

# State Sales Taxes and the Commerce Clause

THE constitutional limitations on the power of states to impose sales taxes become increasingly important as more and more states introduce some form of sales tax into their revenue systems. A major limitation results from the fact that the Commerce Clause of the United States Constitution has been construed to prohibit state taxation having some ill-defined kind and degree of effect upon interstate and foreign commerce.

The term "sales tax" is rather loosely used to describe several kinds of excise taxes imposed with respect to sales transactions.<sup>1</sup> A sales tax proper is a simple tax on the act of making sales, but most of the sales taxes now in operation are privilege or occupation taxes on the business of either selling or performing certain acts such as soliciting orders and making deliveries. Sometimes the tax is a flat tax and in other instances the amount to be paid is measured by the volume of sales.

In general, a state's authority to levy these different kinds of sales taxes is predicated on the power of a state to tax acts done or businesses conducted within its borders.<sup>2</sup> This essay is confined to a discussion of the extent to which this power to impose sales taxes is limited by the constitutional grant to Congress of the power to regulate interstate and foreign commerce.<sup>3</sup> The Constitution is not explicit, and the scope of the limitation must be sought in the opinions handed down by the United States Supreme Court construing the Commerce Clause.

It has never been doubted that a sales transaction occurring within a state, which is totally unconnected with any prior or subsequent interstate or foreign transportation, is subject to state taxation unrestrained by the Commerce Clause.<sup>4</sup> On the other hand, if a sale is connected with

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<sup>1</sup> See Table in (1934) 12 TAX MAG. 365; see also discussion of classifications of sales taxes in (1930) 47 HARV. L. REV. 860; Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1934) 12 N. C. L. REV. 99.

<sup>2</sup> There is, of course, an important limitation on the taxing power of the states which must be considered in determining the validity of sales taxes, namely, that imposed by the "Due Process Clause" of the Fourteenth Amendment of the Federal Constitution, which is interpreted to prohibit state taxation of subjects outside the boundaries of the taxing state.

<sup>3</sup> Clause 3 of Section 8 of Article I of the Constitution of the United States usually referred to as the Commerce Clause, provides in part that, "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States. . . ."

<sup>4</sup> See *Hatch v. Reardon* (1907) 204 U. S. 152, particularly at 162, where it is said, "The facts that the property sold is outside of the State and the seller and buyer are foreigners are not enough to make a sale commerce with foreign nations or among the several States. . . ." Also, a sale of land in the taxing state to a citizen of another state, see *Munday v. Wisconsin Trust Co.* (1920) 252 U. S. 499, not a tax case, however.

a prior or subsequent transportation into or out of the state, of the thing sold, the Commerce Clause still does not forbid state taxation of the sale unless that connection is of a degree of closeness which the decisions as yet have not wholly defined.

A principal object of this essay is to determine what the Supreme Court holds is the degree of closeness of connection necessary to give the sale immunity from state taxation.

The recent case of *Wiloil Corporation v. Pennsylvania*<sup>5</sup> indicates a tendency on the part of the Court to require a very close connection. In that case a Pennsylvania statute<sup>6</sup> imposed an occupation tax on the business of distributing (using or selling and delivering) liquid fuel. The amount of the tax was determined by the number of gallons of liquid fuel distributed.<sup>7</sup> Wiloil Corporation was a Pennsylvania corporation and contracted to sell and deliver thirteen tank cars of gasoline to two Pennsylvania purchasers. The seller then procured the gasoline in Delaware and shipped it from there direct to the purchasers in Pennsylvania. In favor of the proposition that these sales were protected by the commerce clause from taxation by Pennsylvania were the following facts: the invoices covering the shipments stated that the shipments were made f.o.b. Delaware;<sup>8</sup> the bills of lading covering each shipment recited the place of shipment as Wilmington, Delaware, and the place of destination as either Philadelphia or Essington, both in Pennsylvania; the Wiloil Corporation appeared as consignor and either one or the other of the purchasers as consignee. The court nevertheless held the sales subject to taxation by the State of Pennsylvania, stating among other things: "Appellant [Wiloil Corporation] was not required by the contracts to obtain the fuels in Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. . . . These contracts did not require or necessarily involve transportation across the state boundary, . . . as interstate transportation was not required or contemplated it may be deemed incidental."<sup>9</sup>

These statements clearly show that if the contract of sale requires transportation across state lines the connection is sufficiently close to render the sale immune from state taxation. In addition, however, the

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<sup>5</sup> (1935) 294 U. S. 169; see also the opinion of the state court in *Commonwealth v. Wiloil Corporation* (1934) 316 Pa. 33, 173 Atl. 404.

<sup>6</sup> 72 Pa. Stats., §2611b.

<sup>7</sup> Thus, while the business of distributing was a proper subject of state taxation, it could not be measured by non-taxable distributions (in this case, non-taxable sales and deliveries.)

<sup>8</sup> This fact alone is usually construed to be no more than a price-fixing arrangement, although it may aid in questions arising under the "due process" clause, in determining the taxable situs of the transaction.

<sup>9</sup> *Wiloil Corporation v. Pennsylvania*, *supra* note 5, at 173-4.

statements infer that even though the contracts do not require transportation across state lines if they necessarily involve it or if interstate transportation is contemplated, the connection between sale and transportation may be sufficiently close to immunize the sale. If this be true, it is important to know what facts and circumstances surrounding the making of a contract of sale will be considered by the Court in determining whether or not it necessarily involves or contemplates transportation into or out of the state. The cases cited and relied upon by the Court do not shed much light on this problem. *Moore v. New York Cotton Exchange*<sup>10</sup> was not a tax case and furthermore involved the question whether or not dealing in cotton futures was subject to federal regulation. In that connection the Court decided that the contracts to sell cotton for future delivery were purely local and that, "Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another. If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. The most that can be said is that the agreements are likely to give rise to interstate shipments."<sup>11</sup> It is a fact, however, and one recognized by the Court in the *Wiloil* case,<sup>12</sup> that even though a subject may be sufficiently connected with interstate transportation to bring it within the federal regulatory power, this fact alone will not preclude state taxation of that subject.<sup>13</sup>

*Ware and Leland v. Mobile County*,<sup>14</sup> more in point since it was a tax case, also involved contracts for future delivery. Alabama imposed a license tax on persons "engaged in the business of buying and selling futures." The taxpayers had offices in Alabama and also in several other states, where they bought and sold cotton future contracts for customers in other states. The agreed statement of facts shows that "When the customer gave the order to Ware and Leland, either for a sale or a purchase of a future contract, it was not usual for anything to be said between them about an actual delivery of the cotton, . . . No actual delivery of cotton or grain was ever made on any such contracts, except

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<sup>10</sup> (1926) 270 U. S. 593.

<sup>11</sup> *Ibid.* at 604.

<sup>12</sup> Mr. Justice Butler writing the opinion in the *Wiloil* case, *supra* note 5, at 175, remarks, "We need not consider whether deliveries to purchasers ended the interstate commerce involved, including all incidents that *in other connections* might constitute an essential part of that which is covered by the commerce clause." (*italics added.*)

<sup>13</sup> See *Minnesota v. Blasius* (1933) 290 U. S. 1, cited and relied upon by the Court in the *Wiloil* case.

<sup>14</sup> (1908) 209 U. S. 405.

in a few instances, when such deliveries were made where the contracts were executed, . . ."<sup>15</sup> It is evident from reading the opinion that the Court was impressed by the special nature of cotton future contracts, "Merely speculative and followed by no actual delivery." In fact the Court said, in upholding the tax, that "These contracts are not, . . . the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another State than that of the residence and office of the company."<sup>16</sup>

The state court,<sup>17</sup> in upholding the tax in the *Wiloil* case, was of the opinion that *Banker Brothers Company v. Pennsylvania*<sup>18</sup> presented an analogous situation. The contract of sale there was between parties in the taxing state for the purchase of an automobile. The statement of facts reveals that, "The purchaser of the machine was to pay at least ten per cent when he signed a printed form addressed to Banker Brothers Company requesting it 'to enter my order for.....motor car, for which I agree to pay the list price f.o.b. factory, as follows: . . .' The name of the Pierce Company [the out-of-state manufacturer] did not appear anywhere on this printed form furnished by it, but when the Banker Brothers Company accepted the order it remitted the cash to the Pierce Company. . . . The written contract was silent on the subject, but it was stipulated that the Pierce Company warranted the machine direct to the purchaser."<sup>19</sup> The manufacturer shipped the automobile to the seller in the taxing state who delivered it to the buyer. In holding the sale taxable the Court held that the buyer's agreement to "pay the list price f.o.b. factory" and the "warranty from the manufacturer direct . . . were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser . . . who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city or from the manufacturer in New York."<sup>20</sup> Suppose the contract does not expressly require interstate shipment but it is a fact known to both parties, that the goods will have to be procured from out of the state, can it be said that the contract impliedly requires interstate shipment? It would seem that interstate shipment is necessarily involved in such a transaction.

An examination of the United States Supreme Court cases passing

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<sup>15</sup> *Ibid.* at 407-8.

<sup>16</sup> *Ibid.* at 413.

<sup>17</sup> *Commonwealth v. Wiloil Corporation*, *supra* note 5.

<sup>18</sup> (1911) 222 U. S. 210. This case is also cited in the opinion in the United States Supreme Court, but apparently not for the purpose of demonstrating what facts are regarded as showing the connection between sale and transportation.

<sup>19</sup> *Ibid.* at 212, 213.

<sup>20</sup> *Ibid.* at 214.

upon the validity of state taxes imposed upon acts, transactions, businesses and occupations involved in the sale of goods transported into and out of the taxing state, indicates the circumstances to be considered in drawing the line, which must be drawn, between local sales which the states may tax and sales which, because of the closeness of their connection with transportation into or out of the state, the states may not tax.

SALES CONTRACTS REQUIRING SHIPMENT INTO OR OUT OF THE  
TAXING STATE

In the early case of *Robbins v. Shelby County Taxing District*,<sup>21</sup> the court invalidated a privilege tax imposed alike on "all persons not having a regular licensed house of business in the taxing district," selling by sample, as applied to a person selling by sample for an out-of-state firm. It does not appear, but we may assume from the nature of the tax, that the out-of-state firm had no place of business in the district, and probably kept no stock of goods there. It is not possible to tell whether the agreement between the parties obligated the seller to ship the goods interstate.

The decision is based on the principle that the power of Congress to regulate interstate commerce is exclusive whenever the subjects of it are national in their character or admit of one uniform system, or plan of regulation, and that the failure of Congress to make express regulations indicates its will that the subject shall be free from any restrictions or impositions.<sup>22</sup> Was the tax, as applied, an imposition on a subject of interstate commerce national in character or admitting of one uniform system or plan of regulation? <sup>23</sup> The Court laid down the rule that, "The negotiation of the sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce," <sup>24</sup> and having already said that "Inter-

<sup>21</sup> (1887) 120 U. S. 489.

<sup>22</sup> This principle is a sort of compromise evolved from the conflicting views in the early opinions interpreting the meaning of the Commerce Clause. The separate opinions in *The License Cases* (1847) 5 How. (46 U. S.) 504, give evidence of this conflict. In that case Mr. Justice Catron and Mr. Justice Woodbury voiced this principle. The separate opinions in *The Passenger Cases* (1849) 7 How. (48 U. S.) 282, show the Justices divided on the question whether the power to regulate interstate and foreign commerce is exclusively in Congress or concurrent with the states. The principle is fully expressed in *Cooley v. Board of Wardens* (1851) 12 How. (53 U. S.) 299. The inroads made on this general principle are well shown by state regulations held valid with respect to interstate railway transportation, see *Southern Railway Co. v. King* (1910) 217 U. S. 524, and cases referred to therein.

<sup>23</sup> In *Welton v. Missouri* (1876) 91 U. S. 275, 280, it is said, "It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation." See also *Stoutenburgh v. Hennick* (1889) 129 U. S. 141, 148.

<sup>24</sup> *Robbins v. Shelby County Taxing District*, *supra* note 21, at 497.

state commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce,"<sup>25</sup> the court necessarily held that the negotiation of sales in the manner described, is a subject of commerce to be regulated exclusively by Congress and as such is entitled to freedom from state taxation.

The court's reference to the right of a non-resident to sell or seek to sell his goods in a state before they are introduced therein, and its announcement of the rule as to the negotiation of sales of goods, for the purpose of introducing them into the state, seems to exclude from the rule those situations where although the goods are of out-of-state origin and the sales are solicited, the orders are filled from a stock of goods in the state at the time the negotiations are made.

*Real Silk Hosiery Mills v. Portland*<sup>26</sup> is a more recent case involving the limitations imposed by the Commerce Clause on a state's power over solicitors selling by sample for out-of-state firms. It is clear from the facts in this case that the contracts of sale required interstate shipment. The seller's mills were outside the state, the solicitors going from house to house in the taxing state soliciting and accepting orders. "When a willing purchaser is found, the solicitor fills out and signs in duplicate, a so-called 'order blank.' This obligates appellant [the seller] to make delivery of the specified goods. . . ." The order blank stated among other things, "Your hosiery will be mailed you by Parcel Post c.o.d., direct from the Post Office branch in our mills."<sup>27</sup> The court announced the rule laid down in *Robbins v. Shelby County Taxing District*,<sup>28</sup> and held that a city ordinance requiring solicitors to secure a license, pay a fee, and file a bond, conflicts with the Commerce Clause.

*Heyman v. Hays*<sup>29</sup> illustrates the application of the principle to contracts of sale requiring shipment out of, instead of into, the taxing state. This case involved the validity of a privilege tax for conducting a wholesale liquor business. The seller was in the taxing state with a stock of liquor, but confined his business activities to "soliciting orders from persons in other states by mail, the receipt of such orders and filling the same by delivering the liquor to a carrier for through transportation out of the state." This was held to be interstate commerce embracing "those acts which are necessary to the complete enjoyment of the right protected." Again in *Crew Levick Co. v. Pennsylvania*<sup>30</sup> the sales were made by a seller in the taxing state to customers in foreign countries. It was not

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<sup>25</sup> *Ibid.*

<sup>26</sup> (1925) 268 U. S. 325.

<sup>27</sup> *Ibid.* at 334.

<sup>28</sup> *Supra* note 21.

<sup>29</sup> (1915) 236 U. S. 178.

<sup>30</sup> (1917) 245 U. S. 292.

questioned that sales to customers in foreign countries negotiated by foreign agents of the seller, were foreign commerce. The court held that, "That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."<sup>31</sup>

This principle has been consistently applied and although the reports of the cases do not always make clear what the contracts in question expressly required, the language of the court negatives any inference that it was dealing with contracts performable by delivery of goods that were in the taxing state at the time the contracts of sale were made.<sup>32</sup>

The theory behind all this involves the notion that the purpose of the Commerce Clause is to keep interstate and foreign commerce free from state taxation as to those subjects held to be national in importance and requiring uniformity of regulation.<sup>33</sup> The transportation and exchange of commodities between states being of national importance is, therefore, free from state taxation. The sale of goods under a contract is a method of exchange and where a sales transaction requires interstate

<sup>31</sup> *Ibid.* at 297-298. The tax imposed was a mercantile license tax of two dollars and also "one mill additional on each dollar of the whole volume, gross of business transacted annually."

<sup>32</sup> State attempts to tax agents of non-resident sellers meet the same objection, notwithstanding the agent may receive the property and perform certain acts upon it prior to delivery to the buyer. See *Davis v. Virginia* (1915) 236 U. S. 697, where the local agent took orders for portraits which were delivered to such agent and framed by him before delivery to buyer; *Stewart v. Michigan* (1914) 232 U. S. 665, where the out-of-state seller came into the taxing state and solicited orders for subsequent delivery from his out-of-state store. The deliveries were made by local draymen employed by seller, who filled the orders from carload lots; *Crenshaw v. Arkansas* (1913) 227 U. S. 289, and *Rogers v. Arkansas* (1913) 227 U. S. 401, where the local sales unit consisted of a superintendent, solicitors and delivery men. The salesmen were furnished with samples not to be sold; *Dozier v. Alabama* (1910) 218 U. S. 124, where the local agent took orders for enlargements of photographs and placed them in suitable frames after delivery to him; *Rearick v. Pennsylvania* (1906) 203 U. S. 507, where the local agent after soliciting orders, received the goods in large lots, separated the orders and delivered them; *Norfolk and Western Ry. v. Sims* (1903) 191 U. S. 441, where the railway company was the local agent for delivery; *Caldwell v. North Carolina* (1903) 187 U. S. 622, where the local agent received the pictures and frames and after placing pictures in proper frames, delivered them; *Stockard v. Morgan* (1902) 185 U. S. 27, where the local agent had an office in the taxing state where he kept samples; *Brennan v. Titusville* (1894) 153 U. S. 289, where the local agent solicited orders for pictures and picture frames by exhibiting samples but the goods were shipped direct to the purchasers by the out-of-state seller; *Stoutenburgh v. Hennick*, *supra* note 23, where a Maryland seller had a soliciting agent in the District of Columbia, and the Court held that the Act of the Legislature Assembly of the District of Columbia imposing a tax on the agent was bad for the reason that the agent was not subject to municipal regulation and that whether Congress could delegate such a power to the Assembly or not, it had not attempted to do so; and *Asher v. Texas* (1888) 128 U. S. 129, where the local agent solicited orders by exhibiting samples.

<sup>33</sup> See *supra* note 22.

shipment of the goods sold, there is a close causal connection between the sale and the interstate shipment, resulting in one interstate transaction, the component parts of which all share the same advantages of freedom from state taxation. Such a theory assumes as a fact that where domestic commerce is taxed, interstate commerce must be favored.

CONTRACTS TO SELL GOODS PREVIOUSLY SHIPPED INTO THE  
TAXING STATE

Here goods which have been previously brought into the taxing state from another state are sold for delivery in that state, the contract of sale being made after their arrival. A non-discriminatory tax on sales in these cases is valid. There is a connection between the sales and the prior transportation in the sense that, but for the transportation, the sales would not have occurred. And in a broad sense, sales by California merchants of goods brought by them from New York cause interstate sales and interstate shipments from New York merchants and manufacturers to California merchants.

Theoretically a non-discriminatory tax on sales of goods of out-of-state origin, in so far as it discourages those sales, diminishes the market for out-of-state goods and therefore impedes interstate commerce. But whatever causal connection there is between the sale and interstate transportation, the court holds that it does not render the local sale immune from state taxation. The sale of a particular lot of goods has no causal connection with the prior transportation of those particular goods. It seems that the rule with respect to a sale being immune because of its connection with interstate transportation applies only where the connection is with the subsequent transportation of those particular goods.

The leading case is *Woodruff v. Parham*.<sup>34</sup> There a tax imposed upon auction sales was held validly applied to the first sale of goods brought in from sister-states and sold in the original packages in which they were brought in. The case is particularly important for the reason that the court refused to follow the *dictum* of the earlier case of *Brown v. Maryland*,<sup>35</sup> to the effect that first sales of original package goods from sister-states are protected from state taxation.<sup>36</sup> In limiting the rule laid down in *Brown v. Maryland* to first sales of original package goods imported from foreign countries, there was created the inconsistent situation where, although the constitutional grant to Congress of the power to regulate interstate commerce is identical with the grant of power to regulate foreign commerce, the grant to regulate interstate commerce is held not to prohibit state taxation of first sales of original package

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<sup>34</sup> (1868) 8 Wall. (75 U. S.) 123.

<sup>35</sup> (1827) 12 Wheat. (25 U. S.) 419

<sup>36</sup> *Ibid.* at 449.



goods brought in from sister-states, while the grant to regulate foreign commerce is held to prohibit state taxation of first sales of original package goods imported from foreign countries.<sup>37</sup>

It is true that *Brown v. Maryland* involved not only the Commerce Clause but the imports and exports clause<sup>38</sup> as well, but the decision is unequivocal in its holding that the tax on the first sale was not only a duty on imports but was a charge on the incorporation of the imports "into and with the mass of property in the country," and, therefore, "hostile to the power given to Congress to regulate commerce." The regulation of commerce was held to include the first sale for the reason that the first sale "is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part." It may be admitted that taxing the first sale makes importation for the purpose of sale more expensive, and to that extent impedes foreign commerce, but the same reasoning applies with equal force to first sales of original package goods brought in from sister-states.<sup>39</sup>

Between *Brown v. Maryland* and *Woodruff v. Parham*, the case of *Almy v. California*<sup>40</sup> was decided. The case involved a state tax on instruments in writing and was held invalid as applied to bills of lading issued in connection with the shipment of gold dust by water from San Francisco to New York. The case was held to be indistinguishable from *Brown v. Maryland*. The court held that if the tax on the sale in *Brown v. Maryland* was a tax on imports then the tax on the bill of lading, necessarily associated "with every shipment of article of commerce from the ports of one country to those of another" is in substance and effect a duty on the article and repugnant to the imports and exports clause.

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<sup>37</sup> It has been suggested that Mr. Chief Justice Marshall, who wrote the opinion in *Brown v. Maryland*, was talking about discriminatory state taxes and that the passage of the opinion at 449 reading, "We do not mean to give any opinion on a tax discriminating between foreign and domestic articles" was intended to read, "We do not mean to give any opinion on a tax *not* discriminating between foreign and domestic articles." See Margaret Spabr, *The Supreme Court on the Incidence and Effects of Taxation*, 10 SMITH COLLEGE STUDIES IN HISTORY, 142-46.

Professor Thomas Reed Powell, on the other hand regards the printed statement to be what Marshall intended and concludes from it that "Marshall would never have allowed a discriminatory tax on sales of imported goods even by retailers after the articles had ceased to be technical imports within his original package rule." See Powell, *Indirect Encroachment of Federal Authority* (1918) 32 HARV. L. REV. at 907.

<sup>38</sup> Clause 2 of Section 10 of Article I of the Constitution of the United States provides in part that, "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports . . ."

<sup>39</sup> Mr. Justice Thompson in dissenting in *Brown v. Maryland* contended that foreign commerce ended with the introduction of the goods. He also pointed out that if the tax on the first sale would stop all importations, merely exempting the first sale and allowing State taxation on the second sale is just as bad.

<sup>40</sup> (1857) 24 How. (65 U. S.) 169.

No mention was made in the case, however, of the tax being repugnant to the Commerce Clause.<sup>41</sup> Mr. Justice Miller, writing for the majority in *Woodruff v. Parham*, agreed with *Brown v. Maryland*, only if Mr. Chief Justice Marshall meant that a discriminatory tax on the sale of goods from sister-states would be as repugnant to the Commerce Clause as a discriminatory tax on the sale of goods from a foreign country. Mr. Justice Nelson dissenting, points out of the futility of trying to distinguish between the power to regulate foreign as opposed to interstate commerce.<sup>42</sup> However incapable of reconciliation the principles set forth in *Brown v. Maryland* and *Woodruff v. Parham* may be, both principles are recognized. In *Anglo-Chilean Nitrate Sales Co. v. Alabama*<sup>43</sup> a majority of the Court held that a state franchise tax upon a foreign corporation whose only business consisted of selling original package goods imported from foreign countries was repugnant not only to the imports and exports clause but also the Commerce Clause.<sup>44</sup>

After *Woodruff v. Parham* a number of state taxes with respect to first sales of original package goods brought in from sister-states were sustained.<sup>45</sup> In several cases, however, the rule laid down in *Brown v.*

<sup>41</sup> In *Woodruff v. Parham* attention was called to the fact that it must have "escaped the attention" of counsel on both sides and of the Chief Justice who delivered the opinion in *Almy v. California*, that the transportation was interstate and not foreign. It is possible, however, that after the decision in *Brown v. Maryland* no distinction was thought to exist between interstate and foreign commerce or between imports and exports from and to foreign countries and "imports" and "exports" from and to sister-States. Certainly the decision in *Brown v. Maryland* recognized none.

<sup>42</sup> Referring to the commerce clause, Mr. Justice Nelson says at 143-144 of the opinion "And in the clause conferring upon the Federal Government the general power over commerce, it is given, in terms 'to regulate commerce with foreign nations and among the several States.' The two are placed upon the same footing without any discrimination. The power is equally broad and absolute over the one as over the other. No distinction is made between foreign and interstate commerce, and why should the specific prohibitions to be found in the Constitution in relation to this subject receive a different interpretation in the absence of any words indicating any such distinction?"

<sup>43</sup> (1933) 288 U. S. 218.

<sup>44</sup> *Brown v. Maryland* and *Cook v. Pennsylvania* (1878) 97 U. S. 566 were relied upon by the majority. In dissenting, Mr. Justice Cardozo pointed out the discriminatory nature of the tax in both those cases. The Court in *Cook v. Pennsylvania* was aware of the discriminatory nature of the tax, but it does not appear that a different decision would have been reached had the tax been a non-discriminatory one.

<sup>45</sup> See *Kehrer v. Stewart* (1905) 197 U. S. 60, upholding a Georgia flat tax on a Chicago firm with a place of business in Georgia to which it sent meat to be distributed pursuant to orders previously obtained. Meat was also sent without a previous sale or contract to sell, and sold in the ordinary course of trade. In sustaining the tax the court held that the burden was on the taxpayer to show that the domestic business was merely incident to the interstate business; *Emert v. Missouri* (1895) 156 U. S. 296, upholding a flat license tax on peddlers of sewing

Maryland was applied.<sup>46</sup> The confusion was finally settled in *Sonneborn Bros. v. Cureton*,<sup>47</sup> which affirmed the rule of *Woodruff v. Parham* as to first sales of original package goods brought in from sister-states. The rule then is that a non-discriminatory state tax on the sale within a state, of goods still in the original package in which they were brought in from sister-states, is not in conflict with the Congressional power to regulate interstate commerce, but where the goods are imported from a foreign country a state tax on the first sale in the original package is not only a prohibited tax on imports, but is in conflict with the Congressional power to regulate foreign commerce.

#### DISCRIMINATORY TAXES

While the rule giving immunity to sales with a close causal connection with interstate transportation rests on the proposition that a purpose of the Commerce Clause is to keep free from state taxation, only those sales transactions which cause the interstate shipment of the particular goods sold therein, it is recognized that sales after arrival, of goods of out-of-state origin tend to cause interstate shipments generally. This being true, the court holds that sales after arrival, although not free from state taxation, are perpetually protected by the Commerce Clause, from the burden of a discriminatory state tax.<sup>48</sup>

Discrimination exists where a state seeks to tax sales of goods produced or manufactured outside the state, without imposing any tax on the sale of domestic goods, also where a state tax rate is higher on sales of goods of out-of-state origin, than on the sale of domestic goods.

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machines. The machines were of out-of-state origin but the peddler had them with him at the time sales were negotiated; and *Howe Machine Co. v. Gage* (1880) 100 U. S. 676, upholding a license tax on peddlers selling sewing machines, as applied to sales of machines of out-of-state origin. It does not appear that the machines were in the state at the time the sales were negotiated, but the case has been regarded as implying as much. See also *Magnano Co. v. Hamilton* (1934) 292 U. S. 40, and *Hart Refineries v. Harmon* (1929) 278 U. S. 499, both decided after *Sonneborn Bros. v. Cureton*, *infra* note 47.

In *Wagner v. Covington* (1919) 251 U. S. 95, a State license tax on dealers in soft drinks was upheld where the out-of-state seller regularly sent a wagon into the taxing State to sell to local retailers. It was conceded that that portion of the seller's business which consisted of deliveries in response to previous orders was not subject to state regulation, but it was held that the business subject to regulation was the business of itinerant vendor or peddler.

<sup>46</sup> See *Texts Co. v. Brown* (1922) 258 U. S. 466; *Bowman v. Continental Oil Co.* (1921) 256 U. S. 642; *Askren v. Continental Oil Co.* (1920) 252 U. S. 444; *Standard Oil Co. v. Graves* (1919) 249 U. S. 389. Compare *May Co. v. New Orleans* (1900) 178 U. S. 496; *Austin v. Tennessee* (1900) 179 U. S. 343 and *Cook v. County of Marshall* (1905) 196 U. S. 261.

<sup>47</sup> (1923) 262 U. S. 506.

<sup>48</sup> For discussion of the economic effect of State taxes generally see Margaret Spahr, *The Supreme Court on the Incidence and Effects of Taxation*, 10 SMITH COLLEGE STUDIES IN HISTORY.

The leading case is *Welton v. Missouri*<sup>49</sup> where the state sought to impose a license tax on peddlers of goods of out-of-state origin, but imposed none on peddlers of domestic goods. The Court pointed out that the power to regulate interstate and foreign commerce included the power to "prescribe rules by which it shall be governed, that is, the conditions upon which it shall be conducted, to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts and how far it shall be prohibited." It was next pointed out that "The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects<sup>50</sup> which are local in their operation, it has been held that the states may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority." If then the transportation and exchange of commodities between the states and with foreign countries "is of national importance and admits and requires uniformity of regulation," a fact which the Court says will not be denied, the elements of that transportation and exchange are not subject to state regulation at all. Here, however, the goods were already in the state and no longer subjects of interstate commerce, but the Court held that "the power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation until it has mingled with and become a part of the general property of the country and subjected like it to similar protection and to no greater burdens." This case lays down the rule that, notwithstanding the property has ceased to be a subject of interstate commerce, the commercial power of the federal government "continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. This power protects it, even after it has entered the

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<sup>49</sup> (1876) 91 U. S. 275.

<sup>50</sup> The instruments and subjects of interstate and foreign commerce may be persons, property, acts or businesses and occupations involved in carrying on the commerce. More specifically they may be divided into four classes, namely,

1. Persons or property (merchants, ship and train crews, vehicles and fuel) used in carrying on the commerce.
2. Persons or property (passengers, cargo or documents) which may be subjects of the commerce.
3. Acts done (such as transporting, communicating, negotiating, executing contracts, soliciting orders, making deliveries, installing) in conducting the commerce.
4. Businesses and occupations related to the conduct of commerce.  
State sales taxes are generally concerned with regulations of subjects of the 3rd and 4th classes.

state from any burden imposed by reason of its foreign origin." This rule has been consistently applied.<sup>51</sup> But the mere fact that a particular state statute imposes a tax with respect to goods of out-of-state origin does not warrant the conclusion that discrimination exists. The entire revenue system of the state may be examined to demonstrate that, notwithstanding one state tax may be directed against goods of out-of-state origin alone, no discrimination in fact exists.<sup>52</sup>

#### WHAT CIRCUMSTANCES CONSTITUTE CLOSE CONNECTION?

As has been shown, there may be so close a causal connection between a sales contract and interstate transportation that the sale is immune from non-discriminatory state taxes. Where the sales contract expressly requires such transportation of the goods sold, the case is clear.

Even in the absence of any express requirement, the position of the goods, and the purpose of the purchase may set up a definite causal connection between the contract of sale and the subsequent interstate transportation. Where a California buyer contracts to buy goods from a California merchant, the subsequent shipment of the particular goods from wherever they are at the time the order is placed, is unquestionably caused by the contract of purchase and sale, made in California. And similarly, if a California buyer in New York contracts to buy goods from a New York merchant, to be used by the buyer in California, it cannot be denied that the subsequent interstate transportation of the particular lot of goods, from New York to California, is caused by the contract of sale made in New York. The Court holds, however, that the connection is not close enough to immunize the sale against state taxation, where the facts show that it is immaterial to the buyer where the goods come from or that it is immaterial to the seller where the buyer subsequently transports the goods. Thus in *Superior Oil Co. v. Mississippi*,<sup>53</sup> the contract of sale required the seller to deliver the goods to the buyer's wharves in Mississippi, the state where the goods were at the time the contract was made.<sup>54</sup> It was known to the seller that the buyer intended immediately

<sup>51</sup> See *Bethlehem Motors v. Flynt* (1921) 256 U. S. 421; *Webber v. Virginia* (1881) 103 U. S. 344; *Tiernan v. Rinker* (1880) 102 U. S. 123; *Cook v. Pennsylvania* (1878) 97 U. S. 566 and *Ward v. Maryland* (1871) 79 U. S. 418.

<sup>52</sup> See *Hinson v. Vott* (1868) 8 Wall (75 U. S.) 148, upholding a state tax on the sale of liquor of out-of-state origin. It was demonstrated that this tax was in fact equal to a tax on the manufacture of domestic liquor. See also *Gregg Dyeing Co. v. Query* (1932) 286 U. S. 472, and *Interstate Busses v. Blodgett* (1928) 276 U. S. 245.

<sup>53</sup> (1930) 280 U. S. 390.

<sup>54</sup> The seller did receive a bill of lading upon delivery of the goods at the wharves, reading in part "Consigned to Gussie Fontaine Pkg. Co. [or other purchasers]. Destination: Grants Pass, La. By boat Frank Louis, owned and operated by Gussie Fontaine Pkg. Co.," and providing that title was to remain in the seller until delivery at the point of destination, all risks, however, on the purchasers. The Court made short work of this instrument, saying, "The document seems to have had no other use than, . . . to try to convert a domestic transaction into one of interstate commerce."

to transport the goods to a sister-state. The Court regarded the case as near the line, but held the sales subject to state taxation. The connection between the contract of sale was not sufficiently close. The goods after performance of the contract were in Mississippi, "in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes." The Court pointed out that "A distinction has been taken between sales made with a view to a certain result and those made simply with indifferent knowledge that the buyer contemplates that result." Some indication of what circumstances would have made the connection close enough to immunize the sale, is gleaned from the Court's statement that "There was a regular course of business known to the appellant [seller] that took the gasoline into another state and if by mutual agreement the oil had been put into the hands of a third person, a common carrier, for transportation to Louisiana, the mere possibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to keep the transaction out of interstate commerce."

The extremely tenuous nature of the distinction is shown by *Spalding v. Edwards*,<sup>55</sup> referred to by the Court in *Superior Oil Company v. Mississippi*. The sale there was between a seller in this country and a foreign buyer whose agent negotiating the purchase, was also in this country. The seller was required to pack the goods for exportation, mark them with the symbol of the foreign buyer and deliver them to a third party transportation company. From these facts the Court concluded that "There was not the slightest possibility" that the domestic agent of the foreign buyer to whom the sale was actually made, might change his mind about shipping the goods to a foreign country. The attempt to impose a federal sales tax on this sale was held to be in conflict with the constitutional prohibition of federal taxation of exports.<sup>56</sup> The sale was regarded as a step in exportation. In referring to *Spalding v. Edwards* in its opinion in *Superior Oil Company v. Mississippi*, the court necessarily recognized a similarity between the constitutional limitation on federal taxation of exports and the constitutional limitation on state taxation of sales closely connected with interstate shipments. Whether the court will in the future regard *Spalding v. Edwards* as controlling in state sales tax cases, is an open question. It is submitted that the language of *Superior Oil Company v. Mississippi*, favors such a conclusion. On the other hand we have the case of *Wiloil Corporation v. Pennsylvania* which, while recognizing the existence of the established principle that a sale requiring interstate shipment is immune from state taxation, in-

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<sup>55</sup> (1923) 262 U. S. 66.

<sup>56</sup> Clause 5 of Section 9 of Article I of the Constitution of the United States provides that, "No tax or duty shall be laid on articles exported from any State."

sists upon a very close causal connection between the contract of sale and the interstate shipment.

The *Willoil* case is also important in connection with the feeling expressed that there is some possibility that the Supreme Court might uphold a non-discriminatory state tax on interstate sales.<sup>57</sup> The opinion may indicate some such tendency, but the actual decision of the Court necessarily implies a contrary tendency; and the opinion itself in so far as it contains any such indication is subject to criticism for gratuitously raising a doubt concerning a question to which no answer intermediate yes and no is possible.

As to the decision in the *Willoil* case, the Court's analysis of the facts leading it to the conclusion that the sale did not "require or necessarily involve transportation across the state boundary," necessarily indicates the existence of a rule that the sales would not be taxable if they did require or necessarily involve such transportation.

Turning to the implications in the language of the opinion it may be helpful first to dispose of the Court's reference to the non-discriminatory nature of the tax in question. The Court said, "There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The Commerce Clause does not prevent taxation of goods by the state in which they are found merely because brought from another state, for that would unduly trammel state power of taxation and produce gross inequality and injustice." This language taken alone is no indication of any tendency to permit state taxation of interstate sales; on the contrary it simply takes cognizance of and excludes from application to the case, the rule mentioned above that a state tax, even though otherwise permissible is void if it levies a more burdensome tax on sales in connection with which interstate transportation occurred, because of that transportation. The Court continued, "The limitation appellant puts on section 4 would operate to the extent of 3 cents a gallon in favor of liquid fuels delivered, as in this case, from a place in another state against those delivered in Pennsylvania from sources in that commonwealth over routes wholly therein. And, if that section may not be constitutionally construed to tax the shipments here in question, then equally free from the burden must be liquid fuel transported by rail or truck from Pennsylvania sources to places of delivery in that state over any route not wholly therein." Now it is unquestionably true that the rule protecting from state taxation, sales that require interstate transportation, also compels states with sales taxes to favor such sales, and to discriminate against sales not involving interstate

<sup>57</sup> C. L. B. Lowndes, *State Taxation of Interstate Sales* (1935) 7 MISS. L. J., 223, n. 1.

transportation. The Court's decision does not, however, eliminate this condition, but at most reduces the number of sales to be favored. It should further be said that the situation last put by the court, where goods are transported from one point in the taxing state to another point therein but across state lines, is treated as an exception to the general rule.<sup>58</sup>

The disadvantage to intrastate business occasioned by the existing rule was faced with more candor by the Court in *Robbins v. Shelby County Taxing District*, where it remarked that, "If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the state, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different States."<sup>59</sup> That was nearly a half century ago, however, and "much water has run under the bridge." The existence of large commercial enterprises with business interests in many states and the volume of commercial traffic going on daily between states may produce state interdependence sufficient to dispel most of the fears of varied, discordant or retaliatory taxation, however well grounded those fears may once have been.

If compulsory favoritism toward interstate sales is as a matter of national policy thought undesirable there are at least three possible remedies:

1. Congress might itself tax interstate sales, as was suggested by the Court in *Robbins v. Shelby County Taxing District*.<sup>60</sup> Federal taxation

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<sup>58</sup> *Lehigh Valley R. R. v. Pennsylvania* (1892) 145 U. S. 192, involved the validity of a state tax with respect to receipts from transportation from a point in Pennsylvania through a portion of New Jersey and back to a point in Pennsylvania, it being conceded that the application of the tax to receipts from interstate commerce would be invalid. In upholding the tax the court said the question was "simply whether, in the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state renders that business foreign, which is domestic" and held, "We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk." See also *Ewing v. Leavenworth* (1913) 226 U. S. 464, and *Cornell Steamboat Co. v. Sohmer* (1915) 235 U. S. 549.

<sup>59</sup> 120 U. S. 498. At p. 501, the dissent argued that "If citizens of other States cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of Tennessee and in favor of those of other states. This could never have been intended by the legislature and I cannot believe the Constitution of the United States makes such a thing necessary." This seems to be the view expressed in the *Wilcoil* case, but the rule made the basis of the decision is irreconcilable therewith.

<sup>60</sup> *Supra* note 21.



of interstate sales would not remove discrimination as between local and interstate sales for at least two reasons: first, it would result in discrimination against interstate sales as between states without sales taxes; and, second, because of widely varying rates in states having sales taxes it would at best operate unevenly, favoring domestic commerce in some instances and interstate commerce in others.

2. Congress might consent to non-discriminatory state taxation of interstate sales. There is some question as to the constitutionality of such procedure, but there seems to be ample support for Congressional action of this kind. There is also the question of determining which states should tax a particular interstate sale. This jurisdictional question presented by the constitutional requirement that the taxable situs of the subject of the sales tax be within the jurisdiction of the taxing state, is a more formidable obstacle.<sup>61</sup>

3. The Supreme Court might take it upon itself to answer the broad question of policy presented and devise a remedy. It might for this purpose simply repudiate the long established rule that sales requiring interstate transportation are immune from non-discriminatory state taxation. This is the solution toward the adoption of which some tendency is indicated by the language quoted above from the opinion in the *Wiloil* case. Moreover, notwithstanding the otherwise apparently conclusive force of the considerations mentioned in support of the rule favoring interstate sales, one rather recent decision, if followed in its major implications, undermines the whole line of cases protecting interstate sales against state taxation, namely, the decision of *Gregg Dyeing Co. v. Query*.<sup>62</sup> The court there upheld a state tax on the storage for domestic use or consumption of gasoline brought into the state from sister-states, the amount of the tax being equal to that imposed by another statute upon local sales of gasoline. It is apparent so far as practical consequences go, that a general application of the principles laid down in this case would permit the states to circumvent completely the rule that interstate sales are immune from state taxation. The only limitation being that the tax on the storage for use or consumption shall not be discriminatory. The theoretical justification for the storage or use tax, notwithstanding its practical frustration of the rule protecting interstate sales, is difficult to answer. A state excise tax on a particular act may be perfectly valid although the act in question is part of a course of conduct, one element of which is the interstate transportation of goods,

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<sup>61</sup> For a discussion of the problems involved in the proposed federal statute to remove immunity from interstate sales, see C. L. B. Lowndes (1935) *State Taxation of Interstate Sales*, 7 MISS. L. J. 223.

<sup>62</sup> *Supra* note 45.

provided only that the act in question is sufficiently remote from the transportation that the tax on the act can be said to be not a tax on the transportation.<sup>63</sup> It is thoroughly settled that once the transaction, a necessary part of which was interstate transportation, has come to an end and the goods have become part of the goods of the state, their earlier interstate transportation ceases to be of any significance and the storage, sale or other use thereof may be taxed.

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<sup>63</sup> For taxable acts done in relation to the thing sold, but before interstate transportation, see *American Mfg. Co. v. St. Louis* (1919) 250 U. S. 459, where a state Manufacturer's Tax was upheld although it was measured by sales of the manufactured goods within and without the state. This was regarded as simply a method of arriving at the value of the manufactured goods; *Oliver Iron Mining Co. v. Lord* (1923) 262 U. S. 172, upholding a state tax on the business of mining and producing iron ore, measured by the value of the ore at the place where it is brought to the surface of the earth. It was established that practically all of the ore was mined to fill existing contracts with consumers outside the taxing state. The Court held that "Mining is not interstate commerce, but like manufacturing is a local business subject to local regulation and taxation. Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce"; *Hope Natural Gas Co. v. Hall* (1927) 274 U. S. 284, upholding a state occupation tax on the production of natural gas measured by the value of the gas produced, "as shown by the gross proceeds derived from the sale thereof by the producer." Here it was established that the gas was sold to customers outside the taxing state; and *Utah Power and L. Co. v. Pfost* (1932) 286 U. S. 165, upholding a state license tax on the generation of electricity. The electricity was transmitted across state lines. The Court pointed out the distinction between "generation" which was a local matter and "transmission" which was commerce.

For taxable acts done in relation to the thing sold after interstate transportation, see *Browning v. Waycross* (1914), 233 U. S. 16; also *General Railway Signal Co. v. Virginia* (1918) 246 U. S. 500 and compare *York Mfg. Co. v. Colley* (1918) 247 U. S. 21.