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On February 24, 1959, the Supreme Court of the United States, in companion cases, held, by a 6-3 vote, that a state could levy a properly apportioned tax on the net income of a corporation doing a purely interstate business, provided there were sufficient "activities" within the state to justify a tax. *Northwestern States Portland Cement Co.* v. *Minnesota*, and *Commissioner* v. *Stockham Valves and Fittings, Inc.*, 79 Sup Ct. 357 (1959).

Were this article a movie script, I would begin by portraying the separate meetings of two groups: the hastily summoned executive committee of the National Association of Manufacturers gravely, but vigorously, exploring means of avoiding the new menace; jubilant state tax collectors eagerly planning (between sips from long-stemmed glasses) how best to construct this new pipeline into state coffers.

The passage of time may reveal that some interstate manufacturers and sellers will find their net profits increased because of this decision and that not all states will find their net tax yield increased.

The Cases and the Opinions of the Justices

In the *Stockham* case, *supra*, a Delaware corporation which manufactures and sells valves and pipe fittings maintained its principal office and plant in Birmingham, Alabama, and a sales-service office in Atlanta, Georgia, where one solicitor and a secretary were employed. The solicitor devoted about one-third of his time to solicitation in Georgia. All orders were sent to the home office in Birmingham, accepted or rejected there, and the merchandise shipped to the customer "f.o.b. warehouse" (Birmingham). The corporation had no property in Georgia (other than office equipment, office supplies, and circulars), deposited no funds there, and stored no merchandise in that state.

Georgia imposes a tax on the net income of corporations which engage in "any activities or transactions for profit or gain . . ." in that state; the tax is apportioned by taking the arithmetical average which the ratios of (a) the taxpayer's inventories held within the state, (b) compensation paid or incurred within the state, and, (c) gross receipts from business done within the state, bear to the taxpayer's totals of the foregoing factors.

The facts in the *Northwestern* case, *supra,* are substantially the same except that more personnel were employed, almost half of the corporation's sales (48 per cent) were made in the taxing state, and the apportionment formula included all "tangible property owned or used in the state", not merely "inventory."

The majority opinion, written by Mr. Justice Clark, upholding the state taxes, conveys the impression that precedent left no doubt as to which way the decision could go. Mr. Justice Clark, in passing, observed that the taxes were apportioned, not privilege taxes, and no multiple burdens were *shown* to exist.

In his concurring opinion, Mr. Justice Harlan stressed his belief that there is no practical difference between taxation of the apportioned net income of purely interstate transactions and allowing a state when taxing a corporation which does both an intrastate and interstate business to include income from interstate transactions. (The latter has often been upheld. *E. g., Underwood Typewriter Co.* v. *Chamberlin,* 254 U. S. 113, 41 Sup. Ct. 45 (1920); *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 62 Sup. Ct. 857 (1942).

Mr. Justice Whittaker, in a dissenting opinion in which he was joined by Justices Frankfurter and Stewart, first carefully demonstrated that there was no precedent for the majority holding, found that this was a tax on "exclusively interstate commerce," and concluded that direct taxation of "exclusively interstate commerce" was a substantial regulation of it and not within the power of the states, absent

.congressional consent. He did not explain how or why such tax was a regulation of interstate commerce.

It remained for Mr. Justice Frankfurter, in his separate dissenting opinion, to show the nature of the "burden" these taxes imposed on interstate commerce: first, the great expense involved in the multiplicity of accounting, bookkeeping operations, and legal fees (which would be especially onerous on "small companies doing a small volume of business in several states") and second, the burden of increased litigation and uncertainty which will flow from this decision. His conclusion was that Congress, rather than the Court, should decide whether, and the manner in which, the states should levy such taxes.

Were These Novel Cases?

The majority placed its principal reliance upon six cases: *United States Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321, 38 Sup Ct. 499 (1918; *Underwood Typewriter Co.* v. *Chamberlin,* 254 U.S. 113, 41 Sup. Ct. 45 (1920); *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 62 Sup. Ct. 857 (1942); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commissioner,* 266 U. S. 271, 45 Sup. Ct. 82 (1924); *Norfolk & W. Ry. Co.* v. *North Carolina,* 297 U. S. 682, 56 Sup. Ct. 625 (1936); and *West Publishing Co.*. v. *McColgan,* 328 U. S. 823, 66 Sup. Ct. 1378 (1946).

With the possible exception of *West Publishing* (a *per curiam* "sleeper" that slipped through the Court with no more than a brief memorandum opinion), I think it can safely be said that the Court had not previously passed upon the exact issue raised by *Northwestern* and *Stockham. Oak Creek* and *Underwood* involved corporations doing both an interstate and intrastate business within the taxing state, and in *Oak Creek* the corporation had been chartered in the taxing state while in *Underwood* the corporation had established a "commercial domicile" within the taxing state; in *Beeler* both the state court and the Supreme Court of the United States found that the corporation was engaged in intrastate commerce, and had established a "commercial domicile", within the taxing state. In *Bass, Ratcliff & Gretton* the taxed corporation was doing an intrastate business, and the same was true in *Norfolk & W. Ry. Co.*

West Publishing is more difficult to distinguish. West Publishing Company employed four full-time solicitors in California. The solicitors had authority to receive payments, collect delinquent accounts, and to make adjustments of accounts. The solicitors were given space in the offices of California attorneys and in return the attorneys were allowed to use West's law books. In addition, West advertised extensively in the state and held out the attorney's offices as being its local offices. West is a Minnesota corporation and had not qualified to do a local business in California. (For full statement of facts see *West Publishing Co.* v. *McColgin,* 166 P. 2d 861 (Calif. 1946).

Mr. Justice Whittaker took the position that West was engaged in intrastate commerce as well as interstate commerce and hence that case was not controlling.

The *West Publishing* case points up the hazy distinction, if indeed one can always be found (or now need be found) between "doing a local or intrastate business" and mere "activities" carried on within the taxing state in furtherance of interstate commerce.

I cannot help but conclude that although decided cases may have established the principles of decision, the Court had not consciously passed upon this situation before; Mr. Justice Frankfurter, the only one of the three dissenting justices who was on the Court at the time of the *West Publishing per curiam* decision, thought of that case as one involving some degree of intrastate business.

Professor Thomas Reed Powell, speaking in 1955, was of the opinion that this was an issue which had not been passed upon by the Court. Powell, *Vagaries and Varieties in Constitutional Interpretation* 198 (1956) However, Professor Powell had long ago suggested that an apportioned tax imposed directly upon net income would be valid. *Id.* at 197-98. Professor Edward L. Barrett, Jr., a careful student of interstate commerce, had also reached the conclusion that the Court had not passed on this issue. Barrett, *State Taxation of Interstate Commerce—'Direct Burdens', 'Multiple Burdens', or What Have You?*, 4 Vand. L. Rev. 496, 503 (1951).

It is my guess that the majority of the Court realized that these cases presented novel applications of state net income taxes but also realized that judges, like merchants, must puff their wares in order to detract attention from their less attractive features: Had the majority opinion acknowledged the novelty of the cases the stench of retroactivity would have been almost overpowering. In *Northwestern* the taxes were being collected for the years 1933 through 1948!

Do These Taxes Offend The Commerce Clause?

Within the area of the present discussion, the purposes of the commerce clause are to prevent the states from (a) creating trade barriers in the Federal union, (b) imposing a fiscal levy which, over and above the fiscal burden, has the effect of retarding the spread of interstate business, and (c) imposing a levy which takes advantage of the chance geographical location of the burdening state. *See* Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 *Yale L. J.* 219 (1957).

To find that the state tax is "on" interstate commerce is not of itself determinative of whether a state's action counters the purposes of the commerce clause.

Any tax, or additional tax, a state imposes, because of the mere fiscal burden of the tax, has the effect of giving pause to the spread of interstate business (provided there are some states in the union which do not impose similar taxes or which impose lesser taxes). But to say that the fiscal burden, standing alone, is prohibited by the commerce clause, is to say that the commerce clause always demands a tax preference to interstate business over similar intrastate business.

Apparently Mr. Justice Frankfurter saw that the burden of the monetary exaction was not the type of burden the commerce clause prohibited. He did not mention the *tax itself* as being a burden on interstate commerce but costs and difficulties inherent in reporting and paying the tax.

Do apportioned state taxes on the net income of a purely interstate business create trade barriers? Except for the certainty that the apportionment formulas adopted by the states will produce a yield computed on more than 100 per cent of the net income of a given corporation, or be manipulated by the states so that in combination they yield results which are incompatible with roles the constitution assigns in our federal union, it is hard to see how. (Assuming, for the time being, that the states of incorporation or of commercial domicile are not permitted to tax the entire net income derived from interstate operations.) But the qualifications noted are of no small consquence and justify further discussion later in this article.

The Due Process, Or Jursidictional, Questions Suggested.

United States Law Week reported a portion of the argument in *Stockham* as follows:

> Looking at the facts for due process purposes, Mr. Johnson, Counsel for the state of Georgia argued that Stockham's activities in Georgia, even though interstate, were substantial enough to receive Georgia protection. He contended that it was the quality of the activity, and not the quantity, that was determinative. On this score, he continued, Stockham had an office and publicized itself, it was listed in the telephone book and the classified directory, its letterheads listed the Atlanta office, and it published literature there; in other words it was there as a designed system of distribution.
>
> Mr. Justice Frankfurter: "Did they have an inventory there?"
>
> Mr. Johnson: "No, but they had a secretary in teletype communication with Birmingham. It was there to compete with local competitors to get business. They stressed good service."
>
> Mr. Justice Whittaker: "Although the Atlanta office consisted of one man, it was substantial qualitatively?"

Mr. Johnson: "Yes sir."

Mr. Justice Frankfurter: "Suppose IBM men demonstrate in Georgia, just create atmosphere?"

Mr. Johnson: "I wouldn't say any one factor is decisive."

Mr. Justice Black: "Are you saying that a state can levy a tax on net income from receipts derived from interstate business?"

Mr. Johnson: "Yes sir."

Mr. Justice Frankfurter: "How about mail order houses?"

Mr. Johnson: "I think that gets into the due process question again." (27 *U. S. L. Week* 3121 at 3123 (1958.)

Later in the hearing, Mr. John Izard, Jr., arguing for Stockham, contended that Stockham's method of doing business in Georgia is the "typical pattern" of business done everywhere by foreign corporations and is "not a tax avoiding scheme." *Ibid.* The following exchanges then occurred:

The Chief Justice: "Would it make any difference in your case if you maintained a warehouse in Atlanta?"

Mr. Izard: "We would be subject to the tax."

Mr. Justice Frankfurter: "Your company had no bank accounts there?"

Mr. Izard: "No."

The Chief Justice: "You have warehouses?"

Mr. Izard: "Yes, we have one in California and one in Pennsylvania."

The Chief Justice: "Is the income tax levied where you have warehouses?"

Mr. Izard: "Yes, we pay it in California." (*Ibid.*)

The above arguments and questions have been set out at length because they (a) strongly suggest that traditional conceptions as to jurisdiction of a state to tax do not adequately explain the present totality of decisions on jurisdiction to tax, and (b) they point to, and give some factual support to, a manner in which the states singularly or collectively, can, by taxing the net income of interstate corporations, exert some measure of control over the shape of the national economy and perhaps "burden" interstate commerce in a manner which may not be desirable.

Traditionally, jurisdiction of a state to tax is thought to rest upon some specific benefit conferred or protection afforded by the taxing state. But this explanation of the taxing power of the states was not satisfactory even prior to the *Stockham case* (the tax was often highly disproportionate to the specific benefits found to be conferred by the taxing state). Its deficiencies will become even more apparent as the Court considers the due process questions in the cases which will follow *Stockham.*

For example, as suggested by Mr. Justice Frankfurter, does a state have jurisdiction to levy an apportioned net income tax on an interstate mail order business? On a corporation which merely accepts orders from buyers within the taxing state but which does no advertising within the taxing state? It would be drawing a fine, and unsatisfactory, line to hold that a state can levy an apportioned net income tax on a corporation's entire earnings if it regularly employs but one part-time solicitor (who, let us assume, produced one-tenth of the business done in the taxing state, the remaining nine-tenths originating from unsolicited mail orders), but to deny jurisdiction to tax any portion of the net income of a corporation which floods the state with advertising material and does a multi-million dollar mail order business within the state.

Such a decision would tend to shape the method of conducting interstate business in much the same way that the "drummer" cases led some corporations to utilize solicitation in the (now mistaken) belief that it was a means of avoiding state taxation. *Stockham,* along with state statutes which will follow, will remove much of the temptation to conduct interstate business solely by "drumming."

This result can be avoided, and a reconciliation between jurisdictional concepts and fair and desirable results can be achieved, by modifying the traditional conception as to the base on which jurisdiction to tax rests.

Professor Ernest J. Brown, an especially perceptive student of these problems, has suggested that ". . . jurisdictional concepts within a federal system are, like commerce concepts, to be shaped for the appropriate or better ordering of the component units. . . ." Brown, *op cit.* at 231 This suggests (to me, at any rate) that in the area of state taxation a more realistic approach to jurisdiction to tax begins with a realization that in a federal union there are many governmental units which afford an intangible benefit in the form of the creation and maintenance of the orderly and civilized society which provides the framework necessary for the efficient production and marketing of goods and services. (*Cf.* 27 *U. S. L. Week* 3121 at 3122 (1958) and *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization*, 347 U. S. 590 at 608, 74 Sup. Ct. 757 at 767 (1954) (dissent). Because of having contributed by its expenditures to the creation of this orderly framework, each state should have *prima facie* power (jurisdiction) to tax (leaving aside objections based on the commerce clause) whenever any use whatsoever was made of the ordered society it had helped to create, subject to the further requirement that the state demonstrate that its tax does not infringe upon the like power (whether exercised or not) of other states in the Union. The emphasis is changed from one of "power to tax" to "how much". It would be imperative that the Court closely scrutinize the whole taxing system of the state and its apportionment formula. This the Court has not always done. See *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 60 Sup. Ct. 273 (1939).

To some persons this will appear as no more than a restatement of the traditional "protection-benefit" conception of jurisdiction to tax; however, its shifts in starting point and emphasis appear to resolve the conceptional difficulties inherent in finding state jurisdiction to tax net income arising solely from interstate mail orders.

If the Court is going to base jurisdiction to tax net income on solicitation it should also hold that jurisdiction exists when that income is derived from mail orders. A contrary holding would tend to induce many businesses to seek tax avoidance by doing business exclusively by mail and thus tend to shape the manner of conducting business along lines which may not accord with what is best from a functional, business viewpoint.

Problems Raised By Variations in the Apportionment Formulas

While the apportionment formula of any one state may be fair, the formulas in combination can result in double taxation.

To the extent there is double taxation, there would be, it seems, some pressure to confine one's business operations to one or a few states. Brown, *op. cit.* at 237-38.

However, it is possible there is a more subtle consideration to be taken into account: The *Stockman* case and its sequels will probably fully erase the line previously thought to exist between interstate business and intrastate business as the criterion for taxation of the apportioned net income; the states will probably re-examine and revise their tax structures. Some states may conclude that their over-all tax structure is such that they would benefit more by inducing the building of factories, warehouses, etc. within the state. Those states could induce the entry of industry by failing to tax net income from interstate operations or by omitting tangibles from the net income apportionment formulas. (Notice that the Georgia statute does this; the Minnesota statute includes tangibles.) Other states might conclude that they would gain more by taking the tangibles into account in their apportionment formulas, and to this extent would discourage new industry from locating within their boundaries. Both formulas have been upheld by the Court. But if, and to the extent that, tax considerations pay a part in the locating of the tangibles necessary to production and marketing, an upheaval is likely to occur in the distribution of capital assets.

True it is that the states have and have previously used their power to employ their tax structures as means of attracting capital, but the *Stockham and Northwestern* decisions reactivate and give added vitality to this competitive bidding among the states. In limited quantities, this competitive bidding for industry may be a wholesome influence for lowering state taxes, as well as serving to balance somewhat the unevenness in natural industrial advantages among the states. But if this competition among the states were to continue unchecked and unbridled by the restraints of wisdom or of law, it could be destructive of sound state tax programs. (This is recognized on a local level. Some state constitutions limit the "tax bonuses" which the localities within the state may grant to industry.) Take notice that the commerce clause prohibits the states from using the defensive tactic usually employed against the "unfair" competition of another nation.

Further, if it can be said that the nation as a whole, rather than the states individually, has a vital interest, for defense or other reasons, in a more functional distribution of the tangibles necessary to production and marketing, then some federal action should be taken in regard to state income taxes levied on interstate businesses, including state taxes levied on the net income of corporations which do both an intrastate and interstate business within the taxing state.

Let it be noted, however, that were there fair and uniform apportionment formulas and taxes among all the states, the *Stockham* decision would be a step toward causing the distribution of capital assets to be based on functional requirements rather than tax considerations (assuming that the states of incorporation or "commercial domicile" are not permitted to tax the entire net income derived from interstate business).

In any event, Stockham's warehouse in Pennsylvania (no net income tax) might be moved to another state where it would serve its purpose even more effectively; Stockham might find that a net saving could result from placing a small warehouse in Georgia, there might be no tax advantage in continuing to conduct business by teletype between the factory-warehouse and market states.

Should the State of Incorporation be Permitted to Levy a Tax on All of the Income From Interstate Operations?

The Court has not decided whether the state of incorporation or the state of "commercial domicile" can levy an unapportioned tax on the net income from interstate business. Having now decided that states other than the state of incorporation may tax an apportioned part of the net income, the Court should hold that the state of incorporation is restricted to the levy of an apportioned tax on net income. Otherwise interstate corporations are exposed to the threat of double taxation. This may have the effect of tending to slow or prevent the spread of capital throughout the nation. *See* Brown, *op. cit* at 238.

Were the Court to decide that the state of incorporation could tax the whole of the net income there would, in all probability, remain some states which offered "tax havens" to attract industry, and industry might tend to migrate to those states, at least for the purpose of incorporating. Notice, however, that the tendency would be to cast the shape of the industrial organization and marketing mechanisms into an artificial pattern, a pattern which might be different from that which would evolve if sound, efficient techniques of production and marketing were the sole considerations affecting business judgment.

But the force of these arguments has not always been, and may not yet be, apparent to all members of the Court: In the area of intangibles other than net income the Court permits such double taxation. *E. g., Cream of Wheat Co.* v. *County of Grand Fork,* 253 U. S. 325, §40 Sup. Ct. 558 (1920). As to ships traveling through two or more states the Court has, despite earlier cases to the contrary, restricted the state of domicile to an apportioned *ad valorem* tax. *Standard Oil Co.* v. *Peck,* 342 U. S. 382, 72 Sup. Ct. 309 (1952) Whether the state of incorporation can levy an unapportioned property tax on the air fleet of an interstate air carrier is in doubt, despite an earlier holding affirming such tax. *Compare Northwestern Airlines, Inc.* v. *Minnesota,* 322 U. S. 292, 64 Sup. Ct. 950 (1944) *with Braniff Airways, Inc.* v. *Nebraska State Board of Equalization, supra.*

It will be interesting to see whether the majority of the

Court realizes that having now allowed an apportioned tax by states other than the state of incorporation, what appear to be reasonable economic desiderata demand that the state of incorporation or "commercial domicile" not be permitted to tax the entire net income arising from the conduct of an interstate business. The majority opinion in *Stockham* dropped a broad hint, by way of footnote, that the Court would not permit such taxation by the state of incorporation, but the force of the hint was weakened by the footnote which immediately followed.

Do These Cases Overrule the "Drummer" Cases?

In arguing the *Stockham* case, Mr. John Izard, Jr., counsel for the corporation, stated to the court: "This is the old drummer case once again, nothing but drumming." 27 *U. S. L. Week* 3121 at 3123.

There is only a superficial similarity between the "drummer" cases *(E. g., Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 7 Sup. Ct. 592 (1887); *Nippert* v. *City of Richmond,* 327 U. S. 416, 66 Sup. Ct. 586 (1946)) and the present cases. The significant differences between the two groups of cases lies in the nature of the tax and the manner of collecting the tax. In the drummer cases the tax imposed was a flat-fee license tax and the seller was thought to be responsible for the payment of the tax before commencing business; the Court treated the taxing statutes as giving the state a right to exclude the drummer unless he paid. Quite obviously, such taxes when applied to the seller of out of state goods tend to confine a seller's operations to one or a few states (even if the tax is not repeated by the localities within the state).

On the other hand, a tax having "net income" as both its "subject and measure" is difficult to construe into an exclusionary license tax and is dependent upon some profit being made from the whole of the interstate operations.

The Justices very carefully questioned counsel for Georgia and Minnesota as to the mechanisms utilized in collecting net income taxes from interstate corporations. Counsel for the states responded that the solicitors would not be ousted in event of non-payment of the taxes and the collection of the tax was accomplished by the usual means of collecting money. 27 *U. S. L. Week* 3121 (1958).

A petition for certiorari was filed with the Court seeking review of a case which involved pure solicitation by fifteen regular solicitors operating within the taxing state (no "branch office" or "district manager"). An apportioned tax was levied on the net income of the corporation and the state court upheld the tax. *International Shoe Co.* v. *Fontenot,* 236 La. 279 107 So. 2d 640 (1958); 27 U. S. L. Week 3290 (1959). After the decision in the *Northwestern* and *Stockham* cases the Court denied the application for the writ of certiorari in the *Fontenot* case, *supra.* 27 *U. S. L. Week* 3313 (1959). Despite the Court's frequent admonitions about the reliability of a denial of certiorari as precedent, this furnishes a clue that the Court does not regard "branch offices" or "district managers" as the foundation on which the validity of the tax rests.

The drummer cases, properly interpreted, still survive.

Is Spector Still Law?

In *Spector Motor Service Inc.,* v. *O'Connor,* 340 U. S. 602, 71 Sup. Ct. 508 (1951), the Court held that a state could not levy an apportioned net income tax against a purely interstate business for the privilege of engaging in interstate commerce within the taxing state. The subject of the tax was the privilege of engaging in interstate commerce, its measure was net income, apportioned according to the interstate business beginning and ending within the state.

In discussing the *Northwestern* and *Stockham* cases with a lawyer friend of mine, my friend, without reflection, I am sure, asserted that had he been arguing those cases for the corporations he would have relied upon *Spector* as controlling. His reasoning was analytical and proceeded in logical order: First, said he, you must admit there is really no such thing as a tax *on* net income—the tax must be for something or on something other than money. There was no intrastate business done in those cases therefore the tax can only be on, must be on, the privilege of engaging in interstate business. He continued by stating a simple syllogism which he expected to carry the day in court: These net income taxes on a purely interstate business are in reality for the privilege of engaging in interstate business. *Spector* held that a state could not levy a tax on the privilege of engaging in interstate business. Therefore, *Spector* controls and these taxes are invalid.

Needless to say, I disagree. But I find this manner of reasoning both frightening and frustrating. Frightening because of its prevalence and its pretensions to solve practical problems of overwhelming, or almost overwhelming, complexity by the manipulation of words and labels and the use of syllogism; frustrating because of the difficulty and tedious labor required to make a satisfying demonstration of what frequently is patently unreliable and false. (Incidentally, my friend's argument was utilized by counsel for Stockham. 27 *U S. L. Week* 3121 at 3124 (1958).)

A partial demonstration of the fallacies in my friend's argument (and also an explanation of why *Spector* should still be law) can start at what might appear to be an unpromising place: an explanation of why *Spector* was not and is not an absurd decision.

1. To allow a state to levy a tax which has as its subject the privilege of engaging in interstate commerce within the taxing state would afford logical basis for a state claim that it had the power to exclude the corporation from doing an interstate business in event of non-payment of the tax or the power to impose other "conditions" upon the "privilege." *Cf. Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 30 Sup Ct. 190, 208 (1910) (dissent).

2. If the Court permitted a state to levy a tax having as its subject the privilege of engaging in interstate commerce and its measure apportioned net income, then if a corporation

engaged in both interstate and intrastate commerce within the same state, that state could also levy a non-discriminatory tax on all corporations doing an intrastate business measured by net income (apportioned, of course, as to corporations doing both an intrastate and interstate business) *Cf St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350 Sup. Ct. 99 (1914); *United States Glue Co.* v. *Town of Oak Creek, supra; Underwood Typewrier Co.* v. *Chamberlin, supra.* This would lead to double taxation which in turn might tend to prevent the spread of interstate business.

True, the Court could invalidate the second levy on the apportioned net income (the privilege tax for doing an intrastate business) but, if a choice between the two taxes should be made, less upheaval of existing case law and tax structure will take place by invalidating the tax on the privilege of engaging in interstate commerce

The Court has granted review of a case which appears to contain the same facts as *Spector* (a purely interstate carrier which rents freight terminals within the taxing state) except that the state tax was levied directly upon net income apportioned according to deliveries and pick-ups in the taxing state. *ET & WNC Transportation Co.* v. *Currie,* 248 N. C. 560, 104 S.E.2d 403 (1958); 27 *U. S. L. Week* 3241 (1959). Consistency with *Northwestern* demands that the Court affirm the state court decision upholding the tax, but the policy implicit in *Spector's* denunciation of a state tax on the privilege of engaging in interstate commerce, regardless of how the tax be measured, has not been basically altered by these decisions. *Spector* should survive these decisions, but a path by which another *Spector* can be avoided has been pointed out to the states.

Finale

How can one explain the divergence of views of the Justices in the *Northwestern* and *Stockham* cases? One might conclude that some of the Justices simply have little understanding of the economic implications of their decisions. I, personally, prefer not to adopt this view and offer the suggestion that the principal reason underlying the decision of the Court was a difference of opinion as to what choices were open. I feel that the majority of the Court viewed the cases, as indeed they were presented, as demanding a decision as to whether the states *could* or *could not* tax. If those were the choices with which the nation and states were faced, I believe I would go along with the majority. (It is hard to believe, as apparently Mr. Justice Whittaker does, that even if the states were denied the right to levy this tax, the burden of supporting interstate commerce, and the tax receipts from interstate commerce, "balance out between the states." *See* 27 *U. S. L. Week* 3121 at 3122 (1958). My geography teacher talked too often about the "industrial states.")

In reality the choices presented are three, the third being state taxation of interstate commerce in a manner approved by Congress; the difficulty, of course, lay in the fact that this third choice required the action of a body which is independent of the Court. But this should not blur our realization that where, as here, the Court is acting as a co-ordinate governing body, its range of choices, although not presented by the litigants, should include a reference of the problem to the branch of government more adequately equipped to reach solutions.

There being no way for the Court to force Congress to act, it is easy for the Court to fall into the error of deciding cases as though Congress did not exist. This, and the "yes" or "no" answers more or less implicit in the judicial process, are part of the price we pay for decking out one of our legislative-umpiring bodies in judicial robes.

A great paradox may be in the making: it could be that the decision rendered by the majority will more quickly bring the Congressional regulation sought by Mr. Justice Frankfurter in his dissent. Unless the taxing statutes which will be enacted by the states achieve a degree of uniformity heretofore unseen (or open new and better "tax havens"), the business community is likely to rally with unity of purpose behind the enactment of federal legislation; the power to vary the apportionment formulas creates self-serving interests among the states which make it unlikely that they, upon their own initiative, will seek federal legislation.