

JURISDICTIONAL AND INTERSTATE COMMERCE PROBLEMS IN THE IMPOSITION OF EXCISES ON SALES

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The popular conception of the tax assessor as being as confidently relentless as a dentist, drill in hand, has always had its counterpart; at the mention of interstate commerce the tax gatherer has looked and acted like a hound that has been chased by rabbits. The reason? It was not altogether a mirroring of "the action of States . . . looking with jealous eye upon the freedom of interstate commerce";¹ rather it had its source in the fact that the economic results of adjudicated cases and the doctrinal pronouncements accompanying them did not converge. Distinctions between "direct" and "indirect" burdens upon interstate commerce were the barren results of sterile logic rather than practical effect bound up with the taxes judicially reviewed. The results, viewed economic-wise, revealed a broad, sure highway, while the map of the courts' mind revealed by the decisions indicated either no road, not even a path, or detours, dead-ends, quagmires, and missing bridges.

THE CONSTITUTIONAL SITUATION PRIOR TO THE *Berwind-White* DECISION

The commerce clause concept as developed prior to 1930 placed emphasis upon individual rights. Since the depression this emphasis has shifted to an approach based upon social consciousness. Such divergent first premises could not fail to lead to a revolutionary realignment of the very principles applicable to state taxation under the commerce clause. Perhaps the foregoing observation oversimplifies recent developments. There is also an economic aspect: during most of the life of the Republic its states have relied mainly upon property taxation for the revenues which nourished them. In a property tax system, the rule that no state could tax interstate commerce was not, functionally, a serious limitation. But, latterly, sales taxes and taxes measured by gross receipts, fostered by necessity and by the general urbanization of society, have grown to be good providers to many of the states and their political subdivisions.² Such a tax system finds the old formulae a serious hindrance, both from a revenue standpoint and from the standpoint of economic results. They aggravated the competitive struggle, for the old doctrines fathered discrimination against local businessmen, who felt the bite of a tax from which were exempted

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¹ See Hughes, C. J., dissenting in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 66 (1940).

² HAIG AND SHOUP, *THE SALES TAX IN THE AMERICAN STATES* (1934) 2 *et seq.*, 37-38, 100-101; Pierce, *The Place of Consumers' Excises in the Tax System*, *supra* this issue.

active competitors who solicited by mail or through drummers.³ These observations invite a review of the situation as it existed prior to the recent New York City sales tax cases.

During the decade just passed, the state of the law of taxation in its relation to the commerce clause seemed all sail and no anchor. That decade had been preceded by a stretch of three decades or more during which it seemed definitely established that no state might tax an interstate sale.⁴ No less than nineteen state taxing statutes and municipal ordinances⁵ were invalidated because their grasp was deemed a restraining burden upon the occupation of selling goods prior to the interstate transportation necessary to effect the delivery of those goods to the purchaser. There can be no doubt that the Court was profoundly influenced in all of these cases by the practical consideration that the type of tax involved, *i.e.*, a license, usually of a fixed amount, was really a device to discriminate actively against interstate commerce and to place it upon a disadvantageously competitive footing with local commerce. The rule thus appeared fixed, and, if the pronouncements were to be believed, unchangeable. To be sure a variation existed, for at the same time the Court recognized that gross receipts could properly be utilized as the measure of a tax if the appearance of placing the tax "on sales," as such, could be avoided, and if the avowed subject matter of the exaction were found to be manufacture,⁶ extraction,⁷ or severance.⁸ In such instances, the tax was constitutionally unassailable, despite the fact that the measure was the sale price of the property which, regardless of the name given to the tax, was fairly certain to be affected by its imposition.

As demands for state revenue brought forth the gasoline tax, and later its logical extension, the general sales tax, state courts,⁹ tax collectors,¹⁰ and the United States

³ *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937).

⁴ *I.e.*, a sale which required delivery by transportation across state lines as an integral part of the performance of a sales contract entered into prior to the initiation of such transportation.

⁵ From 1887 to 1925: *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887); *Carson v. Maryland*, 120 U. S. 502 (1887); *Asher v. Texas*, 128 U. S. 129 (1888); *Stoutenburgh v. Hennick*, 129 U. S. 141 (1889); *Brennan v. Titusville*, 153 U. S. 289 (1894); *Stockard v. Morgan*, 185 U. S. 27 (1902); *Caldwell v. North Carolina*, 187 U. S. 622 (1903); *Norfolk & Western Ry. Co. v. Sims*, 191 U. S. 441 (1903); *Rearick v. Pennsylvania*, 203 U. S. 507 (1906); *Dozier v. Alabama*, 218 U. S. 124 (1910); *Crenshaw v. Arkansas*, 227 U. S. 389 (1913); *Rogers v. Arkansas*, 227 U. S. 401 (1913); *Stewart v. Michigan*, 232 U. S. 665 (1914); *Heyman v. Hays*, 236 U. S. 178 (1915); *Davis v. Virginia*, 236 U. S. 697 (1915); *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346 (1917); *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147 (1918); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203 (1925); *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325 (1925).

⁶ *American Mfg. Co. v. City of St. Louis*, 250 U. S. 459 (1919); *Utah Power & Light Co. v. Pfost*, 286 U. S. 165 (1932).

⁷ *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (1923); *Heisler v. Thomas Colliery Co.*, 260 U. S. 245 (1922); *Hope Natural Gas Co. v. Hall*, 274 U. S. 284 (1927).

⁸ *Lacoste v. Dep't of Conservation*, 263 U. S. 545 (1924); *Federal Compress Co. v. McLean*, 291 U. S. 17 (1934). "In plain economic fact the states can tax interstate commerce if they go about it in the right way." Powell, *Contemporary Commerce Clause Controversies Over State Taxation* (1928) 78 U. OF PA. L. REV. 773, 774.

⁹ *Montgomery Ward & Co. v. Fry*, 227 Mich. 260, 269 N. W. 166 (1936); *National Cash Register Co. v. Taylor*, 276 N. Y. 208, 11 N. E. (2d) 881 (1937), *cert. denied sub nom.* *McGoldrick v. National Cash Register Co.*, 303 U. S. 656 (1938); *Compagnie Generale Transatlantique v. McGoldrick*, 274 N. Y. 192, 18 N. E. (2d) 28 (1938).

¹⁰ HAIG AND SHOUP, *op. cit. supra* note 2, at 83; *Jacoby, Conflicting Interpretations of Retail Sales Tax Laws* (1934) 2 U. OF CH. L. REV. 78, 96.

Supreme Court by *dicta*,¹¹ assumed that the by-then-familiar formula would also shield sales in which the order preceded delivery across state lines. In fact the Supreme Court held that no tax could constitutionally be placed upon the first sale of petroleum products in the original package after interstate transportation had ceased.¹² In tabloid, this was the background for the pronouncements that interstate commerce could not be taxed by the states at all.

An erosion of the established doctrine began, however, with statements that the states could tax so long as they did not "burden" commerce "as such." *Sonneborn Brothers v. Cureton*¹³ represented one turning point, although Formula's face was saved by the *dicta* that sales made prior to interstate shipment would be relieved of the tax because "such transactions are interstate commerce in its essence." In reality, the Court's decision appears to have been bottomed upon the consideration that the result afforded equal competitive opportunities to local and interstate commerce alike.

Viewed from the standpoint of the equality achieved by sustaining the tax, or, contrariwise, from the standpoint of the disastrous inequalities which would have been called into operation if the tax were declared invalid, it would seem that the same result would have been reached by the Court whether the order preceded the interstate shipment or was one for property in the original package after shipment across the state line had ceased. This consideration appears to have been the forerunner of the ruling in *Gregg Dyeing Co. v. Query*,¹⁴ in which a tax equal in amount to the tax on the sale of gasoline was imposed upon the storage within the state of products on which no state gasoline tax had previously been paid. Here was a tax aimed directly at goods coming into a state through interstate channels precisely because of such interstate pedigree. The tax was sustained. Equality of competition between local and interstate competition provided the key.¹⁵

The critical test, in so far as the sale of gasoline was the chosen subject matter of the excise, came in *Eastern Air Transport v. South Carolina Tax Comm.*,¹⁶ which sustained a tax imposed upon the sale of gasoline destined exclusively for use as the propelling factor of transportation across state lines. At the same term of court, in *Nashville, Chattanooga & St. Louis Ry. v. Wallace*,¹⁷ a tax on the storage within the taxing state of out-of-state-origin gasoline, and its withdrawal for use to generate the energy necessary to bring about interstate transportation, was sustained.¹⁸

The next step in the evolution of the law was taken with reference to "use" taxes when in 1934 the duty imposed by a state statute upon a refiner or wholesaler to collect the gasoline tax from retailers was sustained, in spite of the consideration that

¹¹ *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 515 (1923).

¹² *Standard Oil Co. v. Graves*, 249 U. S. 389 (1919); *Askren v. Continental Oil Co.*, 252 U. S. 444 (1920); *Bowman v. Continental Oil Co.*, 256 U. S. 642 (1921); *Phipps v. Cleveland Refining Co.*, 261 U. S. 449 (1923).

¹³ *Supra* note 11.

¹⁴ 286 U. S. 472 (1932).

¹⁵ In sustaining the tax the Court observed that the taxpayer paid "precisely the same amount per gallon as other consumers within the state. . . ." See also *Bowman v. Continental Oil Co.*, *supra* note 12, at 648-649 (1921); *Hart Refineries v. Harmon*, 278 U. S. 499, 501 (1929).

¹⁶ 285 U. S. 147 (1932).

¹⁷ 288 U. S. 249 (1933).

¹⁸ To the same effect was *Edelman v. Boeing Air Transport*, 289 U. S. 249 (1933).

the gasoline was, pursuant to a prior order, to be shipped across state lines to effect delivery to the retailer.¹⁹

Against this background, the Supreme Court in 1935 announced its holding in *Wiloil Corp. v. Pennsylvania*.²⁰ This pronouncement, variously interpreted, resulted in the origin of the "facilities" test in tax administrative circles.²¹ The Court found that interstate transportation, although actually occurring in fulfillment of a prior sale, was not "required or contemplated," and for that reason treated the sale in the same manner as though no interstate shipment had occurred. This definitely, albeit subtly, eroded the ancient maxim that a state could not tax an interstate sale, and modified in a very important particular *Robbins v. Shelby County Taxing District*.²² Significantly, this erosion preserved equality of competition in the buyer's state. Unmistakably the decision attached importance to the factor that interstate transportation was not a condition to the completion of the contract, but that, in so far as the buyer in the taxing state was concerned, it was incidental. The language of the opinion is that²³ "As interstate transportation was not required or contemplated, it may be deemed as merely incidental."

The practical considerations which underlay the *Wiloil* decision and the sweep of the opinions leading up to it, culminated, by logical progression, in *Henneford v. Silas Mason Co.*²⁴ The use tax of the state of Washington, there approved, was imposed upon use within the state of goods purchased at retail in all instances where an equivalent retail sales tax had not been paid, either in Washington or in some other state. In effect, this accomplished all that could have been achieved by extending the general sales tax to all sales involving a Washington consumer as the purchaser, regardless of whether the sales were within the territorial boundaries of the taxing state, or were extrastate.

The thread of preservation of equality of competition between local and interstate commerce, apparent in the results reached in all of the cases heretofore noted, was also present in *Western Live Stock v. Bureau of Revenue*,²⁵ which sustained the New Mexico business and occupations tax as measured by gross receipts derived from the performance of advertising contracts. But the *Western Live Stock* opinion presented a new approach to the problem that foreshadowed the criterion upon which subse-

¹⁹ *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 (1934).

²⁰ 294 U. S. 169 (1935).

²¹ The facilities test is to the effect that if the taxpayer is possessed of goods within the boundaries of the taxing state similar to those ordered, but chooses to complete the sale by a shipment to the purchaser from a second state, the transportation not being essential to the completion of the sale, the fact of the transportation across state lines will not bar the imposition of a tax by the state into which the goods are shipped. This phase of a practical tax problem seems to have escaped the notice of the courts, except perhaps in *Sears, Roebuck & Co. v. McGoldrick*, 279 N. Y. 184, 18 N. E. (2d) 25 (1938), *reargument denied*, 280 N. Y. 570, 20 N. E. (2d) 18 (1939). But observe that the same result was reached in *Graybar Electric Co. v. Curry*, 238 Ala. 116, 189 So. 186 (1939), *aff'd per curiam*, 308 U. S. 513 (1939).

²² 120 U. S. 489 (1887). Note also the Court's discussion of the *Robbins* case in *McGoldrick v. Berwind-White Coal Mining Co.*, *supra* note 1, at 57.

²³ *Supra* note 20, at 175. Later, in *Graybar Electric Co. v. Curry*, *supra* note 21, a tax was sustained even though the contract of sale plainly contemplated an interstate shipment. See also, *McGoldrick v. Berwind-White Coal Mining Co.*, *supra* note 1, discussed *infra*.

²⁴ *Supra* note 3.

²⁵ 303 U. S. 250 (1938).

quent cases have been decided. This was that state taxes measured by gross receipts are to be sustained when they do not result²⁶ in "cumulative burdens not imposed on local commerce" "merely because interstate commerce is being done." The language utilized was:²⁷

The vice characteristic of those [taxes burdening commerce between the states] is that they have placed on the commerce burdens of such nature as to be capable, in point of substance, of being imposed . . . or added to . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.

Correspondingly, in *Adams Manufacturing Co. v. Storen*,²⁸ the "risk of a double tax burden to which intrastate commerce is not exposed" proved the basis for invalidating an assessment made under the Indiana Gross Income Tax Act. There the tax was imposed on the goods by the state of origin, and was measured by the gross receipts derived from a sale which required the goods to be transported across state lines to the purchaser. Similarly, the multiple tax test was applied, this time to sustain the tax, on the generation of power used to induce the interstate transportation of oil through a pipe line.²⁹ And in 1939, the risk of multiple taxation to which local commerce was not exposed formed the test which in *Gwin, White & Prince, Inc. v. Henneford*³⁰ resulted in the nullification of the Washington state tax measured by gross receipts, where the sales activities productive of the tax base were necessarily extrastate and interstate in character.

THE NEW YORK CITY SALES TAX CASES

On January 29, 1940, Mr. Justice Stone read the prevailing opinion in *McGoldrick v. Berwind-White Coal Mining Co.*,³¹ while Mr. Chief Justice Hughes delivered a dissent in which two colleagues concurred. Upheld was a sales tax imposed by a city in the state of delivery with reference to personal property shipped from another state to consummate a sales agreement entered into prior to the commencement of the transportation. The seller maintained within New York City sales offices at which the orders for the coal were received. The coal was then mined in Pennsylvania, shipped and delivered in the seller's barges to the purchaser at water's edge in New York City. Under the old dispensation, here was a factual situation which would have spelled tax immunization. But the tax was upheld. Evidently the canons of

²⁶ The actual result in the precise case before the Court probably was not intended to be the sole test. Later applications of the rule indicate that danger of cumulative burdens was deemed sufficient to cause the Court to invoke the prohibition. *Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939). When this test was first announced it seemed that it would have been better to have restricted its application to instances wherein the cumulative burden was present or at least actually and immediately threatened. *McGoldrick v. Berwind-White Coal Mining Co.*, and other New York City sales tax cases indicate that practicability may well be served in another manner, that is, by assigning the taxing prerogative exclusively to the purchaser's state.

²⁷ *Western Live Stock v. Bureau of Revenue*, *supra* note 25, at 255-256.

²⁸ *Supra* note 26.

²⁹ *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, 613 (1938).

³⁰ *Supra* note 26.

³¹ *Supra* note 1.

practicability referred to by Mr. Justice Stone in *Western Live Stock v. Bureau of Revenue*³² came into full flower in the New York City sales tax cases.

Because comment upon the leading decision in the *Berwind-White* case has been so widespread, the results in three companion cases decided by the Court on the same day have suffered relative obscurity. In the first of these, *McGoldrick v. Felt & Tarrant Manufacturing Co.*,³³ a taxpayer solicited in New York City orders for comptometers which, upon the approval of the orders at the principal office of the company in Chicago, Illinois, were shipped, invoiced to the purchaser, to the seller's New York City agent, who delivered them to the purchaser after inspection and adjustment. The New York City sales tax was upheld with reference to such transaction. In the same opinion the Court dealt with the case of *McGoldrick v. A. H. Du Grenier, Inc., et al.*³⁴ where an exclusive sales agent solicited orders in New York City for vending machines manufactured by the taxpayer, a Massachusetts corporation. The seller, upon approval of the orders, sent the machines by common carrier direct to the buyer in New York City, who paid the freight. Taxation by New York of this type of transaction was also sustained.

Perhaps the most significant of all the New York City sales tax cases decided on that day is that of *Jagels, "A Fuel Corporation" v. Taylor*,³⁵ a *per curiam* memorandum decision upon authority of the other decisions which have just been discussed. The sales about which the controversy in the *Jagels* case arose and upon which the tax had been assessed fell within three classes: In the first were orders received by telephone at the petitioner's New York office, which the petitioner telephoned to its New Jersey office, where, upon credit approval, they were accepted and delivery made to the consumer in New York from a New Jersey coal yard. In the second class, the order was telephoned direct to New Jersey by the customer, followed by a confirmatory written order, and delivery was made from the New Jersey yard to the customer in New York. In the third class, a written order was sent by the purchaser in New York to the New Jersey office, and delivery was made from the New Jersey yard to the customer in New York. In all three classes, the customer was billed from the New Jersey office, and payment was made to that office. The important thing about the *Jagels* case is that the tax was sustained with reference to all three classes of sales despite the fact that, in the third class, the sale was not made through the resident office at all but resulted from a mail order.

All of the New York City sales tax cases turn upon the multiple tax doctrine which, in effect, permits the state in which delivery of the property is made to impose the tax rather than the state from which the property is shipped. This choice is made because where the state of delivery is permitted to tax, the burden is certain to be equal to, but no greater than that borne by domestic commerce. The Court in the *Adams Manufacturing Co.* case had already observed that if the shipping state and the state in which delivery was effected were permitted to tax the same transaction, there would be one more tax on such a sale than there would be upon purely local

³² *Supra* note 25.

³³ 309 U. S. 70 (1940).

³⁴ *Ibid.*

³⁵ 309 U. S. 619 (1940), *aff'g* 280 N. Y. 766, 21 N. E. (2d) 526 (1939).

sales.³⁶ But while the *Adams* case had invalidated a tax imposed by the state of origin, there had as yet been no actual decision pointing out that the state of destination or delivery would be permitted to tax a sale where the order preceded the delivery of the goods across a state boundary. The majority opinion in the *Berwind-White* case, in dealing with the familiar doctrine which had distinguished between sales where the order for the goods was received and accepted before the transportation from across state lines was initiated and those where it was made after, utilized the following language:³⁷

But we think that this distinction is without the support of reason or authority. A very large part, if not most of the merchandise sold in New York City is shipped interstate to that market. In the case of products like cotton, citrus fruits and coal, not to mention many others which are consumed there in vast quantities, all have crossed the state line to seek a market, whether in fulfillment of a contract or not. That is equally the case with other goods sent from without the state to the New York market whether they are brought into competition with like goods produced within the state or not. We are unable to say that the present tax laid generally upon all sales to consumers within the state, subjects the commerce involved where the goods sold are brought from other states to any greater burden or affects it any more in any economic or practical way, whether the purchase order or contract precedes or follows the interstate shipment. Since the tax applies only if a sale is made, and in either case the object of interstate shipment is a sale at destination, the deterrent effect of the tax would seem to be the same on both. Restriction of the scope of the commerce clause so as to prevent recourse to it as a means of curtailing state power seems as salutary in the one case as in the other.

Is "Imposition" the Magic Word?

Since the announcement of the *Berwind-White* decision, some have attempted to minimize its effect by asserting that the rule announced is only applicable where the taxing enactment formally "imposes the tax upon the purchaser." A provision of the New York City taxing ordinance directing that the tax "shall be paid by the purchaser to the vendor, for and on account of the City of New York," lends some color to the hypothesis that sales taxes or gross receipts taxes formally levied upon the vendor will not participate in the enlightened attitude which blacks out the former discrimination in favor of interstate commerce. The recent decision affirming the power of a state to tax the transaction of renting safe deposit boxes, despite the fact that the lessor was a national bank, will probably be cited in support of this restrictive hypothesis, since there the Court mentioned that the tax was formally "imposed" upon the lessee.³⁸ What would be overlooked in drawing such an analogy is this: The reason for the rule in the *Bedford* case is that it is not enough that the tax be non-discriminatory. National banks, as such, may be taxed by the states only in the manner that Congress prescribes,³⁹ whereas, in the *Berwind-White* case, a non-discriminatory tax on interstate commerce was upheld. Thus in the *Bedford* case, because an entirely different rule was applicable, it was necessary to show that the tax was not on the bank. In addition, it should be noted that both the economic thrust

³⁶ *Supra* note 26, at 311.

³⁷ *Supra* note 1, at 54.

³⁸ *Colorado National Bank v. Bedford*, 310 U. S. 41 (1940).

³⁹ REV. STAT. §5219 (1875), 12 U. S. C. §548 (1934).

and the technical requirement with reference to the imposition of the tax led to the result reached.

It would appear that such attempts to limit the *Berwind-White* rule are destined for disappointment. Practicality is the essence of both the pronouncement and the results achieved in the case itself. The strength of the analogy in economic impact between the New York City sales tax and the use taxes which the Court has hitherto held valid indicates clearly that out-of-pocket realities, rather than form, are the controlling factors. In the use tax cases, the vendor is responsible for the collection of the taxes; as far as actual results are concerned, therefore, there is no substantial difference between these excises. The effect upon commerce is identical in both cases. The minority who dissented in the *Berwind-White* case, thereby objecting to the imposition of the sales tax, had previously approved of the incidence of the use tax. Had a substantial economic difference existed between the results of a sales tax and a use tax, the minority would have demonstrated it. Significantly, they did not attempt such a task. The rule permitting the state of entrance to impose a sales tax is not likely to be restricted to statutes which name the purchaser as the person from whom the tax is to be collected.

Must Both Order and Delivery Occur Within the Taxing State?

In the *Berwind-White* case the receipt of the order, its acceptance, and the delivery of the thing sold, all occurred within the taxing jurisdiction. Since many other states having sales taxes are so situated geographically that only the delivery takes place within the taxing jurisdiction, the question has been presented whether this aspect of the transaction affords sufficient basis to tax.

The *Berwind-White* decision does not go that far. But from its companion cases⁴⁰ the deduction is unmistakable that the place at which the contract is approved or made was considered by the Court as being immaterial. In the *Felt & Tarrant* case the sales contract was approved in Illinois, in the *Du Grenier* case, in Massachusetts, while in the *Jagels* case it was approved in New Jersey. From a legal standpoint such sales contracts are considered as being made, respectively, in Illinois, Massachusetts, and New Jersey.

From a practical standpoint, the place of making the agreement of sale is unimportant. There is no greater danger of pyramiding tax burdens where the approval of the order is an extrastate activity, than where approval to sales is locally indicated. No cumulative tax burden will result where only the delivery occurs within the taxing jurisdiction, if the power to tax is limited to the jurisdiction in which delivery is accomplished. It seems safe, therefore, to predict that sales taxes in states of entrance will be sustained regardless of the locale chosen at which to consummate the agreement of sale.

Since the *Berwind-White* decision was announced, Illinois, Virginia, Washington, Utah, and Kansas have promulgated new regulations. Newspapers have character-

⁴⁰ *McGoldrick v. Felt & Tarrant Mfg. Co.*, *McGoldrick v. A. H. Du Grenier, Inc.*, *supra* notes 33 and 34; *Jagels*, "A Fuel Corporation" v. Taylor, *supra* note 35.

ized the tax imposed under such broadened regulations as a "delivery tax." Whether this is so is a debatable question. Those who are of the "delivery-is-the-only-essential" school rely upon a statement of the majority describing the tax as⁴¹

. . . conditioned upon events occurring within the state, either *transfer of title or possession* of the purchased property, or an agreement within the state "consummated" there, for the transfer of title, or possession;

and also upon the dissent's characterization of the tax as one on delivery:⁴²

It is urged that there is a taxable event within the state. That event is said to be the delivery of the coal. . . . If, because of the *delivery* in New York, that State can tax the gross receipts from the sale. . . .

They also point to the result in the *Jagels* case and to the fact that no discrimination results from such a tax; that realities and practical consequences are its only fruits.

Those who believe that some local activity, in addition to mere delivery, must exist before the state of destination may tax, point out that the statements of the *Berwind-White* majority, quoted above, undergo in that opinion a process of evolution. For later the Court says:⁴³

It [the tax] is laid upon every purchaser, within the state, of goods for consumption. . . .

Still further on:⁴⁴

Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption.

And of both the *Felt & Tarrant* and the *Du Grenier* cases, it was judicially observed that⁴⁵

. . . the tax was imposed on all the sales of merchandise *for which orders were taken within the city* and possession of which was transferred to the purchaser there.

The results reached in the *Jagels* case appear at war with the statements quoted immediately above; that is apparent. In construing what the Court said, due regard must be given to what it actually did in this companion case decided at the same sitting, and to what has latterly transpired.

For in two cases decided on February 17, 1941, the Court upheld the Iowa use tax imposed by the state in which delivery was made, even though the purchases were pure mail-order transactions.⁴⁶ The cases were presented under the due process clause and there is language in the decisions which indicates that a different result might have been reached if the Sears, Roebuck and Montgomery Ward companies had not been admitted to do business in Iowa. From the standpoint of a consideration of commerce clause problems, however, these cases indicate that delivery, of itself, will be a sufficient basis for the imposition of a tax, because the economic thrust

⁴¹ *McGoldrick v. Berwind-White Coal Mining Co.*, *supra* note 1, at 43-44 (ital. added).

⁴² *Id.* at 64, 68 (ital. added).

⁴³ *Id.* at 49.

⁴⁴ *Id.* at 58.

⁴⁵ *Id.* at 77 (ital. added).

⁴⁶ *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359 (1941); *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373 (1941).

cannot be duplicated elsewhere, and hence an equality of competitive opportunities is maintained between local and interstate transactions.

INTERRELATIONSHIP OF COMMERCE AND DUE PROCESS CLAUSES

That there is a definite relationship between the due process clause of the Fourteenth Amendment and the commerce clause is apparent.⁴⁷ In many cases the identical result is reached whether one clause or the other is invoked.⁴⁸ The Fourteenth Amendment is a general limitation upon the powers of the respective states, the commerce clause a special limitation. During the era in which the states relied primarily upon a property tax system for their revenues the Court maintained that if the projected state action was beyond its jurisdiction as measured under the Fourteenth Amendment, it *a fortiori* constituted an invalid regulation of interstate commerce. Strictly, all cases involving property taxes should have been decided under the due process clause of the Fourteenth Amendment—this because the exaction's vice was that it reached property outside of the territorial jurisdiction of the taxing authority. Such a tax was void whether the owner of the property was engaged in interstate or in intrastate commerce. Later when the states taxed as property the intangible assets of one engaged in interstate business as a going concern, a new problem was presented as to whether the method used by the state had reached more than the taxing jurisdiction's fair share of the intangible assets. In the absence of an affirmative showing that the assessment had actually touched property outside of the state, such taxes were uniformly upheld.⁴⁹

The next step was to permit the taxation of one engaged in interstate transportation by utilizing the gross receipts as a measure of the tax in so far as such taxes were in lieu of other taxes. But with the advance of taxes measured by gross receipts generally, it has become increasingly difficult to harmonize the results reached under these two clauses of the Federal Constitution. That the Court believes that the same results are to be achieved under certain circumstances is vividly illustrated by *Gwin, White & Prince, Inc. v. Henneford*.⁵⁰ There is also the suggestion in *J. D. Adams Manufacturing Co. v. Storen*,⁵¹ that if the taxing statute contains a method of allocation such that only the fruits derived from the taxing state are included in the measure of the tax, taxes assessed thereunder will not be held to violate the commerce clause. This allocation suggestion the Supreme Court has repeated on several occasions.

⁴⁷ GAVIT, *THE COMMERCE CLAUSE* (1932) 47 *et seq.*

⁴⁸ *Cf.* *Cleveland, C. C. & St. L. Ry. v. Backus*, 154 U. S. 439 (1894), with *Pittsburgh, C. C. & St. L. Ry. v. Backus*, 154 U. S. 421 (1894). *See also*, *St. Louis v. Ferry Co.*, 11 Wall. 423 (U. S. 1870); *Delaware, L. & W. R. R. v. Pennsylvania*, 198 U. S. 341 (1905); *Louisville & N. R. R. v. Greene*, 244 U. S. 522 (1917); *Illinois Central R. R. v. Greene*, 244 U. S. 555 (1917); *Union Tank Line Co. v. Wright*, 249 U. S. 275 (1919).

⁴⁹ *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530 (1888); *Cleveland, C. C. & St. L. Ry. v. Backus*, *supra* note 48; *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1 (1898); *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897); *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150 (1897); *American Express Co. v. Indiana*, 165 U. S. 255 (1897); *Adams Express Co. v. Kentucky*, 166 U. S. 171 (1897); *Keokuk, etc., Bridge Co. v. Illinois*, 175 U. S. 626 (1900); *St. Louis & East St. Louis Electric Ry. v. Missouri*, 256 U. S. 314 (1921); *Southern Ry. Co. v. Watts*, 260 U. S. 519 (1923); *Schwab v. Richardson*, 263 U. S. 88 (1923).

⁵⁰ *Supra* note 26.

⁵¹ *Ibid.*

However, it would seem that, from a practical standpoint, such allocation remedies are destined to be sterile, because the tax measured by a part of the gross receipts in the state of origin would, when the goods were shipped into a state of ultimate delivery, result in interstate commerce bearing an added fiscal burden *merely because interstate commerce was being done*. The concept that the state of origin will not be permitted to impose a tax measured by the gross receipts of a sale resulting in delivery into another state seems to be as inseparable as a pair of shears from the results reached in the *Graybar Electric Co.*,⁵² the *Berwind-White*, and the *Sears Roebuck* cases. Such an apportionment statute would, moreover, bristle with perplexities from the standpoint of both draftsmanship and administration. For the present, therefore, it seems unlikely that any state will attempt to apportion gross receipts used as a measure of an excise other than to separate it into receipts derived from a source within the taxing state, and income from sources outside of that jurisdiction. The assumption which seems to be behind the result reached in the second *Dravo Contracting Co. v. James* case⁵³ would indicate that the state within which delivery was made (or the contract fulfilled) was entitled to use the entire receipts from such a source in measuring the taxes on activities within that state.

POSSIBLE DEVELOPMENTS

The probability most likely to be realized within the next few years is the adherence by the Court to the multiple tax doctrine as expounded in the *Western Live Stock* case and as developed in the New York City sales tax cases. There are, however, several other possible developments which should be mentioned.

(1) In the dissenting opinion in the *Adams Manufacturing* case, Mr. Justice Black indicated his willingness to repudiate the negative implication theory as it relates to problems arising under the commerce clause.⁵⁴ Many who have studied the past writings and records of Justices Frankfurter and Douglas believe that they may be expected to join Mr. Justice Black in insisting that whether state taxes are a prohibited burden or regulation of commerce is within the special domain of Congress. There appears to be some justification for this conjecture; however, in the Court as presently constituted it seems but a mere possibility. The consideration that in the practical results flowing from the multiple-tax doctrine Chief Justice Stone and Justice Reed can find themselves on common ground with Justices Black, Frankfurter, and Douglas, makes it unnecessary to repudiate the negative implication theory.

There can be no doubt that the most satisfactory approach to this problem would be to have Congress exercise its power to determine the permissive limits of state taxation touching interstate commerce by authorizing particular taxes and prohibiting those it finds discriminatory or destructive. The Congress can obtain factual data necessary for such a solution more easily than can the courts, and is, by its very nature, the agency in a position to piece together a comprehensive program. This cannot be accomplished within the confinements of the judicial process restricted to

⁵² *Supra* note 21.

⁵³ 114 F. (2d) 242 (C. C. A. 4th, 1940).

⁵⁴ *Supra* note 26, at 331-333.

deciding single, isolated controversies wherein the facts are narrowed both by the rules of evidence and the limitations of the parties to the litigation. As the problem becomes more intense, this method of achieving a solution in an authoritative national manner will gain adherents.⁵⁵

(2) Another possibility is that Congress may permit non-discriminatory sales taxation by the state of destination of solicitors and mail-order houses who ship goods into a state for ultimate use or consumption. Although Congress has not acted upon bills having this purpose, it is quite probable it will act favorably. But such action would yield to the states no power not already possessed by them under the new judicial dispensation.

(3) The state of Arkansas has evolved a technique⁵⁶ of a differential rate applicable to cities or incorporated towns which adjoin the state line. By the statute, where there are adjoining cities or incorporated towns which are separated by a state line, the taxes and licenses to be paid by dealers in and on sales and services in such cities or towns on the Arkansas side shall be at the rate provided by law in the adjoining state, if any, but in no instance to exceed the rate provided for by the Arkansas statute. This section has never been the subject matter of litigation. Many states are of the opinion that their state constitutions would prevent them from adopting a similar statute. Others believe that the provision is invalid under the Federal Constitution. All, including the taxing authorities of Arkansas itself, agree that the differential rate technique multiplies the administrative problems of the tax assessor, and while its use may be accepted for petroleum-product excises it is doubtful if it will be applied under the general sales taxes of the respective states.

(4) There is a definite possibility of ultimate adoption of the proposed Federal Manufacturers' Sales Tax with the allocation of collected revenues back to the respective states, as discussed in the 1935 progress report of the Interstate Commission on Conflicting Taxation.⁵⁷ There are strong factors which would indicate that it ultimately will be the technique relied upon to eliminate the litigation and administrative difficulties germinated by the commerce clause. This will not be accomplished without strong opposition from those who insist upon states' rights. This group feel that as the agency in collecting the funds and re-allocating them back to the states, the Federal Government will utilize the power inhering in such a situation to dictate state policies. They point to the record of the Federal Government under the grants-in-aid legislation and assert that state governments that have taken funds from the central government have always been required to surrender sovereignty over the subject matter upon which such funds were to be expended. The present defense endeavors and the foreign affairs crisis cannot fail to have a centralizing influence. This will condition the thinking of many persons in such a way that they will be willing to accept the proposed Federal Manufacturers' Sales Tax and allocation formula. Then, too, the drying up of state revenues, should a depression follow

⁵⁵ See Hellerstein and Henefeld, *State Taxation in a National Economy* (1941) 54 HARV. L. REV. 949.

⁵⁶ ARK. DIG. STAT. (Pope, 1937) §14070(e).

⁵⁷ CONFLICTING TAXATION (Council of State Governments, 1935) 64-87.

upon the heels of the present defense boom, will undoubtedly influence the final result.⁵⁸

The recent developments, beginning with *Gregg Dyeing Co. v. Query*,⁵⁹ and continuing through to this year's decision in *Nelson v. Sears, Roebuck & Co.*⁶⁰ represent progress toward the ideal of reaching realistic and practical results with reference to state taxation and the commerce clause. It is, therefore, to be hoped that the Court will some day recognize that sales and use excises should be allowed to disregard antecedent taxation in other states to the same extent and in the same manner that conventional property taxes now do so. In reality taxes, whether on property or on opportunities granted, are not an attempt at regulation.⁶¹ When they are an attempt at regulation, the object is to prohibit or destroy the activity which is the subject matter of the legislation. This destruction of the source of the revenue, and therefore the revenue itself, is an indication that the matter under consideration is not a tax at all. The United States Supreme Court has had no difficulty in invalidating certain purported revenue measures because they were regulatory and therefore not in reality taxes. The historic statement of Mr. Justice Holmes, that "The power to tax is not the power to destroy, while this court sits"⁶² will eventually be given its full application in the field of taxes measured by gross receipts as it has been in the property tax field. This eventuality, however, is for the far horizon.

⁵⁸ Similar conditions prompted the evolution of state collection of consumption taxes, with allocation back to the localities. See Smart and Hart, *The Distribution of Revenues from State-Collected Consumer Taxes*, *supra* this issue. ⁵⁹ *Supra* note 14. ⁶⁰ *Supra* note 46.

⁶¹ Contrast the views of Hart, *Consumption Taxation as an Instrument of Economic Control*, *supra* this issue.

⁶² *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223 (1928) (dissenting opinion).