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THE SALES TAX AND TRANSACTIONS IN INTERSTATE COMMERCE

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The development of state sales taxation in recent years has made the taxpayer and the tax official increasingly aware of the Commerce Clause of the Federal Constitution and its restrictions on taxation.[1] In order to supplement diminished revenues from other forms of taxes and in an effort to decrease the tax burden on property, a number of states have adopted some form of sales tax and the prospects are that other states soon will enter this field.[2] Due to the immunity from privilege taxation which transactions in interstate commerce enjoy, the taxpayer finds that sometimes it is convenient and prof-

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[1] Nowhere does the Constitution expressly forbid the states to tax interstate commerce. The Commerce Clause [Art. I, §8, cl. 3], gives Congress the power "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes". The restrictions on taxation result from judicial interpretation of this clause.

[2] The sales tax appears in a variety of forms. In California, Illinois, Michigan, New York, North Carolina, Oregon (effective March 9, 1934) and Utah, the tax is imposed on the privilege of selling tangible personal property at retail, and is a uniform percentage of the gross receipts. The rates range from one per cent in New York and Oklahoma to three per cent in Michigan and North Carolina. In Arizona, Indiana, Mississippi, Washington and West Virginia the acts apply to production as well as to consumption sales, and in Indiana, Mississippi, South Dakota and West Virginia they are comprehensive gross income statutes. Pennsylyania imposes a merchants' license tax at a very low rate, measured by gross sales. Kentucky and New Mexico have merchants' license taxes graduated according to gross sales. Connecticut imposes a gross income tax on unincorporated business. Vermont has a merchants' license tax measured by sales. The exemption of gross sales of fifty thousand dollars seems to make this in effect a chain store tax. Virginia and Delaware tax merchants according to their purchases.

See, Ariz. Laws 1st. Spec. Sess. 1933, c. 17; CALIF. STAT. 1933, c. 1020; CONN. GEN. STAT. (1930) §§1340-1349; DEL. REV. CODE (1915) §198; Ill. Laws 1933 p. 924; Ind. Acts 1933, c. 50; KY. STAT. (Carroll, Supp. 1933) §4202, A1-12; Mich. Pub. Acts 1933, H. B. 184; Miss. Gen. Laws 1932, c. 90; N. M. Laws 1933, c. 73; N. Y. Laws 1933, c. 281; N. C. CODE ANN. (Michie, Supp. 1933) §7880 (156); Okla. Laws Ex. Sess. 1933, c. 66, art. 9, §§1052-68; Ore. Laws 2d. Spec. Sess. 1933, H. B. 110; PA. STAT. ANN. (Purdon, 1931) tit. 72, §2621; S. D. Laws 1933, S. B. 101; Utah Laws 1933, c. 63; Vermont Acts 1933, H. B. 115; VA. CODE ANN. (Michie, Supp. 1932) Tax Code, §188; Wash. Laws 1933, c. 191; W. Va. Acts Ex. Sess. 1933, c. 33.

Georgia had a sales tax from October 1, 1929 until December 31, 1931. GA. CODE ANN. (Michie, Supp. 1930) §993 (316)-(341). Pennsylvania had a sales tax for a six months' period ending February 28, 1933. Pa. Acts Spec. Sess. 1932, Act. 53. The gross income tax adopted in North Dakota (N. D. Laws, 1933, S. B. 315) was defeated at a special election, September 22, 1933. See *N. Y. Times*, Sept. 24, 1933, at 2.

itable to bring his purchase or sale under this constitutional protection. The tax official finds that these transactions constitute a fair-sized volume of business which he feels should be taxed on a parity with intrastate sales. And the local merchant is aggrieved to discover that he is losing trade to business houses in other states.

Intrastate business is placed at a distinct disadvantage. Very often it is equally as convenient and economical to order goods from beyond the state's borders as to purchase locally, and when there is in addition the opportunity of saving even a small amount in taxes, local business and the state's revenues are bound to suffer. In some jurisdictions this loss of business from local buyers should be counter-balanced by the business gained from without the state. That probably is true only of the more commercial states. And even so, the trade loss of the small retailer is not recouped by that class of trade. The shift is to the nationally-known firms. Nor is it a question of one state losing the sales tax and another gaining it, because the transaction cannot be taxed in any state while it is shielded by the Commerce Clause.[3]

To be sure, it cannot be charged that the Commerce Clause is at present alone responsible for the grievances of the local merchant and the tax official. So long as there is an absence of uniformity in the tax systems of the states, taxpayers will endeavor to confine their activities to the most favorable jurisdictions.[4] The decisions under the Commerce Clause simply make escape easier. Remove this immunity and if the parties are determined to avoid a sales tax, they are forced to make the sale in a non-taxing state. This latter device, however, need not frustrate the sales tax program. The state may supplement this tax with a production tax or with a consumption tax. Whether either or both of these should be adopted will depend on the policy behind the sales tax in the particular state. In some states the purpose is to tax consumer sales and not to place this tax on produc-

[3] Robins v. Shelby County Taxing Dist. 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694 (1887); Norfolk and Western R. Co. v. Sims, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. ed. 254 (1903); Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 45 Sup. Ct. 525, 69 L. ed. 982 (1925); see Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. ed. 295 (1917).

[4] Illustrated in another tax field by the attempts of corporations to attribute income to activities in states without income taxes or taxing at low rates. See, Breckenridge, *Tax Escape by Manipulations of Holding Company* (1931) 9 N. C. L. Rev. 189; Magill, *Allocation of Income by Corporate Contract* (1931) 44 Harv. L. Rev. 935; Huston, *Allocation of Corporate Net Income for Purposes of Taxation* (1932) 26 Ill. L. Rev. 725; notes (1931) 40 Yale L. J. 1273; (1931) 9 N. C. L. Rev. 470.

tion.[5] To effectuate this plan the state might pattern the tax after the gasoline statutes and tax the sale or use of the article.[6] Where the policy is to tax production as well as consumption the statute could apply to production, sale or use.[7]

Why then is the immunity of sales in interstate commerce an impediment to state taxation? The difficulty is largely an administrative one. A tax on production does not offend the Commerce Clause and doubtless is as effective as a tax on the sale of the product.[8] But the consumption tax is more troublesome. First, the decisions say that the use of the article in interstate commerce cannot be taxed.[9] Second, and far more important in the hunt for revenue, it would be impractical to attempt collection of a use tax as broad as a sales tax. This, for the obvious reason that there are so many more persons who buy and use than those who sell. It seems that a consumer sales tax state, such as North Carolina, would like to have the power to collect a tax from out-of-state merchants on their sales to purchasers within the state. If the tax were added to the selling price, this would give the sales tax the consistency of exacting a contribution from all local consumers.[10]

[5] Such states are: California, Illinois, Michigan, New York, North Carolina, Oklahoma, Oregon and Utah. The taxes do not apply to sales for resale and do not apply to production. Statutory references, *supra* note 2.

[6] IOWA CODE (1931) §5093-a1, "A license fee . . . is hereby imposed on all motor vehicle fuel used or otherwise disposed of in this state for any purpose whatsoever. Any person using motor vehicle fuel within the State shall be liable for the fee herein provided for unless the same shall have been previously paid." W. VA. CODE (1931) c. 11, art. 14, §3, taxes distributors on "gasoline sold, purchased or used in this state. . . ." WYO. REV. STAT. (1931) §115-1102, imposes a tax on "all gasoline used or sold in this state. . . ."

[7] Arizona, Indiana, Mississippi, South Dakota, Washington and West Virginia tax production. The taxes are measured by the value of production as shown by the gross proceeds from sales. Statutory references, *supra* note 2.

[8] Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 Sup. Ct. 83, 67 L. ed. 237 (1922); Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 43 Sup. Ct. 526, 67 L. ed. 929 (1923); Hope Natural Gas Co. v. Hall, 274 U. S. 284, 47 Sup. Ct. 639, 71 L. ed. 1049 (1927); Utah Power and Light Co. v. Pfost, 286 U. S. 165, 52 Sup. Ct. 548, 76 L. ed. 1038 (1932); Powell, *State Production Taxes and The Commerce Clause* (1923) 12 CALIF. L. REV. 17; notes (1923) 32 YALE L. J. 406; (1927) 40 HARV. L. REV. 908; (1932) 42 YALE L. J. 94.

[9] Moran v. New Orleans, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. ed. 653 (1884); Pickard v. Pullman Co., 117 U. S. 34, 6 Sup. Ct. 635, 29 L. ed. 785 (1886); Helson v. Kentucky, 279 U. S. 245, 49 Sup. Ct. 279, 73 L. ed. 683 (1929); Station WBT, Inc. v. Poulnot, 46 F (2d) 671 (E. D. S. C. 1931); notes (1931) 40 YALE L. J. 990; (1931) 44 HARV. L. REV. 992; (1931) 4 So. CALIF. L. REV. 298.

[10] The sales tax statutes of California, Michigan, New York, North Carolina, Oklahoma and Oregon forbid the vendor to advertise that the tax is not an element in the price to the consumer. Under the North Carolina statute ". . . the Commissioner of Revenue is empowered and directed to devise, pro-

There is nothing new in the constitutional plight of the sales tax. Indeed, the first tax case under the Commerce Clause, *Brown v. Maryland*,[11] decided that a license tax on importers and sellers of foreign goods was repugnant to the power of Congress to regulate foreign commerce. It has been an almost annual function of the Court to nullify privilege taxes impinging on interstate commerce. Yet in some other forms of taxation involving such commerce the decisions, though perhaps not their language, have come a long way from the absolutes of Chief Justice Marshall.[12] The states can tax net income[13] derived from interstate commerce and they can tax the property employed therein.[14] And even in privilege taxation, though adhering to the precepts of the immunity of interstate commerce, the Court has indicated of late a tendency to find that the tax does not fall on that commerce.[15]

The position of the sales tax will be unique, however, if that form of taxation continues in development and becomes one of the major

mulgate and enforce regulations under which merchants shall collect from the consumers . . . the sales tax levied upon their business. . . ." N. C. CODE ANN. (Michie, Supp. 1933) §7880 (156) cc. In Oregon, "The tax hereby imposed shall be collected by the retailer from the consumer in so far as may reasonably be done." Ore. Laws 2d. Spec. Sess. 1933, H. B. 110, §8.

[11] 12 Wheat. 419, 6 L. ed. 678 (U. S. 1827). Maryland imposed a tax of fifty dollars upon importers of foreign articles and other persons selling the same at wholesale. The tax was held invalid as violating the constitutional prohibition on state taxation of imports and as a regulation of foreign commerce.

[12] "Questions of power do not depend on the degree to which it may be exercised," said Chief Justice Marshall in Brown v. Maryland. "The action of the State as a regulation of interstate commerce does not depend upon the degree of interference; it is illegal in any degree," said Mr. Justice McKenna, a century later, in Heisler v. Thomas Colliery Co., *supra* note 8, at 259.

[13] United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. ed. 1135 (1918); Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. ed. 445 (1920); Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 Sup. Ct. 45, 65 L. ed. 165 (1920); Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413, 43 Sup. Ct. 620, 67 L. ed. 1051 (1923).

[14] Marye v. Baltimore and Ohio R. Co., 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. ed. 94 (1888); Postal Telegraph Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. 268, 39 L. ed. 311 (1895); Adams Express Co. v. Ohio, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965 (1897); American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. ed. 899 (1899); Western Union Telegraph Co. v. Gottlieb, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. ed. 1116 (1903).

[15] See Edelman v. Boeing Air Transport, Inc., 289 U. S. 249, 252, 53 Sup. Ct. 591, 77 L. ed. 1155 (1933) ("A State may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce."); see also, Eastern Air Transport, Inc. v. S. C. Tax Commission, 285 U. S. 147, 52 Sup. Ct. 340, 76 L. ed. 673 (1932); Nashville etc. R. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. ed. 731 (1933).

sources of revenue. As indicated, the Commerce Clause is not a serious obstacle to the taxation of property and net income. Although goods cannot be taxed while in interstate transit,[16] the property employed as agencies of the transit may be taxed,[17] and it is likely that the goods will at some time in the year be taxed in one state. That does not nicely recompense every state for the protection afforded, but in the absence of a satisfactory allocation formula the immunity probably will continue. Net income may be taxed and it seems that this may be done although the business from which it arises is entirely interstate.[18] The gasoline tax incurs difficulties similar to the sales tax but to a lesser extent due jointly to the fact that all states have the tax and that in many states it applies to sale, distribution or use.[19] There is the evil of some purchases in states with low rates, but if the purchases are of large volumes the use in the high tax state can be detected and there taxed.[20] Privilege taxes, whether a corporation excise[21] or a general occupation tax,[22] may not be exacted for the conduct of interstate business. So a foreign corporation or

[16] State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146 (U. S. 1873); Kelley v. Rhoads, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. ed. 359 (1903); Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 43 Sup. Ct. 146, 67 L. ed. 309 (1922).

[17] *Supra* note 14.

[18] In Underwood Typewriter Co. v. Chamberlain, *supra* note 13, Mr. Justice Brandeis said, "that a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly from interstate commerce is settled." Since a tax on net income is valid as being only an "indirect burden" on interstate commerce, United States Glue Co. v. Oak Creek, *supra* note 13, it should continue that status whether the income is all or only in part derived from interstate commerce. See, Magill, *Taxation of Property and Business as Affected by the Commerce Clause* (1932) PROC. NAT. TAX ASS'N. 242, 254; Powell, *Contemporary Commerce Clause Controversies Over State Taxation* (1928) 76 U. PA. L. REV. 958, 963.

[19] *Supra* note 6.

[20] People v. City and County of Denver, 90 Colo. 598, 10 P. (2d) 1106 (1932); Burke v. Bass, 123 Neb. 297, 242 N. W. 606 (1932); George E. Breese Lumber Co. v. Mirabal, 34 N. M. 643, 287 Pac. 699 (1930); Stedman v. City of Winston-Salem, 204 N. C. 203, 167 S. E. 813 (1933); State v. City of Sioux Falls, S. D., 244 N. W. 365 (1932); Crockett v. Salt Lake County, 72 Utah 337, 270 Pac. 142 (1928).

[21] Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 45 Sup. Ct. 184, 69 L. ed. 439 (1925); Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 Sup. Ct. 477, 69 L. ed. 916 (1925). If, however, the corporation does a local business that privilege may be taxed although its measure includes interstate commerce. Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, 42 Sup. Ct. 305, 66 L. ed. 622 (1922); Western Cartridge Co. v. Emmerson, 281 U. S. 511, 50 Sup. Ct. 383, 74 L. ed. 1004 (1930). See Powell, *State Excises on Foreign Corporations* (1919) PROC. NAT. TAX ASS'N. 230; Powell, *Business Taxes and the Federal Constitution* (1925) PROC. NAT. TAX ASS'N. 164.

[22] Dozier v. Alabama, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. ed. 965 (1910); Heyman v. Hays, 236 U. S. 178, 35 Sup. Ct. 403, 59 L. ed. 527 (1915); *supra* note 3.

an individual engaging solely in interstate commerce receives a bounty from the Commerce Clause. This immunity is comparable to that enjoyed by interstate sales transactions, but the growth of sales taxation may mean that of the major forms of taxation, the sales tax will suffer most from the immunity of interstate commerce. Is it desirable to continue this discrimination against intrastate business? Does a free movement of commerce among the states require this exemption?

A study of the background of the Federal Convention of 1787 will show that one of the impelling reasons for the calling of that Convention was the discriminatory legislation of the states directed at the commerce of their neighbors.[23] Particularly vicious were the taxes which some of the states levied on imports from other states. Madison reported that Connecticut taxed imports from Massachusetts higher than imports even from Great Britain.[24] A source of dissatisfaction, he wrote, "was the peculiar situation of the States, which having no convenient ports for foreign commerce were subject to be taxed by their neighbors, through whose ports their commerce was carried on. New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends: and North Carolina between Virginia and South Carolina to a patient bleeding at both arms. The Articles of Confederation provided no remedy for the complaint, which produced a strong protest on the part of New Jersey; and never ceased to be a source of dissatisfaction and discord, until the new Constitution, superseded the old."[25] Out of this type of disastrous condition came several provisions of the Constitution prohibiting the states from taxing imports or exports or tonnage without the consent of Congress,[26] prohibiting Congress from taxing exports,[27] and from giving preference to the ports of any state,[28] and vesting in Congress the power "to regulate commerce with foreign

[23] "It may be doubted," said Chief Justice Marshall, "whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress." Brown v. Maryland, *supra* note 11 at 446. And Mr. Justice Johnson had said, "if there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." Gibbons v. Ogden, 9 Wheat. 1, 231, 6 L. ed. 23 (U. S. 1824). See THE FEDERALIST (1842) 31; FARRAND, THE FRAMING OF THE CONSTITUTION (1913) 12, 45; WARREN, THE MAKING OF THE CONSTITUTION (1928) 567.

[24] 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1911) 548.

[25] *Id.* at 542.

[26] Art. I, §10, cl. 2, 3.

[27] Art. I, §9, cl. 5.

[28] Art. I, §9, cl. 6.

nations and among the several states. . . ."[29] The terms "imports" and "exports," have been interpreted as applicable only to foreign commerce,[30] and "tonnage" refers only to vessels.[31] Hence the restrictions on state taxation of interstate trade have developed under the Commerce Clause.

There can be no doubt that the Supreme Court's nullification of state taxes which discriminate against interstate commerce has contributed to the harmonious relations among the states. There is today as much need for this restraining hand as there was in 1787. Only recently North Carolina sought to exact a tax from produce truckers selling within the state while offering an exemption if the produce were grown in North Carolina.[32] Too often the state legislature attempts to protect local trade from the competition of outsiders. "I do not think the United States would come to an end," Mr. Justice Holmes has said, "if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end."[33]

If it were a question of impairing the indispensable freedom of commercial relations among the states, the answer should be that the present discrimination against local enterprise is a small price to pay

[29] Art. I, §8, cl. 3. Some of the members of the Convention also feared to intrust the regulation of commerce to a majority of the national legislature. Charles Pinckney moved that: "No Act of the Legislature for the purpose of regulating the commerce of the United States with foreign powers or among the several States shall be passed without the assent of two thirds of the members of each House." WARREN, THE MAKING OF THE CONSTITUTION (1928) 461, also 397; 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1911) 164.

[30] Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382 (U. S. 1868); Pittsburg Coal Co. v. Louisiana, 156 U. S. 590, 15 Sup. Ct. 459, 39 L. ed. 544 (1895); *Cf.* SPAHR, THE SUPREME COURT ON THE INCIDENCE AND EFFECTS OF TAXATION (1925) 135.

[31] State Tonnage Tax Cases, 12 Wall. 204, 20 L. ed. 370 (U. S. 1870); Huse v. Glover 119 U. S. 543, 7 Sup. Ct. 313, 30 L. ed. 487 (1886).

[32] Gramling v. Maxwell, 52 F. (2d) 256 (W. D. N. C. 1931) (A specially constituted three-judge federal court declared the tax unconstitutional since it discriminated against the products of other states and so constituted a burden on interstate commerce. No appeal was taken); See Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449 (U. S. 1871); Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347 (1875); Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565 (1880); Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454 (1886); Bethlehem Motors Co. v. Flynt, 256 U. S. 421, 41 Sup. Ct. 571, 65 L. ed. 1029 (1921).

[33] SPEECHES OF OLIVER WENDELL HOLMES (1918) 102.

for the benefits accruing to the nation. It is believed, however, that interstate commerce could be made to pay its way without obstructing this commerce. It does not appear that the property taxation of the agencies of interstate commerce nor the taxation of net income has unduly impeded commercial intercourse. A tax on gross income is disapproved because it exacts its toll whether or not the commerce is profitable and may thereby become a prohibition.[34] Yet a property tax may do the same. Although the decisions are against the proposition, it does seem that a privilege tax, for example, the sales tax, which applies to business in general and in no way singles out interstate commerce should be valid. The mere fact that a tax falls in the class termed "privilege taxes" should not proclaim its invalidity. The tax should be unconstitutional only when it is an unwarranted exaction by the state.[35] Whether it is unwarranted is a question similar to the validity of state taxation under the fourteenth amendment, with the additional factor of a stronger national interest.

That, however, is not the law. In the face of the interdiction against the application of its tax to interstate commerce, how may a consumers sales tax state effectuate its program? It desires to tax consumption within the state. To attempt collection from all consumers is administratively impractical. Consequently the legislature drafts its statute as a merchants' privilege tax and thereby narrows the task of collection, yet provides that the merchant shall pass the tax on to the purchaser.[36] Consumers find that if they order their goods to come from outside the state they do not have a sales tax added to the price. Suppose a state, which has a three per cent retail

[34] Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. ed. 295 (1917) (gross receipts from foreign commerce); Philadelphia and Southern S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. ed. 1200 (1887); Galveston, H. and S. A. Ry. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. ed. 1031 (1908); Meyer v. Wells, Fargo and Co., 223 U. S. 298, 32 Sup. Ct. 218, 56 L. ed. 445 (1912); New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338, 50 Sup. Ct. 111, 74 L. ed. 463 (1930). However, a gross receipts tax is valid if in reality a substitute for a property tax. United States Express Co. v. Minnesota, 223 U. S. 335, 32 Sup. Ct. 328, 56 L. ed. 459 (1912); Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 38 Sup. Ct. 373, 62 L. ed. 827 (1918); Pullman Co. v. Richardson, 261 U. S. 330, 43 Sup. Ct. 366, 67 L. ed. 682 (1923). Notes (1914) 28 HARV. L. REV. 93; (1930) 28 MICH. L. REV. 1062; (1930) 39 YALE L. J. 750; (1930) 14 MINN. L. REV. 811; (1930) 18 CALIF. L. REV. 512.

[35] "Nor can I find any practical justification . . . for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce", *per* Stone, J., concurring in Helson v. Kentucky, *supra* note 9 at 253.

[36] *Supra* note 10.

sales tax, imposed on the use of goods within the state a tax of three per cent of the purchase price, but provided that if the merchant selling the goods paid to the state three per cent of the sales price then the user would not be liable to the tax. Assume, of course, that the use is an intrastate one. The sale, however, is made in interstate commerce,—is the statute constitutional? An argument for its validity runs in this manner. As far as the Federal Constitution is concerned, a state could tax simply the use of goods.[37] It could tax the use of goods which have not paid a sales tax.[38] The posed statute does nothing more than this. It does not tax the vendor, but only invites him to make a payment to the state in order that his customers will not be placed in the position of consuming goods which have not contributed to the expenses of the state on an equality with other goods consumed. The state does not try to reach any extraterritorial values, nor does it discriminate against interstate commerce. It expects the merchant to add the tax to the selling price. The desire to collect from merchants outside the state is for the more efficient administration of the tax. It is believed that the decisions would sustain this type of legislation imposing a like tax on use and on sale.[39]

Assuming that it is constitutional, would such a statute solve the administrative problem? The thought is that the merchant would pay the tax to relieve his customers of a use tax. But if the sales tax and the tax on use are at the same rate, the merchant might say to his customer, "If I pay this tax it will be added to your price, while if I do not pay it they may try to collect it from you, but even so the cost to you would be no more." Suppose, however, the use tax were four per cent and it were provided that if the merchant paid three per cent the customer would not be liable to the four per cent tax. If the state enforced collection in a number of cases, would this induce the merchant to pay the smaller amount, add it to his price, and save the

[37] Bowman v. Continental Oil Co., 256 U. S. 642, 41 Sup. Ct. 606, 65 L. ed. 1139 (1921). As to a use tax being in effect a property tax and consequently subject to state constitutional restrictions on property taxes, see Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 41 Sup. Ct. 272, 65 L. ed. 638 (1921); Thompson v. McLeod, 112 Miss. 383, 73 So. 193 (1916); note (1921) 35 HARV. L. REV. 70; *cf.* Jerome H. Sheip Co. v. Amos, 100 Fla. 863, 130 So. 699 (1930).

[38] Bowman v. Continental Oil Co., *supra* note 37; Hart Refineries v. Harmon, 278 U. S. 499, 49 Sup. Ct. 188, 73 L. ed. 475 (1929); Gregg Dyeing Co. v. Query, 286 U. S. 472, 52 Sup. Ct. 631, 76 L. ed. 1232 (1932).

[39] See Nashville etc. R. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. ed. 730 (1933); Gregg Dyeing Co. v. Query, *supra* note 38; Edelman v. Boeing Air Transport, Inc., 289 U. S. 249, 53 Sup. Ct. 591, 77 L. ed. 1155 (1933).

customer from a heavier tax? If he did not pay this he might lose the customers against whom a four per cent tax was enforced. And therein the statute may run afoul of the Commerce Clause. For the use tax has been sustained "on the assumption that the tax does not discriminate against the commodity because of its origin in another state."[40] Although in many instances the use tax exists only because the commodity originated in another state, apparently it is considered that there is not a discrimination on account of origin if the rate is no higher than for the sales tax. Since the supposed statute would carry the higher tax on use only to facilitate collection of a non-discriminatory rate, conceivably it might be sanctioned.[41] Yet if the Court countenanced this, it might just as well permit directly the taxation of sales in interstate commerce as to permit this justifiable circumvention. Indirection, however, is not unknown in taxation.

In a more direct effort to correct the disadvantageous position of the sales tax, the North Carolina Department of Revenue has suggested that Congress authorize the states to tax certain sales in interstate commerce. The proposed bill provides:

"That all taxes levied by any state upon sales of property or measured by sales of property may be levied upon or measured by sales of property in interstate commerce by the state into which the property is moved for use or consumption therein, in the same manner and to the same extent that said taxes are levied upon or measured by sales of property not in interstate commerce. Provided: that no state shall discriminate against sales of property in interstate commerce; nor shall any state discriminate against the sale of the products of any other state. Provided, further: that no state shall tax the sale in interstate commerce of property transported for the purpose of resale by the consignee as a merchant or as a manufacturer. Provided, further: that no county, city, or town, or other subdivision of any state shall levy a tax upon or measure any tax by sales of property in interstate commerce."[42]

[40] Gregg Dyeing Co. v. Query, *supra* note 38 at 479; See Hart Refineries v. Harmon, *supra* note 38 at 502.

[41] *Cf.* Schlesinger v. Wisconsin, 270 U. S. 230, 46 Sup. Ct. 260, 70 L. ed. 557 (1926) ("A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid").

[42] The North Carolina Department of Revenue has sent letters containing this proposal to the revenue departments of the various states soliciting their suggestions.

A bill embodying a more comprehensive permission for state taxation of interstate commerce was introduced in the Senate by Senator Thomas of Oklahoma on January 15, 1932, at the request of the Oklahoma Tax Commission.

The proposal selects the state of consumption as the place where taxation of a sale in interstate commerce will be permitted. In this way it limits taxation of a sale to one state, and, on the theory that the consumer will pay the tax, selects the state into which the property is shipped for use or consumption. Because the state will collect a tax at the time of resale the permission does not extend to sales of property which will be resold by the merchant or manufacturer.

Two questions are preëminent. What would be the constitutional status of the measure if passed by Congress? Would it enable the states more effectively to collect the sales tax?

Immediately one is reminded of the type of legislation embodied in the Wilson Act and in the Webb-Kenyon Act permitting the application of state prohibition laws to shipments of liquors into a dry state. Very clearly the tax proposal is derived from that type of statute. Consequently, an inquiry into the theory there developed will be undertaken with a view to its application to the present proposal.

In *Leisy v. Hardin*[43] the Court had held that a state law prohibiting the sale of liquor was an unconstitutional interference with interstate commerce when enforced against a sale in the original package. Mr. Chief Justice Fuller wrote the opinion in this case and at several places suggested that Congress had the power to place the liquor traffic under the control of the states.[44] Promptly Congress passed the Wilson Act which provided that upon arrival in a state liquor should be subject to the police laws of the state in the same manner as liquor produced there.[45] *In Re Rahrer*[46] brought up the Wilson Act for a

The bill was entitled, "A bill granting consent to the several States to tax property employed, and business done in interstate commerce". It provided, "That each of the several States may levy and collect, license, franchise, gross revenue, registration, or any other forms of taxes upon, or measured by, any property employed, or business done, within such State, in interstate commerce in the same manner and to the same extent as such taxes may be imposed under the constitution and laws of such State upon like property employed, and business done, in commerce wholly within the State, except that (a) in no case shall the tax imposed be at a greater rate than is assessed upon like property employed, and business done, in commerce wholly within the State, and (b) nothing contained in this Act shall be construed to authorize the taxation of the same property and business by more than one State." Two companion bills were introduced in the House of Representatives. It appears that no action was taken on these bills.

[43] 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128 (1890).

[44] *Ibid.* at 109, 110, 113.

[45] 26 STAT. 313 (1890). "An act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases.

"That all fermented, distilled or other intoxicating liquors or liquids trans-

constitutional test and it was sustained as a valid regulation of interstate commerce. The opinion, again by Mr. Chief Justice Fuller, interpreted the act as divesting intoxicating liquor of its interstate commerce character upon its arrival in a dry state. Congress did not delegate its power to regulate interstate commerce. Congress itself by the Wilson Act regulated that commerce by stripping the commodity of a character which had placed it outside of state regulation. Previously the commodity retained that character while in the original package. Now it was retained only until arrival in the state, and after that, original package or not, it was subject to state law. The value of this statute in the enforcement of state prohibition was lessened, however, when the words "upon arrival" were so interpreted as not to permit the state law to operate until after delivery to the consignee.[47] To remedy this the Webb-Kenyon Act was passed.[48] It prohibited the transportation of liquor into a state

ported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in the original packages or otherwise."

[46] 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572 (1891); see Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 25 Sup. Ct. 552, 49 L. ed. 925 (1905); Foppiano v. Speed, 199 U. S. 501, 26 Sup. Ct. 138, 50 L. ed. 288 (1905); Delamater v. South Dakota, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. ed. 724 (1907); Phillips v. Mobile, 208 U. S. 472, 28 Sup. Ct. 370, 52 L. ed. 578 (1908); DeBarry and Co. v. Louisiana, 227 U. S. 108, 33 Sup. Ct. 239, 57 L. ed. 441 (1913).

[47] Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. ed. 1088 (1898); see, American Express Co. v. Iowa, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. ed. 417 (1905); Heyman v. Southern Railway Co., 203 U. S. 270, 27 Sup. Ct. 104, 51 L. ed. 178 (1906); Adams Express Co. v. Kentucky, 206 U. S. 129, 27 Sup. Ct. 606, 51 L. ed. 987 (1907); Adams Express Co. v. Kentucky, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. ed. 972 (1909); Kirmeyer v. Kansas, 236 U. S. 568, 35 Sup. Ct. 419, 59 L. ed. 721 (1915); Rossi v. Pennsylvania, 238 U. S. 62, 35 Sup. Ct. 627, 59 L. ed. 1201 (1915); Rosenberger v. Pacific Express Co., 241 U. S. 48, 36 Sup. Ct. 510, 60 L. ed. 880 (1916).

[48] 37 STAT. 699 (1913). "An Act Divesting intoxicating liquors of their interstate character in certain cases.

"That the shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind, from one State . . . into any other State, . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, . . . is hereby prohibited." This act was passed over the veto of President Taft who believed it to be unconstitutional as a delegation of the power of Congress to regulate interstate commerce. 49 CONG. REC. 4291 (1913).

The Reed Amendment [39 STAT. 1058, at 1069 (1917)] made it a federal crime to "order, purchase, or cause intoxicating liquors to be transported in interstate commerce . . . into any State or Territory the laws of which State

where the liquor was intended to be used or sold in violation of the state's law. It will be noted that this statute was different in form from the Wilson Act. Whereas the Webb-Kenyon Act was written as a Congressional prohibition of the transportation of liquor, the Wilson Act prohibited nothing, but subjected the commodity to state law. Nevertheless, the Court regarded the two acts as based upon the identical theory,—the earlier one as divesting liquor of its interstate commerce character upon delivery to the consignee, and the subsequent one but an extension to divest liquor of that protective attribute at the moment it entered a state for use in violation of the state's laws. "No reason is perceived," said Mr. Chief Justice Fuller, "why if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."[49] And when the Webb-Kenyon Act came before the Court in *Clark Distilling Co. v. Western Maryland Railway Co.,* Mr. Chief Justice White considered it "but a larger exertion of the identical power"[50] employed in the Wilson Act.

It would seem that this "divesting theory" was not the only available interpretation of the Wilson Act. It had been said in *Leisy v. Hardin* that "inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is na-

or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes. . . . "

Note that the twenty-first amendment to the Constitution follows the form of the Webb-Kenyon Act: "Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[49] *In re* Rahrer, *supra* note 46 at 562. Compare the phraseology of the acts proposed by North Carolina and Oklahoma, *supra* note 42, which are in terms of Congressional permission, with this statement of Mr. Chief Justice Fuller at 564 of *In re* Rahrer, "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws . . . created by the absence of a specific utterance on its part."

[50] 242 U. S. 311, 330, 37 Sup. Ct. 180, 61 L. ed. 326 (1917). At the conclusion of his opinion Mr. Chief Justice White sought to allay fears that the power then sustained "lays the basis for subjecting interstate commerce in all articles to state control and therefore destroys the Constitution". He stated that the "exceptional power" exerted was grounded on the "exceptional nature of the subject",—intoxicating liquor. As this indicates that at least the Chief Justice thought the power had its limits, it should be suggested that there is a difference between state taxation and state prohibition or exclusion. The Court might consider that Congress could not authorize the states to exclude articles of an unexceptional nature and yet consider that Congress could authorize the collection of reasonable taxes. See, Albertsworth, Congressional Assent to State Taxation Otherwise Unconstitutional (1931) 17 A. B. A. J. 821.

tional in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled."[51] In view of this it would have been reasonable to have said that these commodities may still be in interstate commerce, yet now that Congress has spoken and indicated its will that this commerce need not be untrammelled, the states now may regulate. Nothing was said in the Wilson Act about divesting liquor of its character as a commodity in interstate commerce. The interpretation seems neither necessary nor convincing. If a gallon of water and a gallon of liquor are shipped into a dry state the divesting theory says that the gallon of liquor is not in interstate commerce if it is intended to be used in violation of the state's laws, yet the gallon of water is in interstate commerce.

After Mr. Chief Justice Fuller had enunciated the theory of divestment by law, Congress attached that label to its next enactment. The Webb-Kenyon Act was entitled "An Act divesting intoxicating liquors of their interstate character in certain cases." Yet, strange to say, the body of the act did not continue that simple phraseology, but instead it purported to prohibit transportation.[52] Still, the act carried no penalty for its infringement, and if it were to be given any effect at all the Court had to find more in the words than their normal meaning. The legislative history of the act showed clearly that Congress intended to divest intoxicants of their protected character at a point earlier than was permitted by the interpretation given "on arrival" in the Wilson Act.[53] Congress intended to extend the theory of *In Re Rahrer,* yet there were doubts of the constitutionality of the statutory form which that case approved. It was believed that a prohibition would more safely be a regulation of interstate commerce than the implication contained in a subjection to state law. When Congress says that a transaction heretofore considered interstate commerce shall be subject to state law, the Court could say either that this means that the transaction is no longer interstate commerce and so is subject to state law, or that it means that though still interstate commerce Congress intends that the states may regulate because Congress does not think that the subject re-

[51] *Supra* note 43 at 109.
[52] *Supra* note 48.
[53] See Dowling and Hubbard, *Divesting An Article of Its Interstate Character* (1920) 5 MINN. L. REV. 100, 253.

quires uniform regulation, or it might say that this is a delegation of the power to regulate interstate commerce and so is unconstitutional. As the Court had accorded the first meaning to the Wilson Act, Congress desired that it should find that meaning in the Webb-Kenyon Act, and thought that prohibitory terminology would express Congressional divestment and not leave it to the generosity of the Court.

For our purposes the important point is that the Court might, consistently with *Leisy v. Hardin,* have interpreted the Wilson Act as expressing the will of Congress that the states might regulate the liquor traffic in interstate commerce because Congress felt that this traffic need not be unencumbered, and that the Webb-Kenyon Act continued the divestment idea because of its adjudged constitutionality. Such an interpretation is thought to be preferable to the theory of divestment because it avoids a conflict with fact and because it more easily permits an extension of state action without the embarrassments incident to the divestment idea. For example, suppose Congress passed a statute such as the proposal to permit the consuming state to tax sales in interstate commerce. It would be artificial to an extreme to say that the sale is not an interstate commerce transaction when taxed by the consuming state, whereas it is in interstate commerce if the producing state levies the tax; or that if the consuming state attempts to discriminate against a transaction which theretofore had been considered a sale in interstate commerce, the transaction resumes its interstate commerce character. Of course, logic is embarrassed in a similar way when the divestment theory is applied to the liquor traffic.

The constitutional approach which is suggested for the tax statute admits that the sales involve interstate commerce; that they are national in character; that the states may not so regulate the sales as to conflict with the will of Congress; and that by its silence Congress has indicated that it intends for the sales to remain untaxed. But Congress may break its silence, does so by this statute, and manifests its will that the states may tax the sales in the prescribed manner. This seems to follow from the suggestion made by Mr. Justice Brewer in a license tax case, when he wrote, "it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State *without the assent of Congress.*"[54]

The idea that an expression from Congress might permit state

[54] Brennan v. Titusville, 153 U. S. 289, 302, 14 Sup. Ct. 829, 38 L. ed. 719 (1894).

regulation of interstate commerce in matters of national concern is derived from the statement found in a similar form in a number of decisions, that the inaction of Congress "is equivalent to a declaration that inter-State commerce shall be free and untrammelled."[55] If by its silence Congress can regulate interstate commerce, it is arguable that a declaration from Congress that the states may tax interstate commerce in the way in which it directs is also a regulation of commerce. Then the state taxes may validly be applied to interstate commerce because such does not conflict with the Congressional will.

In comparison with the tax immunity of interstate commerce consider the state taxation of national banks. *McCulloch v. Maryland*[56] early established the rule that the states may not interfere by taxation with the agencies of the federal government. In 1863 Congress provided for the organization of the national banking associations,[57]—federal agencies, and the next year Congress gave the states permission to tax the real property of the banks and the shares of stock.[58] Promptly the validity of this permission was questioned in *Van Allen v. The Assessors,*[59] and there sustained. Mr. Justice Nelson, who wrote the opinion, appears to have been of the belief that the states could tax the shares of stock of the banks so long as not forbidden by Congress, and as a result certainly Congress could declare that taxation of a specified kind would be permissible.[60] A

[55] Welton v. Missouri, *supra* note 32 at 282; Philadelphia and Southern S. S. Co. v. Pennsylvania, *supra* note 34 at 336; The Passenger Cases, 7 How. 283, 462, 12 L. ed. 702 (U. S. 1849); County of Mobile v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238 (1881); Robins v. Shelby County Taxing Dist., *supra* note 3 at 493; Smith v. Alabama, 124 U. S. 465, 473, 8 Sup. Ct. 564, 31 L. ed. 508 (1888); see Biklé, *The Silence of Congress* (1927) 41 HARV. L. REV. 121; Dowling, *State Control of Interstate Power Transmission—The Doctrine of Congressional Permission* (1930) 14 PROC. ACAD. POL. SCI. 132; Scott, *State and Federal Control of Power Transmission as Affected by the Interstate Commerce Clause* (1930) 14 PROC. ACAD. POL. SCI. 135. Scott points out that there is nothing novel in the theory of Congressional permission. He finds the theory in two acts of 1790 directing the revenue officers of the United States to aid in the execution of state quarantine laws relating to vessels in interstate or in foreign commerce [1 STAT. 474, 619 (1790)]. Two acts have modeled upon the Wilson Act. In 1902 Congress subjected oleomargarine to the police laws of the state upon arrival in the state [32 STAT. 193 (1902)]. The Hawes-Cooper Act of 1929 subjects convict-made goods to the state's law upon arrival and delivery therein [45 STAT. 1084 (1929)].

[56] 4 Wheat. 316, 4 L. ed. 579 (U. S. 1819).

[57] 12 STAT. 665 (1863).

[58] 13 STAT. 112 (1864), 12 U. S. C. A. §31 (1926).

[59] 3 Wall. 573, 18 L. ed. 229 (U. S. 1866).

[60] *Ibid.* at 585, "It is said that Congress possesses no power to confer upon a state authority to be exercised which has been exclusively delegated to that body by the Constitution and, consequently that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant

convincing interpretation of the action of Congress, which has been suggested, is that the national banking system is a Congressional creation and that, within limits, Congress should be able to determine the characteristics it must possess to accomplish its aims; and that Congress can determine that tax immunity is not a characteristic necessary to the fulfillment of its purpose.[61]

The analogy between the power of Congress to authorize state taxation of national banks and the suggested power to authorize taxation of interstate commerce is not complete, but the points of difference are not thought to be impelling. Nothing is said in the Constitution about the immunity from taxation of federal instrumentalities. Indeed, nothing is said concerning the immunity of interstate commerce, yet it is known that one of the reasons for delegating to Congress the power to regulate interstate commerce was obnoxious state taxation.[62] So it may be suggested that the purpose in placing interstate commerce under the federal domain was to make certain that it could not be taxed by the states. However, this commerce has not remained entirely free from taxation,[63] and furthermore, had the

of any such power from Congress. We agree to this. But as it respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act." Later cases have not followed Mr. Justice Nelson's reasoning, but have held that the state's power to tax national banks is only that expressly permitted by Congress. People v. Weaver, 100 U. S. 539, 25 L. ed. 705 (1879); Owensboro National Bank v. Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. ed. 850 (1898); First Nat. Bank v. Anderson, 269 U. S. 341, 46 Sup. Ct. 135, 70 L. ed. 295 (1926); see Schweppe, *State Taxation of National Banks, Uncertainty of Its Constitutional Basis* (1922) 6 MINN. L. REV. 219.

[61] Rottschaefer, *State Taxation of National Bank Shares* (1923) 7 MINN. L. REV. 357, 378; see Traynor, *National Bank Taxation in California* (1929) 17 CALIF. L. REV. 83, 88.

[62] *Supra* note 23.

[63] *Supra* notes 13 and 14. In comparing interstate commerce and federal instrumentalities, note the statement of Holmes, J., that, "The criterion of interference by the States with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws. . . . The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance." Gillespie v. Oklahoma, 257 U. S. 501, 505, 42 Sup. Ct. 171, 172, 66 L. ed. 338 (1922). Compare this with the statements in *supra* note 12.

Gillespie v. Oklahoma held that income received by a lessee of restricted Indian lands could not be taxed, since the lessee was "an instrumentality used by the United States in carrying out duties to the Indians." It should be noted that the power of Congress to protect the Indians as wards of the nation has supplemented the expressed power of Congress "to regulate commerce . . . with the Indian tribes." Brown, *The Taxation of Indian Property* (1931) 15

makers of the Constitution sufficiently feared the wisdom of a particular type of Congressional regulation of interstate commerce, they might have explicitly forbidden state taxation of it, as they did explicitly forbid Congress to tax articles exported from a state.[64] The importance of the bank tax situation is that there state taxation has developed under the guidance of an expressed Congressional policy. On the other hand, the rule that the privilege of engaging in interstate commerce cannot be taxed by the states developed independently of an expressed policy. Had Congress spoken, the rule might be different.

Briefly, this is thought to be the constitutional status of the proposal. The statute, itself, would stand as an expressed regulation of interstate commerce, as opposed to the existing silent regulation. If the silence of Congress can be a regulation that interstate commerce shall remain untaxed an expression that it may or may not be taxed should as well be a regulation. Such state taxation of interstate commerce as has been considered unconstitutional has been invalid because in conflict with the implied intention of Congress that the commerce should be unimpeded. This conflict ceases when Congress expresses its intention that interstate commerce shall be subject to non-discriminatory state taxation.

If this reasoning is sound and the power of the states to tax interstate commerce thus may be enlarged by Congressional assent, to what extent would this permission enable the states to collect the sales tax? The proposal removes the Commerce Clause obstruction to taxation of local sales of property situated without the state by the state into which the property moves. The number of these sales, however, may be relatively small. Will the simple device of making the sale in some state other than the state of consumption thwart collection? The sale itself could not be taxed since that would then be extraterritorial.[65] Suppose the state turns to such an arrangement

MINN. L. REV. 182; see King, *Taxation of Capital Employed in Interstate Commerce* (1932) PROC. NAT. TAX. ASS'N. 235, 236.

[64] *Supra* note 27.

[65] It has been suggested that a state statute taxing sales might stipulate that the place of delivery is the place of sale. If the state could tax delivery it should be able to tax it under another name. Still, could not the parties arrange for delivery outside the state? The purchaser or his agent would then bring the property into the state.

Another suggestion is that Congress might provide in the proposed statute that "every contract for the sale of goods transported, or to be transported, in interstate commerce shall be considered as made within the state into which the goods are to be transported for use or consumption therein whenever such

as the four per cent use tax where a three per cent sales tax has not been paid. The objection already discussed was that the higher use tax might be unconstitutional as in effect a discrimination against the property on account of its origin and hence invalid under the Commerce Clause. Since the proposed Act of Congress would permit taxation of the sale so far as the Commerce Clause is concerned, that Clause should not be infringed if the state adopted a higher tax on use to enforce the non-discriminatory sales tax. The difficulty then becomes one of jurisdiction.

If there is not in the taxing state a taxable factor of the transaction, the higher use tax may be invalid as coercing a payment because of an act done in another state. Viewed in its most unfavorable light, it is similar to one state exacting a higher tax on a man's property within the state because he or someone else does not pay to it a tax on property outside the jurisdiction. It may be possible, however, to find a local factor in the transaction which would justify a tax measured by a sale, although actually the event which consummates the sale occurs beyond the state's borders. When a merchant sends agents into a state and solicits orders, there is a local factor connected with the sale. Except for the Commerce Clause the state could tax these activities and should be able to measure the tax by the amount of sales to which they are incident.[66] If the state taxed

sale is made, solicited or negotiated in whole or in part within that state." If the sale does take place in interstate commerce, and there are elements of the transaction in the consuming state, it may be within the power of Congress to say that the sale is there consummated. Suppose, however, the parties arrange that the sale shall be an intrastate transaction. If the goods are to be transported in interstate commerce pursuant to the sale, the sale itself is interstate commerce. But if there is a sale and then the goods are shipped not pursuant thereto but simply after the sale, can Congress say the sale is in interstate commerce? If Congress can determine when interstate commerce ceases, can it in like manner determine when interstate commerce begins?

[66] In American Mfg. Co. v. St. Louis, 250 U. S. 459, 35 Sup. Ct. 522, 63 L. ed. 1084 (1919), a tax on the privilege of manufacturing in St. Louis, measured by "the amount of sales of the manufactured goods, whether sold within or without the State, and whether in domestic or interstate commerce" was sustained as not being a regulation of interstate commerce or as taxing property or business transactions outside the state. There Mr. Justice Pitney said, at 463, "There is no doubt of the power of the State, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. . . . The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, . . . it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market." So here, if the Commerce Clause objection to taxing the soliciting of interstate commerce orders is removed, the state might tax the soliciting at, say three per cent of the price at

sales three per cent and taxed the privilege of soliciting orders within the state, for sales to be concluded outside the state three per cent of the sales price, that would not discriminate against interstate commerce; neither would it tax an act without the state nor measure it by an unwarranted value. The state would expect the tax to be paid by the merchant and expect that he would add it to his price to the consumer. To enforce the tax the state would have its cause of action against the merchant. In addition, a four per cent tax might be imposed upon the use or consumption of property which would be subject to either the sales tax or the soliciting tax and which had not been paid at a specified time after the sale. This tax incurred by the user would be intended to have the effect of inducing the merchant to pay the tax. In short, a system embodying the following taxes might be expected to exact contribution from all consumption within the state: (1) a tax on sales within the state; (2) a tax on the privilege of soliciting orders within the state, for sales to be made outside the state, measured by the resulting sales; (3) a tax on the use or consumption of property, which is not exempt, but which is neither sold nor for which orders are solicited within the state; (all of the preceding taxes would be at the same rate); (4) a tax at a higher rate on use or consumption of property subject to one of the preceding taxes and upon which that tax has not been paid at a specified time. These taxes are all imposed upon acts done within the taxing jurisdiction, and they do not discriminate against the property because of its origin in another state. The assent of Congress to state taxation of sales in interstate commerce and a series of taxes of the nature of those suggested should lessen the difficulty of administering a consumption tax, since the merchant would be taxed on intrastate sales, on interstate commerce sales made in the state when the property is to be used or consumed in the state; and on the large volume of solicited orders.[67] For other consumption the tax

which the property is offered for sale. The suggested tax is more lenient. It measures the tax by the resulting sales. *Cf.* Hope Natural Gas Co. v. Hall, *supra* note 8 at 289, where a natural gas production tax measured by the value of the gas, was sustained on the understanding that the value was that at the well and not the value of the gas in interstate commerce or outside the state.

[67] Would the assent of Congress to state taxation of interstate commerce enlarge a state's power to require domestication? A foreign corporation engaged in intrastate business may be required to domesticate. If its sole business in the state is interstate commerce domestication cannot be required. Immunity here rests on the same ground as immunity from privilege taxation. Still, Congressional permission to tax might not on the theory herein developed permit enforcement of domestication, since the theory is that Congress says

on use with its difficulties of collection from individual consumers still would remain. Yet the penalty of the higher tax might induce payment of the normal tax. In the case of large purchases that should be a solution.

The proposal made by the North Carolina Department of Revenue is an attempt to remove the unjustified tax immunity of sales in interstate commerce. It is believed that the assent of Congress would displace the constitutional barrier to state taxation in this field, but the fact that there are serious problems of collection after the Commerce Clause has been hurdled should not be minimized. Whether the difficulties of jurisdiction inherent in our federal system are an insuperable obstacle to state collection must be admitted to be problematical. There is also the question of whether it is desirable for the states to develop still another heterogeneous system of taxation. This is the more doubtful when there is the possibility of the sales tax being levied and collected by the federal government and distributed to the states, which would eliminate the difficulties of interstate commerce, jurisdiction and multifarious taxes.

that taxation of a sort is permissible; it says nothing about domestication. It might be that the requirement of domestication is necessary to the collection of the taxes and so included in permission to tax. That should be expressly stated.