OF LAW—THE PROBLEMS OF CONTACTS**\(^1\)5

The due process clause of the fourteenth amendment "... requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."\(^1\)6 This concept of minimum connections has traditionally represented the threshold question in determining whether a state can levy a particular tax.\(^1\)7 "... the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone...."\(^1\)8

The question of what is the test for determining sufficient connection with a state to sustain a tax for the purposes of due process is not a simple one. The question manifests itself in several ways, but in order to evaluate the problem, the tax must be separated into its two parts—the subject and the measure. A tax is levied on a particular subject, for example property, sale, use, privilege of doing business, etc., and is measured by an application of the

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\(^{14}\) See Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590, 603 (1954) (Douglas, J., concurring). Mr. Justice Douglas alluded to this underlying rationale by stating: "... when we are faced with a due process question, we have a problem we may not delegate to Congress."

\(^{15}\) It must be noted that this review of due process decisions includes many cases in which several Justices dissent and represents the background in light of which the Court's present trend must be viewed. See note 13 supra.

\(^{16}\) Miller Bros. v. Maryland, supra note 2, at 344-45.

\(^{17}\) American Oil Co. v. Neill, supra note 5, at 458.

\(^{18}\) Nippert v. City of Richmond, supra note 13, at 423.
tax rate to an appropriate value.\textsuperscript{19} This value may be that of the property, gross receipts, net income, capital stock, etc. It is therefore necessary not only that the subject of the tax be under the jurisdiction of the state\textsuperscript{20} but also that the appropriate value or measure to which the state applies its rate, includes only property or transactions with which the state has some nexus or minimum connection.\textsuperscript{21}

*International Shoe Co. v. Washington*\textsuperscript{22} established that systematic and continuous activity constituted sufficient connection to warrant a finding of corporate presence within the state.\textsuperscript{23} But it is clear from *American Oil Co. v. Neill*\textsuperscript{24} that corporate presence does not automatically satisfy the due process requirement for a given tax. The question is, do the subject and the measure of the tax have sufficient connection to establish jurisdiction. Although the taxpayer in *American Oil* was engaged in business within the taxing state and held a license to do business there, an excise tax on a sale of oil, f.o.b. out-of-state, the "legal incidence" of which fell upon petitioner,\textsuperscript{25} was held invalid under the due process clause. The reason for this was that the transaction (the subject of the tax) was totally "disassociated from the local business."\textsuperscript{26}

Likewise, due process has been held to prohibit a state from measuring what would otherwise be a valid license fee or excise tax, on a foreign corporation, by property not located or used within the state. In *International Paper Co. v. Massachusetts*\textsuperscript{27} the taxing state attempted to levy an excise tax

\textsuperscript{20} *American Oil Co. v. Neill*, *supra* note 5.
\textsuperscript{22} 253 U.S. 310 (1920).
\textsuperscript{23} Id. at 319.
\textsuperscript{24} Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. . . . But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state.
\textsuperscript{25} Id. at 320.
\textsuperscript{26}Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. . . . It is evident that these operations establish sufficient contacts of ties with the state of the forum to make it reasonable and just . . . to permit the state to enforce the obligations which appellant has incurred there.
\textsuperscript{27} Id. at 321.

The activities which established its 'presence' subject it alike to taxation by the state and to suit to recover the tax.
\textsuperscript{28} *Supra* note 5.
\textsuperscript{29} Id. at 456.
\textsuperscript{30} Id. at 458, quoting *Norton Co. v. Department of Revenue*, *supra* note 13.
\textsuperscript{31} *Supra* note 21.
measured by the par value of the entire authorized capital stock of a foreign corporation doing both local and interstate business. The tax was struck down on both due process and commerce clause grounds.28

A slightly different situation exists where the taxing state is the domicile of the taxpayer.29 Thus a railroad or other business owning rolling stock cannot avoid the imposition of a property tax by the domiciliary state on the full value of its assets merely by showing that some of its property was absent from the state for part of the tax year. Tangible property for which no tax situs has been established elsewhere may be taxed to its full value by the owner's domicile.30 The burden of proving that an exemption, on the basis of the property having acquired a tax situs in another jurisdiction, is on the taxpayer claiming it.31 However, the domiciliary state may not impose an ad valorem tax on any property to the extent that it could be taxed by another state, i.e., having acquired a tax situs elsewhere. Thus the test in this case is not whether the property is actually being taxed by another jurisdiction.32 It is to be noted that this test is not the same as that used by the Court in determining whether a state tax on a foreign corporation doing business in the state should be sustained despite the commerce clause's prohibition against multiple taxation.33

Returning to the question of a state tax on a foreign corporation, the problem in International Paper was not one of contacts with the taxpayer, who was manufacturing and selling within the state, but one of contacts with the intangible property which the state was using as its measure.34 On the other hand, where a state levied a tax on a foreign corporation, doing local and interstate business, for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the taxing state, the tax was held valid.35 The rationale was that the privilege granted by a state to carry on local business supports a tax on the income derived from that business.36

28 Id. at 141-44.
33 See p. 448 infra.
35 The dividends were voted and checks drawn upon banks in the state of the corporation's principal office. Wisconsin v. J. C. Penney, 311 U.S. 435, 443 (1940).
36 Wisconsin v. J. C. Penney, supra note 35.
That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The fact that the tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within the state for which the tax is an exaction.\textsuperscript{37}

As seen previously, although the taxpayer was doing local business, the due process clause prohibited the state from levying a tax on, or measuring it by, assets or transactions which were \textit{physically outside the jurisdiction of the state}. A more complex problem presents itself where the taxpayer's "presence" in the state is equally at issue. The importance of "presence" lies in the fact that the Court is faced with two issues: one of jurisdiction under the due process clause, and one of valid exaction under the commerce clause. A foreign corporation engaged exclusively in interstate commerce may be exempted from a tax under the commerce clause because it amounts to an exaction on the privilege of engaging in interstate commerce,\textsuperscript{38} or it may be found that the state has no jurisdiction to tax the transaction in the light of due process,\textsuperscript{39} depending upon the type of tax involved. As a result of the fine distinctions that have been made with respect to the different types of taxes, confusion has resulted\textsuperscript{40} and it is against this confusion that the liberal approach to state taxation reacts.\textsuperscript{41}

\textit{Miller Bros. v. Maryland,}\textsuperscript{42} in a negative way indicated the outer limits of sufficient connections to meet the due process requirements. A five to four majority there declared that a Delaware department store was not liable for the collection of a use tax levied on the citizens of that state.\textsuperscript{43} The only connections the taxpayer had with the State of Maryland were deliveries in Maryland of goods purchased by Maryland residents at the Delaware store, and advertising in media that reached Maryland consumers.\textsuperscript{44} The Court did not discuss any commerce clause implications, but relied solely on the

\textsuperscript{37} Id. at 444-45.
\textsuperscript{38} Spector Motor Serv., Inc. v. O'Connor, \textit{supra} note 13. In this case a tax was levied for the privilege of doing business in the state on a trucking company doing only interstate hauling. Justices Black, Clark and Douglas dissented, stating that the decision should not turn on whether the company was doing business within the state for the purposes of the privilege tax but whether the state has given anything for which it can ask return. Compare \textit{International Harvester v. Evatt,} 329 U.S. 416 (1947).
\textsuperscript{39} Miller Bros. v. Maryland, \textit{supra} note 2.
\textsuperscript{40} See p. 437-38 \textit{infra}.
\textsuperscript{41} See p. 446 \textit{infra}.
\textsuperscript{42} \textit{Supra} note 2. This case has not been disturbed to the date of this comment, but Department of Revenue v. National Bellas Hess, Inc., \textit{supra} note 6, now awaiting decision in the Supreme Court may call its soundness into question. It is to be noted that Chief Justice Warren, with Justices Black, Clark, and Douglas dissented in \textit{Miller Bros}.
\textsuperscript{43} Id. at 345-47.
\textsuperscript{44} See \textit{id.} at 358 (dissenting opinion).
due process clause. The connections between the taxpayer and the taxing state were insufficient.

Ten years earlier the Supreme Court sustained the liability of a foreign corporation for collection of a use tax on the citizens of the taxing state, even though the taxpayer had no office, branch, or warehouse in the state, but solicited orders by traveling salesmen. The orders were subject to acceptance out of state, and the goods were shipped either by common carrier or by mail. It appeared that the initial question would be that of due process, but the Court did not mention that consideration and sustained the tax as not violative of the commerce clause. Presumably, therefore, due process was satisfied.

In a companion case, however, with a similar fact situation, a state's sales tax (on the transaction as distinguished from the use) was struck down because, "For Arkansas to impose a tax on such transactions would be to project its powers beyond its boundaries and to tax an interstate transaction." (Emphasis added.) The Court there made the distinction between use as a subject and sales as a subject and apparently concluded that the same set of facts was sufficient for due process in one case and not in the other. Mr. Justice Rutledge in his dissenting opinion denied the validity of the distinction.

Id. at 338.
Of course no State can tax the privilege of doing interstate business. See Western Live Stock v. Bureau [of Revenue], 303 U.S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share.
This is due process language, although the Court does not use the phrase.
McLeod v. J. E. Dilworth, supra note 48, at 330. The Court went on to say that it is irrelevant to make the point that if the state had called the tax a use tax instead of a sales tax, it could have been sustained.
A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase. ... A use tax is a tax on the enjoyment of what was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end.
Compare McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940), where a sales tax on a foreign corporation was upheld as not violating the protections of the commerce clause and as being "activity which, apart from its effect on the commerce, is subject to the state taxing power." Id. at 58.
The Court's different treatment of the two taxes does not result from any substantial difference in the facts under which they are levied or the effects they may have on interstate trade. It arises rather from applying different constitutional provisions to the substantially identical taxes, in one the case to invalidate that of Arkansas, in the other to sustain that of Iowa. Due process destroys the former. Absence of undue burden upon interstate commerce sustains the latter.58

In other words, under the majority opinion, an out-of-state seller who has sufficient establishment in the buyer-state may be required to pay a sales tax54 and to collect a use tax.55 Without the sufficient buyer-state establishment, he may not be compelled to pay a sales tax,66 but he may still be obliged to collect and pay over a use tax,67 within the bounds of Miller Bros. v. Maryland.58 This situation not only provoked strong dissent but inspired commentary terming the decisions "indefensible."59

Another contacts problem existed where a net income tax was levied on a foreign corporation engaged exclusively in interstate commerce.60 The tax was exacted from that portion of the taxpayer's income arising from activities within the state. The Court upheld the tax because there was found to exist a sufficient "nexus" between the tax and the in-state activities.61

The "drummer" cases have seldom been referred to in Supreme Court opinions as due process problems.62 In an unbroken line of these cases, dating back to 1887,63 the question presented was the validity of a license tax on a

54 McGoldrick v. Berwind-White Coal Mining Co., supra note 51.
57 General Trading Co. v. Tax Comm'n, supra note 45.
59 Powell, Vagaries & Varieties in Constitutional Interpretation 192 (1956).
drummer or solicitor making sales by sample and obtaining orders for an out-of-state vendor. It has been consistently held that the commerce clause prohibits such license taxes because they discriminate in favor of local merchants and constitute a tax on the privilege of making interstate sales.\textsuperscript{64}

\textit{Nippert v. City of Richmond}\textsuperscript{65} was perhaps the first "drummer" case to consider both the due process and the commerce clause. The Court found that the record did not indicate any systematic and continuous activity within the taxing state to satisfy the due process requirement under the \textit{International Shoe} test.\textsuperscript{66} But due process notwithstanding, the Court went on to find the tax violative of the commerce clause. The City of Richmond attempted to dissect the interstate transaction in order to meet the requirements of the commerce clause, arguing that the license tax in question was imposed upon an event, occurring within the taxing jurisdiction, which was separate and distinct from the transportation or interstate commerce.\textsuperscript{67} The event cited was the "incident of solicitation" and was compared to the local incident of delivery that the Court noted as the basis of a valid sales tax in \textit{McGoldrick v. Berwind-White Coal Mining Co.}\textsuperscript{68} However, a five to three majority\textsuperscript{69} stated that if the only thing required under the commerce clause to sustain the tax was to discover some separate and distinct local incident, and lay the tax upon that, all interstate commerce would be subject to state taxation.\textsuperscript{70}

But beyond the presence of a sufficient connection in a due process or "jurisdictional" sense, whether or not a "local incident" related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce.\textsuperscript{71}

Those "other considerations" are the purposes of the commerce clause of the federal constitution.

\textsuperscript{64} Robbins v. Shelby County Taxing Dist., \textit{supra} note 63.
\textsuperscript{65} \textit{Supra} note 62.
\textsuperscript{66} \textit{Id.} at 426.
\textsuperscript{67} But we do not think the tax as it was applied in this case either conforms to those conditions of regularity and continuity [test of due process] or avoids other prohibited effects [discrimination against interstate commerce].
\textsuperscript{68} \textit{Id.} at 422.
\textsuperscript{69} \textit{Supra} note 51.
\textsuperscript{70} Justices Black, Douglas and Murphy dissented. Mr. Justice Jackson took no part in the case.
\textsuperscript{71} \textit{Nippert v. City of Richmond}, \textit{supra} note 62, at 423.
\textsuperscript{72} \textit{Id.} at 423-24.
Presently, the most pressing problem dealing with the commerce clause in the area of state taxation is that of apportionment. This difficulty emanates from the commerce clause's proscription against burdening or interfering with commerce, which the Court has construed as a prohibition against multiple taxation. Apportionment by its nature alleviates the possibility of multiple taxation. The theory of apportionment, if proper allocation is made, is that no other state can duplicate the tax. It should be stressed, lest confusion might arise, that the problem of apportionment is purely a commerce clause difficulty, and that it has no direct connection with the due process clause. This is emphasized by the statement, aptly phrased by Mr. Justice Holmes, that the "Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds."

The question of the states' right to tax interstate commerce dates back to Brown v. Maryland, where Chief Justice Marshall by way of dictum interpreted the commerce clause as a barrier to the states' power to tax interstate commerce. For more than a century after this decision, the Supreme

Taxation of a single event by more than one state works a disadvantage to interstate businesses. In effect this places local businesses in a favored position and thus discourages interstate commerce. In order to avoid multiple taxation of a single transaction or event, the Supreme Court via the commerce clause has allowed the various states to apportion the tax. See generally note, Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953 (1962).

Federated Dep't Stores, Inc. v. Gerosa, 16 N.Y.2d 320, 213 N.E.2d 677, 266 N.Y.S.2d 378 (1965), appeal dismissed, 387 U.S. 111 (1967). Petitioner, a Delaware corporation doing business in New York City, made deliveries to customers in New Jersey and Connecticut on sales consumated in New York. New York City levied a gross receipts tax on all businesses within the city. The issue presented for appeal to the Supreme Court was whether the commerce clause or the due process clause were violated through the use of an allocation formula, by which a calculated percentage of interstate business was related to the activity within the city.


An excellent example of this is General Motors Corp. v. Washington, 377 U.S. 436 (1964). See also Norton Co. v. Department of Revenue, 340 U.S. 534 (1951).


25 U.S. (12 Wheat.) 419, 449 (1827). This case involved a state tax on selling goods imported from a foreign nation. The Court held that the constitutional ban (import-export clause, U.S. Const. art. I, § 10, and the commerce clause, U.S. Const. arts. 1, § 8) on state taxation of imports kept the state from subjecting the goods to a general non-discriminatory tax, so long as they remained imports. Then by way of dictum, he concluded by saying: "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to imports from a sister state."
Court adhered to the philosophy that the states could not tax interstate commerce.\textsuperscript{78}

The test utilized by the Court during this era to enforce the dictum of \textit{Brown} was whether the exaction placed a \textit{direct} or \textit{indirect} burden upon interstate commerce. If the tax was found to bear directly on commerce, it was forbidden under the commerce clause;\textsuperscript{79} if, however, the exaction had only an indirect or remote effect upon interstate commerce, it was upheld as exacting a fair contribution from the taxpayer for the benefits rendered by the taxing state.\textsuperscript{80} In \textit{United States Glue Co. v. Town of Oak Creek},\textsuperscript{81} a Wisconsin statute imposed a general income tax on all domestic corporations. Even though part of the taxpayer's income was derived from transactions interstate in nature, the Court upheld the exaction: "The distinction between a direct and indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes ... affecting only the net receipts ... was only an indirect burden."

The direct-indirect burdens test did not meet with unanimous approval. Mr. Justice Stone, for one, evidenced his dislike for the test in \textit{Di Santo v. Pennsylvania}.\textsuperscript{82} However, it was not until 1938 that he could release the

\textsuperscript{78} See, e.g., Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 562 (1925) (franchise tax): "... a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on."

\textsuperscript{79} A typical example of the direct-indirect burdens test is found in Minnesota v. Blasius, 290 U.S. 1, 8-9 (1933) (property tax):
The States may not impose direct burdens upon interstate commerce, that is, they may not regulate or restrain that which from its nature should be under control of the one authority and free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. This limitation applies to the exertion of the State's taxing power as well as to any other interference by the State with the essential freedom of interstate commerce. Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it.


\textsuperscript{80} In Southern Natural Gas Corp. v. Alabama, 301 U.S. 148, 157 (1937), Alabama exacted a franchise tax for the privilege of doing local business. The exaction was measured by the property within the state. Since the taxpayer had gas lines in the state, although employed in interstate commerce, the lines were used in computing the tax. The Court held the tax valid: "There is no showing of any direct burden upon interstate commerce, the effect upon that commerce being incidental and remote ...." Cf. Eastern Air Transp., Inc. v. Tax Comm'n, 285 U.S. 147, 153 (1932) (property tax).

\textsuperscript{81} 247 U.S. 321, 328 (1918).

\textsuperscript{82} 273 U.S. 34, 44 (1927) (dissenting opinion):
In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. 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.
Court from the manacles of the "traditional test." In *Western Live Stock v. Bureau of Revenue*, Mr. Justice Stone, writing now for the majority, introduced the "cumulative burdens" test for determining whether a tax transcends the commerce clause. The "cumulative burdens" doctrine was predicated upon two ideas: 1) Businesses engaged in interstate commerce should bear a just share of the tax burden; and 2) State taxes upon interstate commerce should be sustained where there was no risk of "cumulative burdens not imposed on local commerce."

This criterion, which eventually became known as the "multiple burdens" test was a drastic shift from the past. Whereas the direct-indirect burdens test was predicated upon the philosophy that states could not tax interstate commerce, the multiple burdens test was formulated upon the theory that the states could tax interstate commerce so long as there was no possibility of multiple taxation. However, the states could always extricate themselves from the danger of multiple taxation by apportioning the tax, so that the taxing state would be levying upon only that portion of interstate commerce as would be justly attributable to the business done in the state.

The major development resulting from the multiple burdens theory took place in the field of taxes either levied directly upon gross receipts, e.g., sales taxes, or measured by gross receipts, e.g., privilege taxes. An example of this was seen one year after *Western Live Stock*. In *Gwin, White & Prince, Inc. v. Henneford*, the State of Washington exacted a privilege tax measured by gross receipts. The taxpayer was a Washington corporation, who engaged exclusively in interstate sales. While there was corporate activity within the state, a substantial part of it was outside, where the sales were negotiated and the contracts executed. Mr. Justice Stone, speaking for the Court held the tax unconstitutional:

Here the tax, measured by the entire volume of interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce ex-

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83 308 U.S. 250 (1938) (privilege tax).
84 Id. at 254.
85 Id. at 256.
86 Supra note 77.
tends may, with legal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed.90

Mr. Justice Stone's risk of "multiple burdens" test was short lived. The Court retreated for a time into the pre-Stone Age of direct-indirect burdens test.91 Finally the theory which is presently the law, was formulated in Northwestern States Portland Cement Co. v. Minnesota.92 A divided Court speaking through Mr. Justice Clark, felt that something more than a mere possibility of multiple taxation should be present in order to invalidate a tax under the commerce clause. The exaction which Minnesota levied was a net income tax and fairly apportioned to the business activities within the taxing state. The Court recognized that even with an apportioned tax there was still the potentiality of multiple taxation. Mr. Justice Clark disposed of this problem by pointing out that there was "... nothing to show that multiple taxation was present. We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense."93 Thus the test was formulated—multiple taxation must exist in fact.94 Therefore, the taxpayer can avail himself of the protection of the commerce clause only if he proffers evidence showing specifically that he was taxed on the same transactions in sister states.95

"DUE COMMERCE"—MERGER OF THE TWO CLAUSES

"'Due process' and 'commerce clause' conceptions are not always sharply separable in dealing with these problems. To some extent they overlap."96 This notion lies at the basis of the strong reaction97 that has arisen to the philosophy of attempting to decide these cases in terms of fine distinctions with respect to "subject," "measure," "use tax," "sales tax," "direct burden," "indirect burden," and so on, and attempting to bring some logical order out of the endless maze of cases by making still further distinctions. The more liberal approach to the problem appears to be to discard the notion that the two constitutional provisions are separate and successive questions

90 Id. at 439.
91 Freeman v. Hewit, supra note 88.
93 Id. at 463.
95 Supra note 75.
96 International Harvester Co. v. Department of Treasury, supra note 53, at 353 (dissenting opinion).
97 See nn. 13 & 14 supra.
to be asked and answered. Rather, this approach would have the Court grant greater freedom to the states to implement the policy initially stated in Postal Telegraph-Cable Co. v. Richmond,\(^8\) namely, that interstate commerce must "pay its [own] way." In the words of Mr. Justice Douglas, "The Court has not shared the doubts which some of us have had concerning the propriety of the judiciary acting to nullify state legislation on the ground that it burdens interstate commerce. . . ."\(^9\) "I think that one who complains that a state tax, though not discriminatory on its face, discriminates against interstate commerce in its actual operation should be required to come forward with proof to sustain the charge."\(^100\) With respect to due process, Mr. Justice Black stated that although interpretation of the constitution may result in the extension of the purposes of constitutional provisions, "... that is no reason for reading the due process clause so as to restrict a State's power to tax and sue those whose activities affect persons and businesses within the state, provided proper service can be had."\(^101\) (Emphasis added.) This approach to the question of state taxation of interstate commerce, which may well be called an economically realistic one, recommends itself to the resolution of the problem as does the sword to the Gordian Knot.

Although McLeod v. J. E. Dilworth Co.\(^102\) was decided under the technical distinction between a sales tax and a use tax, it is perhaps the first example of the Court's failure to articulate exactly into which constitutional frame of reference it was placing its decision. In due process language, the Court concluded that for the state to impose a tax on the transactions there in question would be "to project its powers beyond its boundaries and to tax an interstate transaction."\(^104\) (Emphasis added.) However, after a discussion of whether the taxing state had sufficient connections with the subject of the tax, namely the sale, the Court stated:

In view of the differences in the basis of these two taxes [sales tax and use tax] and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end.\(^105\) (Emphasis added.)

As a result, Dilworth has been cited as authority for the proposition that

\(^8\) 249 U.S. 252, 259 (1919).
\(^9\) Nippert v. City of Richmond, supra note 62, at 435 (dissenting opinion).
\(^100\) Id. at 437.
\(^101\) International Shoe Co. v. Washington, 326 U.S. 310, 325 (1945) (opinion of Mr. Justice Black). "I believe that the Federal Constitution leaves to each state, without any 'ifs' or 'buts,' a power to tax and open the doors of its courts for its citizens to sue corporations whose agents do business in those States." supra at 324.
\(^102\) 322 U.S. 327 (1944).
\(^103\) See pp. 437-38 & note 50, supra.
\(^105\) Ibid.
solicitors are entitled to the "immunity of interstate commerce," as well as for the notion that

... the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, are inadequate to support the local tax.107

*Norton Co. v. Department of Revenue*108 set the stage for the dissenters' triumph109 in *General Motors Corp. v. Washington.*110 The *Norton* case resulted from the imposition of an Illinois occupation tax, measured by gross receipts, on persons engaged in selling goods within the state. The petitioner, a Massachusetts corporation, had a branch office in Chicago, which engaged in some local business. The sales to the Illinois customers fell into three categories: first, the over-the-counter sales of items maintained in inventory, with respect to which there was no dispute concerning their being taxed; second, the sale of goods ordered from the home office in Massachusetts through the local outlet or ordered directly from the home office and delivered through the outlet; third, the sale of goods ordered directly from the home office by the Illinois buyers and shipped directly to them.111 The petitioner contended that the latter two classes of sales could not constitutionally be included in the measure of its tax. The Court reasoned that when Norton engaged in local business and submitted itself to the taxing power of the state "it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature." Thus, a presumption was raised that any sale made in the state is a taxable incident of the foreign corporation's local business. Applying an administrative law test to the determination of the lower court, the majority stated that, "in light of all the evidence, the judgment attributing to the Chicago branch, income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment."113 With respect to the orders and deliveries not channeled through the Chicago outlet, however, the Court reversed the judgment and declared them non-taxable.

The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly

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108 Norton Co. v. Department of Revenue, supra note 75, at 538.
109 Nippert v. City of Richmond, supra note 62, at 423.
110 *Supra* note 75.
111 See n.13 supra.
114 Id. at 537.
115 Id. at 538.
to Worcester [Massachusetts] by the customer and shipped directly to the cus-
tomer from Worcester. Income from those we think was not subject to this tax.\textsuperscript{114}

This was the sole statement the Court made to justify excluding these sales. What is unclear, and results in a basic difference of opinion among the members of the Court,\textsuperscript{115} is whether these sales were excluded by overcoming \textit{solely} a due process presumption in favor of “sufficient connections” be-
tween these sales and the local activity (which is in effect the subject of the tax), or a due process \textit{and} commerce clause presumption, the latter being in favor of a fair apportionment of the tax to the activities within the state.

To analyze the question thus stated, requires a comparison between the majority opinion in \textit{Norton} and the dissenting opinions in \textit{General Motors} on one hand, and the dissent of Justices Black, Clark and Douglas in \textit{Norton} and their majority opinion\textsuperscript{116} in \textit{General Motors} on the other. Although it is unclear from the dissent in \textit{Norton} just how comprehensive the presumption should be, it is clear that the three Justices felt that the presumption was not overcome.\textsuperscript{117} When writing for the majority in \textit{General Motors}, however, their position became apparent. They would merge the application of the due process clause with that of the commerce clause and are thus able to state their test in terms of “whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation.”\textsuperscript{118} Stated another way, they would emphasize the “operating incidence of the tax” and thus question “whether the State [is exerting] its power in proper proportion to the appellant’s activities within the State and to appellant’s consequent enjoyment of the opportunities and protections which the State has afforded.”\textsuperscript{119} Thus the majority was able to con-
clude that “Since General Motors elected to enter the State in this fashion, [it could not be said] that the Supreme Court of Washington erred in hold-
ing\textsuperscript{120} that these local incidents were sufficient to form the basis for the levy of a tax that would not run contrary to the Constitution.”\textsuperscript{121} The Court cited \textit{Norton} as authority for this proposition.\textsuperscript{122}

\textsuperscript{114} \textit{Id.} at 539.
\textsuperscript{116} Mr. Chief Justice Warren and Mr. Justice Harlan voted with the majority.
\textsuperscript{117} \textit{Norton Co. v. Department of Revenue, supra} note 111, at 541 (Mr. Justice Clark’s dis-
senting opinion). “The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption. Petitioner has failed to meet this burden.”
\textsuperscript{118} \textit{General Motors Corp. v. Washington, supra} note 115, at 440. This test of constitution-
ality was first stated by Mr. Justice Frankfurter, writing for the majority in \textit{Central Gray-
\textsuperscript{119} \textit{Id.} at 441.
\textsuperscript{120} Once again the Court applies an administrative law test to the holding of a state court.
\textsuperscript{121} \textit{Id.} at 447-48.
\textsuperscript{122} \textit{Id.} at 448.
On the other hand dissenting Justices Brennan and Goldberg interpreted the presumption recited in Norton in a much narrower and traditional manner as merely establishing the necessity for a taxpayer to demonstrate that his transactions were dissociated from the local business (a due process question) and not as initiating a presumption in favor of fair apportionment (a commerce clause question).

Mr. Justice Brennan reiterated that the due process clause requires the state to show some minimum connection between a tax and a transaction within a state. The fulfillment of this requirement, he contended, is a "pre-condition" to examining the second question, i.e., whether under the commerce clause the tax is fairly apportioned to the activity carried on within the state.

In concluding that the tax in this case include a fair apportion, however, the Court relies upon the fact that Washington has sufficient contacts with the sale to satisfy the Norton standard, which was formulated to meet the quite different problem of defining the requirements of the Due Process Clause.

Likewise, Mr. Justice Goldberg read Norton differently. "This decision departs from Norton Co. v. Department of Revenue ... and adopts a test there rejected." Presumably the reference is to the Clark dissent in Norton.

It is therefore apparent that the majority in General Motors has in a sense consolidated the due process and commerce clauses. Perhaps the best evidence of this is in Section IV of the Court's opinion, where the majority set up a minimum contacts test to answer the question of fair apportionment. After noting that this privilege tax is measured by unapportioned gross receipts, the Court concludes that the test of such a suspect tax should be "... whether it is so closely related to the local activity of the corporation as to form 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" This minimum connection test, however, was laid down in Miller Bros. v. Maryland to determine the constitutionality of a tax under the due process clause. Its use by the Court in General Motors with reference to fair apportionment is therefore noteworthy since apportionment and multiple taxation are not due process problems but rather questions falling under the commerce clause.

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123 Mr. Justices Stewart and White joined in Mr. Justice Goldberg's dissent.
125 See p. 440 supra.
126 General Motors Corp. v. Washington, supra note 115, at 450 (dissenting opinion).
127 General Motors Corp. v. Washington, supra note 115, at 454 (dissenting opinion).
129 Ibid note 129.
130 See p. 436 supra.
131 See p. 440 supra.
In a manner consistent with General Motors, the state courts have not separated the tax issues distinctively into two categories. Rather, they have treated the issue either as a general due process question or as a general commerce clause controversy, which ever was appropriate in the factual context. In Department of Revenue v. National Bellas Hess, Inc., for example, the State of Illinois attempted to levy a use tax on a non-resident mail order vendor. The taxpayer, having no connection with Illinois except for solicitation by way of catalogues, raised three grounds for reversal of the judgment which was entered against it in the lower court: 1) Illinois did not have in personam jurisdiction over the taxpayer and thus violated the due process clause; 2) the Illinois tax, in so far as it required the taxpayer to collect the use tax from Illinois citizens, was a denial of due process of law; and 3) the Illinois tax violated the commerce clause.

The discussion of the first point led the court to conclude that there was proper jurisdiction. However, when the court delved into the purely tax aspect of the case, it proceeded to discuss at length the due process clause's "minimum connection" doctrine and concluded that "... the Use Tax Act does not deprive the defendant of due process of law under the Federal or Illinois constitutions nor does it violate the commerce clause of the Federal constitution." The latter part of the conclusion seemed to be an after-thought on the part of the court, since it was not discussed at all in the opinion.

As a result of General Motors and other recent cases in this field, the states have been given a much freer hand in drawing their tax laws to meet their fiscal needs. The present economically oriented Court has come a long way from the days of Brown v. Maryland, and the impact of its rationale falls squarely upon the commercial taxpayer. Thus, in order for the out-of-state taxpayer to avail himself of constitutional arguments against the validity of a tax, he must not only extricate the purely interstate transactions from those associated with local business, but, further, he must demonstrate either that multiple taxation exists in fact or that the transactions have no

135 Supra note 135.
129 See Mr. Justice Black's dissent in Miller Bros. v. Maryland, supra note 129.
125 U.S. (12 Wheat.) 419 (1827).
connections with the taxing state. Congressional action is badly needed in this area\textsuperscript{141} and it appears that Congress may be the only hindrance left to freedom by the states to tax interstate commerce.

\textsuperscript{141} Northwestern States Portland Cement Co. v. Minnesota, \textit{supra} note 92, at 476-77 (dissenting opinion of Mr. Justice Frankfurter):

The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power. . . . Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency.

A bill is presently under consideration before Congress, which would fulfill the judiciary’s desire to have the problem of state taxation of interstate commerce settled by legislation. H.R. 2158, 90th Cong., 1st Sess. (1967). The bill provides, \textit{inter alia}, (1) a uniform jurisdictional rule based upon the maintenance of a “business location”; (2) an optional two-factor (property and payroll) apportionment formula for the allocation of net income; (3) rules in the sales and use tax area for locating sales for tax purposes in the state of destination; (4) a remedy for discrimination by the states in the sales tax and gross receipts tax area; and (5) for a continual evaluation by Congress of state progress in resolving problems not solved by the bill.