State Taxation of Interstate Commerce: An Analysis of Current Standards Promulgated by the United States Supreme Court - Department of Revenue v. Association of Washington Stevedoring Companies

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STATE TAXATION OF INTERSTATE COMMERCE: AN ANALYSIS OF CURRENT STANDARDS PROMULGATED BY THE UNITED STATES SUPREME COURT—DEPARTMENT OF REVENUE V. ASSOCIATION OF WASHINGTON STEVEDORING COS.

This, then, is an assessment of the State . . . tax system and its effect on interstate commerce in the United States . . . It is the picture of a system which works badly for both business and the States. It is the picture of a system in which the States are reaching farther and farther to impose smaller and smaller liabilities on more and more companies. It is the picture of a system which calls upon tax administrators to enforce the unenforceable, and the taxpayer to comply with the uncompliable.1

State and local taxation of interstate commerce involves a delicate reconciliation2 of the legitimate right of states3 to collect taxes from multistate companies with the rights of those firms to be free from unfair tax impositions.4 Such a delicate balance has shifted in favor of the state as local tax impositions, applied to an increasingly broad spectrum of so-called "interstate activities, 5 grow in number, complexity and dollar amount.6 These diverse tax impositions have become both unreasonably burdensome to the interstate firm and troublesome for the state to enforce.7


3. Everything said concerning state taxation is equally applicable to local taxation as well. The reader can rightfully assume that even though the phrase "local taxation" is not mentioned it is, in fact, intended.

4. Miller, Current Controversies in State and Local Taxation, 33 N.Y.U. Inst. on Fed. Tax. 897, 898 (1975). In J. Hellerstein & W. Hellerstein, State and Local Taxation, Cases and Materials (4th Ed. 1978), [hereinafter cited as State and Local Taxation], the authors characterized this balancing as a "conflict between the taxing powers and revenue needs of the States and the requirements of a unified, national economy . . . ." Id. at 237.

5. State and Local Taxation, supra note 4, at 11-12. For a percentage distribution of state tax collections, see id. at 13.

6. Id. at 11-15. Between 1965 and 1975 State and local general expenditures increased from $86.6 billion to $266.2 billion—a 200% increase. Id. at 11.

7. For the larger firm, the complexities of multistate tax laws are time-consuming and irritating and result in an uneconomical way for it to determine the distribution of its tax payments. For the vast number of small and moderate-sized companies which carry on their business across state lines, the system simply has no relation to their ability to cope with it. Willis Committee Report, supra note 1, at 596.
The inherent complexities involving compliance with and enforcement of such taxes have been exacerbated by a paucity of unifying federal legislation,\(^8\) inconsistent interpretations of a vague federal jurisdictional standard\(^9\) and a multiplicity of judicial standards applied to the division of interstate income.\(^{10}\) Based on such conflicting considerations as the revenue requirements of the State, the goal of an unburdened interstate commerce and the reality that the economy has become a basically sophisticated multistate national market,\(^{11}\) a multiplicity of judicial doctrines\(^{12}\) has evolved, an evolution described by the business community and commentators alike as inadequate, unprincipled and "devoid of concrete judicial rules . . ."\(^{13}\) and the Court itself as neither "consistent or reconcilable."\(^{14}\)

As a result many of these state rules are disregarded. Non-compliance in filing is rampant in that most companies "in spite of a legal system in which companies are often required to file returns in States in which they maintain sales offices, or inventories of goods . . ., the typical interstate company pays income taxes only where it has a factory, an administrative office, or a warehouse."\(^{15}\) Non-compliance is also epidemic in the computation of tax liability where interstate companies do file. Deviations from the State's methods are common as most companies use the figures computed for federal income tax figures.\(^{16}\) Such non-compliance also occurs in the treatment of various items of income and expenses for the same reason.

In sum, the system, in practice is highly inequitable as non-compliance has become the accepted norm for interstate companies.\(^{17}\) Therefore, the burden of non-compliance falls upon the wholly local company which is required by the system "to pay on its entire taxable income."\(^{18}\) Interstate companies, however, due to complexities and non-compliance avoid their fair share "of the tax which would be required of them by a more coherent set of rules."\(^{19}\)

8. The multistate tax compact may moot this criticism. Any legislation unifying the state impositions, whether federal or not, is a welcome solution. See *Delicate Uniformity*, supra note 2.

9. For a discussion of this standard see text accompanying notes 49-93 supra.


11. Congress has recognized this reality, although it has not acted upon it. In the *Hearings on S. 292, S. 1245, S. 2092 and H.R. 2092 Before the Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance, 93d Cong., 1st Sess.* 86 (1973), the Chamber of Commerce, that most august and conservative body, actually favored federal legislation in this area.

Advances in communication and transportation in this country have brought us to a point where a huge segment of American business is operating in interstate commerce.\(^{16}\) at 87.


13. *Id.* at 394.

14. Miller Bros. Co. v. Maryland, 347 U.S. 340, 344 (1954). The Court also stated that little constructive discussion can be found in responsible commentary as to the grounds on which to rest a state's power to reach extraterritorial transactions or nonresidents with tax liabilities. Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements . . . consistent or reconcilable.

*Id.* at 344.
Although commentators have contended that Congress should take the initiative in resolving the complexities in this area, the Supreme Court appears determined to create a balance between the competing interests of the State's revenue needs and the enhancement of an unburdened free flow of commerce. The analysis employed in several recent decisions, reiterated and synthesized in Department of Revenue v. Association of Washington Stevedoring Cos., demonstrates that the Court has finally arrived at consistent and reconcilable standards delineating the Commerce and Import-Export Clause limitations on state taxing power of interstate commerce.

This Note will analyze the specific tests set forth in Washington Stevedoring's Commerce Clause and Import-Export Clause analysis with a particular focus on the scope of protection such tests will provide interstate taxpayers. The rationale or policy considerations underlying these tests will be evaluated. Finally, it will be suggested that confusion in the field of state taxation of interstate commerce can be only partially solved by judicial decision.

Facts and Background of Washington Stevedoring

The levy in question was Washington's one percent business and occupation tax, amended in 1974 to specifically include the stevedores. The tax provisions, codified in typically convoluted fashion, provide:

There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

In Freeman v. Hewitt, 329 U.S. 249 (1946), the Court again recognized that any attempt to harmonize the many decisions in the area "would neither clarify what has gone before nor guide the future." Id. at 252.


19. This thesis was correctly proposed in W. Hellerstein, State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?, 75 MICH. L. REV. 1426, 1426-27 (1977) [hereinafter cited as Unified Approach].

20. The tax provisions, codified in typically convoluted fashion, provide:

Upon every person engaging within this state in any business activity other than or in addition to those enumerated in . . . as to such persons the amount of tax on
State’s first attempt, in 1937, to impose the tax on stevedoring activity was held by the United States Supreme Court to be a violation of the Commerce Clause. The stevedoring companies, attempting to retain their exemption from the tax, sought a declaratory judgment from a Washington Superior Court that the amendment, Rule 193D, violated both the Commerce and Import-Export Clauses. The declaratory judgment was granted.

Upon direct appeal the Washington Supreme Court affirmed the judgment of the Superior Court on the basis of the Stevedoring Cases and concluded that “[t]he United States Supreme Court obviously views stevedoring as an integrated inseparable part of commerce by sea, and hence absolutely protected.” Upon appeal, the United States Supreme Court upheld the validity of the tax. Adhering to the principles set forth in Complete Auto

WASH. REV. CODE § 82.04.290 (1976).

21. Revised Rule 193, Part D, WASH. ADMIN. CODE 458-20-193 D. Revised Rule 193 D restored the original scope of the tax. 98 S.Ct. at 1393. The original Rule, Rule 198 of the Rules and Regulations Relating to the Revenue Act of 1935, allowed taxpayers a deduction for certain income received from interstate and foreign commerce. Income from Stevedoring was not deductible. However, in Puget Sound Stevedoring Co. v. State Tax Comm’n, 302 U.S. 90 (1937), the United States Supreme Court invalidated the Stevedoring exception, the result being that income from Stevedoring was to also be deductible. Such a deduction was effective until the 1974 passage of Revised Rule 193 D. 98 S.Ct. at 1394.

22. The business of Stevedoring as described by the Department of Revenue is as follows:

The Stevedores’ contract with ship owners to load or unload vessels through the Stevedores’ own employees, controlling and directing the work themselves. 302 U.S. at 91. Vessels are unloaded by moving the cargo from the ship’s hold to the ‘first place of rest’ on the dock; and are loaded by moving the cargo from the place of rest on the dock to the ship’s hold. . . . More precisely, stevedoring consists of taking cargo from a place on the pier wholly within the territorial limits of the State of Washington and . . .’storing it properly for safety and for handling in or on the outgoing vessel along side, or of similarly unloading a vessel on its arrival’. . . . The vessels and cargo are moving exclusively in foreign or interstate commerce.”

Brief for Petitioner at 4, The Dep’t of Revenue v. Ass’n of Washington Stevedoring Cos., No. 76-1706 (1976).


24. 88 Washing. 2d 315, 559 P.2d 997 (1977). The Superior Court, considering itself bound by the Stevedoring Cases, declared Rule 193D invalid to the extent it related to stevedoring in interstate or foreign commerce.

25. Id.


27. 88 Wash. 2d at 318, 559 P.2d. at 998. Two dissenting justices, however, found no violation of the Import-Export Clause on the ground that the State had taxed only the activity of stevedoring, not the goods themselves. They concluded that, even if stevedoring was considered part of interstate commerce, the tax was valid because it did not discriminate against importing or exporting, impair transportation, impose multiple burdens, nor regulate commerce. 88 Wash. 2d at 320-322, 559 P.2d at 999-1000. The dissent, relying on the Complete Auto and Michelin precedents, correctly considered the Stevedoring Cases overruled. 88 Wash. 2d at 320-322, 559 P.2d at 999-1000. (Utter J., dissenting).
Transit Inc. v. Brady and Michelin Tire Corp. v. Wages, the Court concluded that the tax, imposed upon the privilege of conducting interstate business, is a violation of neither the Commerce or Import-Export Clauses.

THE COMMERCE CLAUSE ANALYSIS

In upholding the Washington business and occupation tax imposed on the activity of Stevedoring, the Washington Stevedoring Court reinforced the rule stated in Complete Auto that under appropriate conditions a state may directly tax the privilege of conducting interstate business. According to the Court, the Commerce Clause was not drafted to relieve those engaged in interstate commerce from a just share of the state tax burden even though it increases the cost of their doing business.

Applying the policy that interstate commerce should pay its way, the Washington Stevedoring Court proceeded to dismantle both the holdings and the underlying principles of the Stevedoring Cases. The earlier stevedoring tax was invalidated solely because it allegedly burdened the privilege of engaging in interstate commerce. The Court considered this approach no longer viable considering that Complete Auto permitted a State to tax directly such a privilege.

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30. Complete Auto Transit v. Brady, 430 U.S. 274 (1977), should be regarded as not only solving "the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities related to a corporation's operation of an interstate business," Id. at 274, but as providing as new conceptual framework for the analysis of state taxation of interstate commerce in general. See Unified Approach, supra note 19, at 1427.
31. In Complete Auto, Mississippi's levy of a gross receipts tax on the privilege of doing business within the state was imposed on the activity of transporting motor vehicles manufactured outside Mississippi. For purposes of the decision the Court assumed these activities to be interstate commerce. 420 U.S. at 276 n.4. The Court rejected both the form and philosophy that interstate commerce is absolutely protected from state taxation. Regardless of what form the tax would take it would still be valid. If a state calls "its tax one on 'net income' or on the 'going concern value' . . ." it would not be invalidated. Id. at 288. The rule of Spector Motor Service, which deemed a state tax on the "privilege of doing business" per se unconstitutional as rejected. Moreover, the Court stated:

There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect.

Id. at 288.

The "forbidden effect" would be present if:

the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned.

Id. at 287.

32. See note 26 supra.
34. See note 26 supra.
35. 98 S.Ct. 1396.
Secondly, the Court rejected the Stevedoring Cases' contention that a direct privilege tax would "threaten multiple burdens" of interstate taxation. Characterizing such an argument as "an abstraction", the Court in tautological fashion, stated that if a tax is levied only on the services performed within the state, the tax is, by definition, properly apportioned and multiple burdens cannot occur.

The stevedoring companies also attempted to preserve the distinction between the so-called movement cases, involving taxation on transport, and the non-movement cases, involving taxation on commerce that does not move goods. Tax immunity had previously been broader in scope in movement cases than in non-movement cases. The Court rejected this argument implying that the distinction itself was no longer meaningful as Complete Auto, a movement case, involved no immunity at all.

The Court also swept away the spurious dichotomy involving the direct-indirect taxation distinction. The companies attempted to distinguish the tax in Complete Auto as permissible "indirect" taxation of interstate commerce because the activities concerned only involved the intrastate movement of vehicles from a Mississippi rail head to Mississippi dealers. The Washington tax, contended the companies, was an unconstitutional "direct" tax upon interstate activity itself. The Court discarded the distinction between direct and indirect taxation of interstate commerce both specifically on the facts of the case and generally with respect to all Commerce Clause analyses.

In rejecting the privilege, multiple burdens, movement and direct-indirect arguments, the Court signaled its intent to replace these rather vague constitutional constructs with more concrete standards. Instead of the rejected abstractions, constitutionality under Commerce Clause "depends upon the

36. Id. at 1398 citing Complete Auto Transit v. Brady, 430 U.S. at 288. The Court acknowledged that such a tax is burdensome to an interstate activity but stated that all tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity.
37. 98 S.Ct. 1397.
40. See, e.g., Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) (New Mexico tax on publishing newspapers and magazines).
42. Id.
43. 98 S.Ct. 1398. The Court dismissed the Respondent's argument on two factual grounds: in Complete Auto the Court expressly assumed that the movement of vehicles from the out-of-state manufacturer to the in-state dealer was an interstate "segment" of activity. Moreover, even granting that the Stevedoring activity to be interstate commerce, it "occurs completely within the State of Washington..." Id.
44. 98 S.Ct. 1399.
practical effect of the exaction." Interstate commerce, the Court held, is to bear its fair share of the state tax burden, the determination of which involves four factors: substantial nexus with the State, fair apportionment, nondiscrimination against interstate commerce and a fair relation to the services provided by the State.

In applying these standards, the Court found no facts to indicate that the Washington tax obtained more than its fair share. Substantial nexus was demonstrated by the fact that the companies conduct their entire stevedoring operations within the State. The tax was fairly apportioned as it was levied solely on the value of the loading and unloading within Washington. The tax did not discriminate against interstate commerce since the one percent rate applied to virtually all Washington businesses rendering services. Finally, the Court, in a rather conclusory and ephemeral manner, found "nothing in the record [to suggest] that the tax is not fairly related to services and protection provided by the State."

Other than this cursory application to the specific facts, the Court did not further delineate the boundaries of these standards. Therefore a detailed historical analysis of the scope and underlying policy considerations of the four Commerce Clause factors applied in Washington Stevedoring is necessary if interstate taxpayers are to be properly appraised of their potential liability for or protection from inevitably increasing state and local impositions.

**Substantial Nexus and Fair Relation to Services Provided: The Due Process Limitations**

In Washington Stevedoring, the Court reiterated the principle that a tax will be sustained so long as the activity to be taxed has a substantial nexus with the State. This nexus requirement is the threshold precondition.

45. Id. (emphasis added).
46. Id.
47. Id.
48. 98 S.Ct. 1400.
49. The economic and qualitative analysis offered by the Court to sustain nexus would also apply to the fourth requirement of Washington Stevedoring: fair relation to the services. If a proper nexus is shown it would seem logically impossible to show that the tax is not fairly related to the services provided by the state.
50. 98 S.Ct. 1399.

In order to tax any transaction, the Due Process Clause requires that a State show a sufficient "nexus between such a tax and transaction within a state for which the tax is an exaction."

377 U.S. at 449-50.

The Willis Committee Report, critically but accurately, described the issue:

In determining tax liability, the threshold question for every business which crosses State lines is that of jurisdiction. Is the company required to file a return in the State? The jurisdictional provisions of most State tax laws do very little to help the somewhat reluctant bride across the threshold. Phrases such as "doing business"
on a state's power to tax. However, the parameters of this jurisdictional connection have long perplexed the taxing authorities, taxpayers and commentators alike.\textsuperscript{53}

A precise definition of what activities constitute sufficient nexus in the constitutional sense is still lacking. The Congressional attempt to define "nexus", is framed in language stating "what is not, rather than what is, a sufficient nexus."\textsuperscript{54} The Congressional definition provides in part:

No State, or political subdivision thereof, shall have the power to impose ... a net income tax on income derived within such State ... by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable years are either, or both, of the following:

(1) The solicitation of orders by such person, or his representative, in such State for sales of tangible personal property which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).\textsuperscript{55}

Framed in exclusionary language, this jurisdictional standard results in a broad interpretation of nexus,\textsuperscript{56} in that many activities are ruled to be more than mere solicitation because they do not fall exactly within the federal definition.\textsuperscript{57} Consequently, prediction of tax liability is as difficult now as it was prior to the enactment of federal legislation.\textsuperscript{58}

and "deriving income" are construed by various administrators to produce different results where the company has anything less than a factory, administrative office, or warehouse in the State; ... In some states the company which has its salesmen make collections and investigate credit becomes liable to file an income tax return, while in other states it has no liability even though its activities are more extensive. In some States a company is liable because it employs a telephone answering service in conjunction with the solicitation of orders by its salesman, while in other states it has no liability even though it maintains a full-fledged sales office in the State.

\textsc{WILLIS COMMITTEE REPORT, supra note 1, at 594.}

\textsuperscript{52} WILLIS COMMITTEE REPORT, supra note 1, at 594. One commentator raised the interesting possibility that the nexus question is actually a disguised apportionment question. Id. at 162. However, the \textit{Washington Stevedoring} test, separating the nexus and fair apportionment elements, would indicate that such a distinction is more than illusory. We are assuming, therefore, that before the issue of fair apportionment can be resolved, the threshold jurisdictional requirement must be satisfied.

\textsuperscript{53} See \textsc{The 1974 Term, supra note 15, at 161-67.}

\textsuperscript{54} \textsc{Delicate Uniformity, supra note 2, at 233.}

\textsuperscript{55} Pub. L. No. 86-272, 15 U.S.C. § 381, 73 Stat. 555 (1959), in which Congress has declared that the mere solicitation of orders in a State by a business which accepts, offers and ships goods from outside the state is not enough to provide the jurisdictional nexus.

\textsuperscript{56} WILLIS COMMITTEE REPORT, supra note 1, at 595.

\textsuperscript{57} Id. at 594.

\textsuperscript{58} Id.
Confronted by the lack of a meaningful federal jurisdictional standard, both before and after passage of federal legislation, the Supreme Court developed its own mechanism "for determining whether state tax power has been exerted solely over receipts that arise from the taxpayer's activities within the taxing State." The mechanism involved was the nexus requirement, which in reality is a composite of tests fashioned over a period of 25 years.

The seminal decision involving jurisdictional nexus is considered to be Norton Co. v. Department of Revenue, which involved an Illinois Occupation Tax, imposed on the gross receipts of those persons engaged in the business of selling tangible personal property at retail. Local over-the-counter sales were acknowledged by the company to be constitutionally taxable. However, the company contended that its other sales were specifically exempt as interstate commerce. The Court found that the company's entrance into the state to do local business was a sufficient "local incident" to bring the transaction within the state's taxing power. Presuming all sales to be local, the Court stated that "only by showing that particular transactions are dissociated from the local business and [are] interstate in nature . . ." can the taxpayer avoid the tax. According to the Court, the taxpayer failed to meet this burden of showing that the particular transactions were dissociated in that it had "not established that [the] services as were rendered by the [local] office were not decisive factors in establishing and holding this market."

The specific economic criteria of Norton was again used in General Motors v. Washington—but was given a much broader interpretation. The tax in question, Washington's business and occupation tax, was applied to an out of state wholesaler and measured, as in Norton, by unapportioned gross receipts derived from sales of motor vehicles parts delivered in the state. General Motors contended that the power to tax receipts of sales of items delivered to the state from out-of-state locations was a violation of due process.

59. Id. at 162.
60. 340 U.S. 534 (1951).
61. The manufacturer, a Massachusetts corporation, under consent of Illinois, operated a branch office and warehouse in Chicago from which retail sales were made. The Illinois tax fell upon the gross receipts of all Norton's sales to Illinois customers including (i) sales based on orders or shipments which at some point utilized the Chicago outlet; (ii) sales based on orders from Illinois sent directly to Massachusetts and filled by direct shipment to the Illinois customer; and (iii) sales over the counter. 340 U.S. at 536.
62. Id. at 535.
63. Id. at 537.
64. Id.
65. Id. at 538. However, orders filled in Massachusetts and sent by direct shipment to Illinois customers were held to be "so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business . . . ." Id. at 539.
67. Id. at 437-38. The taxpayers' activities involved promotional and training work carried on by its local employees, maintenance of a warehouse from which sales were sold to local
Embedding its response in a quotation from Norton, the Court found that General Motors "has not established that such services as were rendered . . . [through in-state activity] were not decisive factors in establishing and holding this market." 66 The corporation could not "channel its operations through such a maze of local connections . . ." 69 and still maintain immunity to the tax. The "bundle of corporate activity" which General Motors had engaged in Washington was characterized as "emeshed in local connections . . ." and was sufficient to satisfy the nexus requirement. 70

One commentator who considered General Motors a retreat from the "manageable criterion" 71 of Norton, characterized the General Motors test as a metaphysical substitution. 72 Such a criticism is unwarranted because the underlying philosophy, the approach used in Washington Stevedoring, is the same in both instances. In Norton, the sufficiency of the relationship between local activity and the imposition was measured by whether the transactions producing the receipts were associated with such activities. 73 Such association was further analyzed in economic terms to mean that the activities were "decisive factors in establishing and holding [the] market." 74 In General Motors such "association" was also demonstrated by the economic reality that the in-state company activities were decisive in establishing and holding the Washington market. Although the language used may have been "metaphysical", the underlying philosophy was evident enough: a multi-state company whose activities within a state are economically significant in establishing and holding that local market evidences sufficient jurisdictional nexus to satisfy due process.

Under this extremely broad interpretation of nexus 75 it is not necessary to match local activity to interstate revenue on a transaction-by-transaction
basis. Instead, the qualitative aspects of local activity are to be dispositive.\textsuperscript{76} There need “not be any direct revenue-producing functions within the State in order for the Court to find a sufficient link between the in-state activities and the tax imposed.”\textsuperscript{77} Such a “link” was described by the Washington Stevedoring Court as the state’s “significant interest” in exacting its fair share of the cost of state services.\textsuperscript{78} Since the stevedores conducted their entire operations within Washington, the Court concluded, and logically so, that the services and protection provided by the state were sufficiently “obvious”\textsuperscript{79} to justify nexus, even though such services were not demonstrated to have been specifically provided for the stevedores.

It appears that the Court has adopted a form of economic analysis, based on the qualitative nature of the activities being taxed, to determine whether a sufficient nexus exists. It is not necessary that a direct transaction-by-transaction quantitative correlation be made between interstate revenues and the local activities to be taxed. All that need be shown is a minimum connection between the taxpayer and the state. With minor exceptions,\textsuperscript{80} such

because the in-state activities were so thin and inconsequential as to make the tax on activities occurring beyond the borders of the State one which has no reasonable relation to the protection and benefits conferred by the taxing State. . . .” \textit{Id.} at 562. The Court rephrased this issue to read: “whether the state has given anything for which it can ask return.” \textit{Id.} quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1945).

Characterizing the question as “frivolous,” the Court found with almost no analysis that the company’s lone employee within the State helped create and maintain the valuable contractual relation between the taxpayer and its in-state customer. \textit{Id.}

\textit{76. The 1974 Term, supra} note 15, at 167. The State, in fact, asserted that the nature of due process limitation is qualitative and not quantitative:

These due process requirements are qualitative and not quantitative; . . . While differing as to detail and quantity. Martinson’s in-state activities and that of visiting personnel are not qualitatively distinguishable from the activities of General Motors in regard to the wholesale sales at issue. . . .

\textit{77. The 1974 Term, supra} note 15, at 166. This approach was further refined in National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977), in which nexus, according to the taxpayer, was asserted to require a relationship between the seller and the taxing State, and the activity sought to be taxed and the seller’s particular activity within the state. \textit{Id.} at 560. The Court rejected such a distinction and stated that:

the relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller’s activities carried on within the State, but simply whether the facts demonstrate ‘some definite link, some minimum connection, between [the State and] the person . . . it seeks to tax.’

\textit{Id.} at 561 \textit{citing} Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954). (emphasis added by the Court). The Court found that “definite link” in the municipal services and protection afforded the Society’s two offices within the state. \textit{Id.} at 561. Regardless of the nature of the activities emanating from those offices—whether they be advertising solicitations or sales—the same municipal services are provided.

\textit{78. 98 S.Ct. at} 1398.

\textit{79. Id. at} 1399.

\textit{80. See, e.g.}, National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 758 (1967) (the taxpayer’s \textit{only} communication or contact with customers within the state was by
minimal connections exist whenever a company takes advantage of the economic milieu\textsuperscript{81} within the state to further its corporate goals. The state will be entitled to tax the company because the benefits it provides are a substantial and necessary economic factor\textsuperscript{82} in the success of its operations. Such benefits involve the maintenance of services and protection essential to the production or marketing of goods,\textsuperscript{83} the ownership of property or the employment of personnel.\textsuperscript{84}

In conclusion, the nexus requirement, as a threshold precondition, affords little limitation on the state's taxing power. The requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,"\textsuperscript{85} has been and will continue to be broadly applied in a variety of taxing circumstances.\textsuperscript{86}

\textit{Fair Apportionment}

Once the threshold nexus has been established the state or locality is faced with the problem of how much of the taxpayer's revenue is to be

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82. 238 Or. at 346, 395 P.2d at 130.
83. 238 Or. at 346, 395 P.2d at 130. The basic premise is that a taxpayer should have to pay the services and protection that it has enjoyed.
84. E. Corrigan, \textit{Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response}, 29 VAND. L. REV. 423, 428 (1976). In addition to active sales solicitation within a state, any one of the following activities could subject an out-of-state seller to the jurisdiction of the taxing state: the ownership of rental of any property; salespeoples' performance of minimal services beyond solicitation; or the performance by an agent of the seller of consulting services relative to the property sold to the in-state customer. Id. at 428. This indicates that virtually any activity beyond the solicitation of orders defined in Pub. L. 86-272 confers taxing jurisdiction upon the state in which the activity takes place. Id. at 429.
86. Substantial nexus, a jurisdictional question is, or should be no more mysterious a concept than that applied in the various long arm statutes promulgated by most jurisdictions. The concepts are stated in the same fashion and should be similarly applied in both the procedural area and the state taxation field. See, e.g., Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975) (excise tax on privilege of doing business upheld even if corporation was not incorporated within state but owns property and is qualified to do business within the state); Scripto, Inc. v. Carson, 362 U.S. 207, 211 (1960) (nexus upheld where foreign corporation used wholesalers as independent contractors to solicit orders even though salesmen were not regular employees and were not full time); International Shoe Co. v. Washington, 326 U.S. 310 (1945) (maintenance of an office not necessary in order to provide due process); General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944) (use tax duty of out-of-state seller to collect a state use tax upheld where the foreign corporation maintained no state office but merely sent salespersons into state to solicit orders filled by out-of-state headquarters); International Shoe Co. v. Fontenot, 236 La. 279, 107 So.2d 640 (1959), \textit{cert. denied} 359 U.S. 984 (1959) (tax upheld when activity involved regular and systematic solicitation of orders by salespersons); Brown Forman Distillers Corp. v. Collector of Revenue, 234 La. 651, 101 So.2d 70 (1958), \textit{cert. denied} 359 U.S. 28 (1958), (nexus upheld when the only activity was the presence of representatives to receive orders and promotional representatives).
levied upon without violating the Commerce Clause. It is a problem "of identifying the constitutionally appropriate tax base." 87 Conflicting methods of dividing the revenue of multistate corporations could result in the taxation of more than 100% of the taxpayer's base, an oppressive burden substantially exceeding that of the single state taxpayer. 88 However, diversity in state and local tax apportionment which results in undertaxation of a multistate enterprise is also unfair to the government and to competitive intrastate business. 89 The proper balance is "to furnish each State a fair share of the corporation's tax payment." 90

Fair apportionment then, the second factor in the Washington Stevedoring analysis, requires that the taxpayer be free from oppressive multiple taxation. Upon further analysis this can be delineated as: first, a fairly apportioned levy is one which taxes the local aspects of interstate commerce even though directly taxing the privilege to engage in interstate commerce, 91 or a tax base divided by some method or formula attributing a proportional share of the taxpayer’s gross receipts to the taxing state, 92 and secondly, a fairly

88. WILLIS COMMITTEE REPORT, supra note 1, at 157.
90. WILLIS COMMITTEE REPORT, supra note 1, at 158.
91. 98 S.Ct. at 1397 citing Complete Auto Transit, Inc. v. Brady, 430 U.S. at 288-89.
92. 98 S.Ct. at 1398. As a result of the multiple taxation doctrine, the Court will sanction those levies which are reasonably designed to measure the state's nexus with the activities taxed. STATE AND LOCAL TAXATION, supra note 4, at 243. Justice Stone, in a case involving a gross receipts tax on a publisher, stated that the tax could be supported "in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business. . . ." Westerm Live Stock v. Bureau of Revenue, 303 U.S. 250, 258 (1938).

When dealing with property, income and capital stock taxes, "the states have historically relied on apportionment formulas to divide the tax base of an interstate enterprise equitably among those jurisdictions having a legitimate claim to part of that base." The 1974 Term, supra note 15, at 168. See also WILLIS COMMITTEE REPORT, supra note 1, at 113.

These formulas used to divide tax base among the States, particularly those used for gross receipts taxes, have become a major source of controversy between the States and the multistate businesses. Historical Perspective, supra note 89, at 346. However, the Court has declined to define permissible methods of dividing income or to resolve conflicting methods of apportionment, "so long as each state's method, considered on its own merits, is not repugnant to the Constitution." Id. at 347. In only three cases has the Court found a method or formula "repugnant" and these cases were decided on narrow grounds. Id. at 349. In 1931 in Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123 (1931), the Court set aside, as unconstitutional, a state income tax apportionment made versus the manufacturer. However, "the Court never again has invalidated a state tax apportionment of a corporate income tax, or a franchise tax based on net income, of a manufacturer or mercantile company." Historical Perspective, supra note 89, at 348. In Norfolk & Western Ry. Co. v. Missouri St. Tax Comm'n, 390 U.S. 317 (1968), the Court concluded that the state had violated both the commerce and due process clauses in applying the state's rail mileage apportionment method to the taxpayer's rolling stock in the state. 390 U.S. at 323. In General Motors Corp. v. District of Columbia, 380 U.S. 553 (1965), the Court invalidated the single factor sales receipts formula used by the District of Columbia in determining the net income of General Motors attributable to the District. The
apportioned tax can sustain a risk, a possibility of multiple burdens, but not a multiple burden "in fact".\textsuperscript{93}

\textit{Fair Apportionment: Taxation of the Local Aspects of Interstate Commerce}

Historically, the Court was highly restrictive of the State's tax impositions on interstate commerce. It was generally held that state taxation, in any form, levied on interstate commerce, was an unconstitutional encroachment upon federal authority.\textsuperscript{94} This restrictive philosophy was modified as the Court developed a "local incidents" test which allowed a local imposition if the tax attached to the goods before they entered the stream of commerce.\textsuperscript{95} However, a state imposition, even though totally local in application, was considered unconstitutional if it directly affected interstate commerce;\textsuperscript{96} those taxes which were held to have only an indirect effect on interstate commerce were upheld.\textsuperscript{97} The view that interstate commerce was activity free from direct taxation was repudiated by the multiple taxation doctrine announced in \textit{Western Live Stock v. Bureau of Revenue}.\textsuperscript{98} Interstate enterprises were no longer considered immune from taxation merely because they engaged in interstate commerce. Instead, a tax would be invalid "only if the Court though that [it] subjected interstate commerce to a risk . . . not borne by local commerce."\textsuperscript{99}

Company's sales receipts were established by its sales to local dealers, all of which had been manufacturers outside the District. However, the Tax Comm'n. was authorized by statute to prescribe only methods of apportionment that determined the "portion of the net income of the corp . . . fairly attributable to . . . trade or business carried on . . . within the District." \textit{Id}. at 554-55.

In sum, the Court is reluctant to interfere with the technical problems of administering a complex apportionment system. \textit{Historical Perspective}, supra note 89, at 348. To ensure that the Court refrain from these technical tax mediations, it imposed a restrictive burden on the taxpayer to be met in challenging the validity of an apportionment. The taxpayer must show an actual burden resulting in multiple taxation. This burden precludes a taxpayer from asserting a multiple taxation argument if the tax was apportioned by formula, as formulas are presumed to be fairly apportioned. Only if the imposed tax were unapportioned could the taxpayer realistically assert the multiple taxation argument and then only if a "burden in fact" could be shown. \textit{See} notes 105-123 and accompanying text \textit{infra}.


94. \textit{Willis Committee Report}, supra note 1, at 1038.

95. In \textit{American Manufacturing Co. \textit{v}. St. Louis}, 250 U.S. 459 (1919), the Court upheld a gross sales tax imposed on manufactured goods on the grounds that the tax had only an "indirect" effect on interstate commerce. \textit{Id}. at 464.


98. 303 U.S. 250 (1938).

Although the primary concern of this test was with the practical analysis of arriving at an apportioned tax, rather than characterizing it as direct or indirect, the Court did not, until Complete Auto, begin to eliminate this rather nebulous distinction. Moreover, Complete Auto only implicitly considered the classification of a direct tax, as distinguished from indirect tax, to be irrelevant. It was left to the Washington Stevedoring Court to explicitly discard the indirect-direct distinction:

"With the distinction between direct and indirect taxation of interstate commerce thus discarded, the constitutionality under the Commerce Clause of the application of the Washington business and occupation tax to stevedoring depends upon the practical effect of the exaction."

The multiple taxation analysis entails the narrowing of what constitutes an interstate transaction, a "natural result of measuring the interstate or local character of the business or activities taxed by the yardstick of multiple taxation." A gross receipts tax such as the Washington business and occupation tax, lacking a specific formula for apportionment, nevertheless will not impose upon interstate commerce the risks of multiple taxation because by definition the tax is applied only to the local aspects of the interstate activity. The Washington tax was considered fairly apportioned as it was imposed upon the value of the services performed within the state, even though the activity of stevedoring was specifically characterized as interstate commerce.

**Fair Apportionment: Risks of Multiple Taxation**

Originally, the mere risk or possibility that either a tax apportioned by formula or an unapportioned tax would impose multiple burdens on interstate commerce was sufficient to justify invalidation. As originally formulated the rule was framed in language indicating that capability was sufficient to invalidate a tax whether or not multiple burdens actually were imposed. Even though a specific state tax alone would not be dis-

100. State and Local Taxation, supra note 4, at 287.
101. Such a rejection was anticipated in Freeman, Justice Rutledge felt that merely being a "direct incidence" was "long since discarded as being itself sufficient to outlaw state legislation." 329 U.S. 249, 265-66 (1946). Instead a state tax is unconstitutional if the activity is subject to multiple taxation. Id. at 276-77.
102. 98 S.Ct. at 1399.
103. State and Local Taxation, supra note 4, at 243.
104. 98 S.Ct. at 1397.
106. The 1974 Term, supra note 15, at 175 n.133. See also Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663 (1948). The Court held that New York may constitutionally tax gross receipts from transportation within the state but not outside the state because it unduly burdens interstate commerce. The Court stated:

By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protec-
criminatory, it would be invalidated because "other states also may have the right constitutionally . . . to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special."\textsuperscript{107} However, the Court shifted this position in \textit{Northwestern States Portland Cement Co. v. Minnesota},\textsuperscript{108} by rejecting the risk of multiple burdens concept on two grounds: 1) a tax must be actually shown to burden interstate commerce in order to be invalidated and 2) a tax which is fairly apportioned, by definition, cannot impose multiple burdens on interstate commerce.\textsuperscript{109}

\textit{Id.}

In \textit{Joseph v. Carter & Weekes Stevedoring Co.}, 330 U.S. 422, 429 (1947), a New York city excise tax levied on gross receipts of a stevedoring corporation engaged wholly within the territorial limits of the city in loading and unloading vessels moving in interstate and foreign commerce was held to be an invalid burden on the Commerce Clause. The Court stated:

"In the present case, the threat of a multiple burden . . . is absent. The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading."

\textit{Id.}

In \textit{Gwin, White & Prince, Inc. v. Henneford}, 305 U.S. 434, 440 (1939), a Washington tax measured by the gross receipts of the taxpayer from his business of marketing fruit shipped from the state to places of sale in other states and foreign countries was held to be a burden on interstate commerce prohibited by the Commerce Clause. The Court stated:

"Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

\textit{Id.}

In \textit{J.D. Adams Mfg. Co. v. Storen}, 304 U.S. 307, 311 (1938), the Court Stated:

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by the states in which the goods are sold as well as those in which they are manufactured."

\textit{Id.}

\textsuperscript{107} McLeod v. J.E. Dilworth Co., 322 U.S. 327, 358 (1944) (Rutledge, J., dissenting) (emphasis added) "Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special." \textit{Id.}

\textsuperscript{108} 358 U.S. 450 (1959).

\textsuperscript{109} The \textit{Northwestern} Court stated that:

While the economic wisdom of state net income taxes is one of state policy not for our decision, one of the 'realities' raised by the parties is the possibility of a multiple burden resulting from the exactions in question. The answer is that none is shown to exist here. . . . Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. . . . We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. . . .

358 U.S. 450, 462-63 (1959)
Adherence to the actual burdens approach\(^\text{110}\) was continued in Washington Stevedoring,\(^\text{111}\) as the Court refused to decide on the alleged multiple taxation of the Washington gross receipts tax until it could be shown there was a multiple burden in fact.\(^\text{112}\) Exactly what the taxpayer must show to justify multiple taxation remained unspecified.\(^\text{113}\)

In its latest position on the subject, however, the Court, in Moorman Mfg. Co. v. Bair,\(^\text{114}\) has given some indication of what the taxpayer must prove to substantiate a multiple burdens assertion. In that case, the appellant taxpayer contended that both Illinois and Iowa imposed a tax on a portion of its income derived solely from Iowa sales.\(^\text{115}\) The Court found the record lacking "the essential factual predicate for a claim of duplicative taxation."\(^\text{116}\) Duplicative taxation, according to the Court, could have been established if the taxpayer proved what portion of its net income was derived from Iowa sales, as compared to sales from other states.\(^\text{117}\) Once that portion was computed, it could then be ascertained if "Illinois and Iowa together imposed a tax on more than 100% of the relevant net income."\(^\text{118}\) However, since neither computation was made by the taxpayer, the existence of duplicative taxation was described by the Court as merely "speculative."\(^\text{119}\)

Both the Washington Stevedoring and Moorman decisions are further indication that fair apportionment is an issue which the Court will not scrutinize very closely.\(^\text{120}\) Risks of multiple taxation, no longer sufficient to

\(^{110}\) The Court continued to require that taxpayers prove up an actual burden of multiple taxation in General Motors Corp. v. Washington, 377 U.S. 436 (1964). Dealing with the lack of apportionment claim by declining to prorate the tax, the Court called its lack of apportionment only "suspect," id. at 448, and refused to consider the multiple taxation claim since the Company had not shown a definite burden in fact. id. at 449.

\(^{111}\) The Washington Stevedoring Court seemed to extend the "actual burdens" approach one incredible step further: errors in apportionment that actually lead to multiple burdens in fact will not necessarily be considered a per se violation of the Commerce Clause: for these errors "may be corrected when they occur." 98 S.Ct. at 1397. This is consistent with the view that apportionment is a technical problem best left to administrative adjustment and not to constitutional adjudication.


\(^{113}\) The 1974 Term, supra note 15, at 176 n.133.

While invoking the notion of 'the risk of multiple taxation' as a criterion for evaluating the validity of a gross receipts tax under the multiple burden standard, the Court nonetheless appears to be adhering to the Northwestern/General Motors approach in refusing to deal in abstractions and insisting that the taxpayer make a palpable showing that the risk exists.

\(^{114}\) 98 S.Ct. 2340 (1978).

\(^{115}\) Id. at 2346.

\(^{116}\) Id.

\(^{117}\) Id.

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) Historical Perspective, supra note 89, at 348.
justify invalidation, are actually considered an inseparable "vice", a hazard of engaging in an interstate business. With the exception of flagrant cases, the Court apparently considers it beyond its constitutional province to compare methods of dividing income between jurisdictions in order to discover a "risk of multiple burdens", in the belief that an analysis basically technical in nature is best left to the state tax administrators.

Non-Discrimination Against Interstate Commerce

The fourth factor of Washington Stevedoring, that of non-discrimination against interstate commerce, has long been considered a Commerce Clause restriction as well as forming the basis for an equal protection argument. A tax is defined as discriminatory if it provides a "direct commercial advantage to local business." In applying this standard, the Court has struck down impositions that have been either discriminatory on their face, in that they taxed out-of-state sellers at higher rates than local sellers, or those which were discriminatory in effect, in that "their practical operation worked discriminatorily against interstate commerce to impose upon it a burden, either in fact or by the very threat of its incidence ...." The discriminatory effect analysis is consistent with the Court's "practical" focus underlying the other Commerce Clause factors. Such an analysis is to be applied on a case by case basis, taking the entire scheme of taxation into account.

121. The Court in Standard Pressed Steel noted that "in General Motors ... a vice in a tax on gross receipts of a corporation doing an interstate business [was considered] the risk of multiple taxation; but that the burden is on the taxpayer to demonstrate it .... The corporation made no such showing there. Nor is any effort made to establish it here. Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. at 563.

122. The Court considered the only conceivable constitutional basis for invalidating the Iowa statute to be a Commerce Clause prohibition on any overlap in the computation of taxable income by the States.

123. If the Constitution were read to mandate such precision in interstate taxation, the consequences would extend far beyond this particular case. For some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income.

124. See note 92 supra.


127. Id. at 69.

128. Halliburton Oil Well Cementing Co. v. Reilly, 373 U.S. 64 (1963). The Court stated that:

[t]his concern with the actuality of [the tax’s] operation, a dominant theme running through all state taxation cases, extends to every aspect of the tax operations.

129. See note 49-86 and accompanying text supra for the nexus analysis and notes 87-123 and accompanying text supra for the apportionment analysis.
taxes' effect on out-of-state taxpayers engaged in the same activities as their local counterparts.\textsuperscript{130} If the comparison discloses either an actual discriminatory effect or the mere risk of such an effect, the tax will be in violation of the Commerce Clause.\textsuperscript{131}

The Court's willingness to involve itself in a detailed analysis involving the discrimination factor while avoiding such detail involving apportionment\textsuperscript{132} follows from the purpose of the Commerce Clause.\textsuperscript{133} The Clause is not merely a grant "to Congress to enact laws for the protection and encouragement of Commerce among the states, . . ."\textsuperscript{134} but is also a limitation upon the State's power,\textsuperscript{135} a limitation intended to create an area of trade free from interference by the States.\textsuperscript{136}

A state may enact a tax that, in fact, "burdens" the interstate enterprise, as all taxation does, so long as such an imposition does not favor local enterprises at the expense of out-of-state enterprises. Such discriminatory treatment would create "a multiplication of preferential trade areas destructive of the free trade areas which the Clause protects."\textsuperscript{137}

Therefore, the discrimination factor will elicit a more strict scrutiny of a state imposition than would the other Commerce Clause factors, precisely because the risk of "preferential trade areas" analysis necessitates a detailed comparison of in-state and out-of-state taxpayers similarly situated within one jurisdiction, a manageable task, whereas a risk of "multiple tax burdens" analysis involves the detailed comparison of tax impositions imposed upon one taxpayer by many jurisdictions, a task which is fraught with many technical complexities.

**The Import-Export Clause Analysis**

Resolution of the Commerce Clause issue was considered by the Court as requiring an analysis distinct from the Import-Export Clause question. The Commerce Clause, was considered a grant of power to Congress, involving all state taxation of interstate and foreign commerce, whereas the Import-Export Clause, a restriction upon power, was limited to only "Imposts or Duties on Imports or Exports."\textsuperscript{138} The dispositive issue then, according to the Court, involved the meaning of the prohibition of "Imposts or Duties on Imports or Exports."\textsuperscript{139}

\textsuperscript{130.} Id. at 70. The Court stated that "[t]he conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid . . . [tax]." Id. at 70.

\textsuperscript{131.} Id. at 72-73.

\textsuperscript{132.} See notes 87-123 and accompanying text supra.


\textsuperscript{134.} Freeman v. Hewit, 329 U.S. 249, 252 (1946).

\textsuperscript{135.} Id.

\textsuperscript{136.} Id.

\textsuperscript{137.} Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).


\textsuperscript{139.} Id. at 1400.
The stevedores contended that the Import-Export Clause absolutely prohibits all taxation on imports and exports, a ban necessary in order to give it meaning apart from the Commerce Clause. The Court, however, citing Michelin, rejected the Stevedores contention on two grounds. First, the central holding of Michelin involves "an absolute ban... only of 'Imposts or Duties' and not of all taxes." Secondly, using a linguistic construction, the Court felt that an interpretation of "Imposts and Duties" which would encompass all taxes would make some of the terms of Article I superfluous. Since Article I grants Congress the "power to lay and collect Taxes, Duties, Imposts and Excises," the Court reasoned that the framers did not include "excises," such as those on the privilege of doing business, within the phrase "Imposts or Duties."

The Court also rejected the analysis that a tax is forbidden because it is imposed on imports or exports themselves or the process of importing or exporting. Exclusive consideration of what constitutes an import or export, a vague process at best, was abandoned in favor of the query of whether the taxes are "Imposts or Duties" that "offend constitutional policies...." As set forth in Michelin, a tax is to be considered constitutionally offensive, if it violates any three of the policy considerations underlying the existence of the Clause: first, the federal government must have exclusive power when regulating tariffs which may affect commercial relations with foreign governments; secondly, duties from imports, a major source of revenue for the federal government, should not be diverted by the states; third, harmony among the states should be preserved, a concern involving the possibility that seaboard states, with their crucial ports of entry, could levy transit taxes on goods merely flowing through their ports to other states.

Under this approach a tax which offends either of the first two policies is suspect under the Import-Export Clause regardless of whether it disturbs interstate harmony, in contrast to the Commerce Clause considerations which affect neither of the first two policies. The Washington tax, according to the Court, offended neither of the three Import-Export policies. First, the tax, held not to be a restrictive tariff, did not affect the ability of the federal government to conduct foreign policy. The levy was imposed only upon business conducted entirely within Washington. Neither a foreign

140. Id. at 1404.
141. Id.
142. U.S. Const. art. I. § 8, cl. 1.
143. 98 S.Ct. at 1405.
144. The previous ban on import taxes used the "original package" doctrine of Brown v. Maryland, 12 Wheat. 419 (1827), in which the goods enjoyed complete immunity from state taxation so long as "the goods retained their status as imports by remaining in their import packages..." 98 S.Ct. at 1400. Exports were immune from state taxation once "the goods had entered the 'export stream,' the final, continuous journey out of the country." 98 S.Ct. at 1400.
145. Id. at 1404.
147. Id. at 1403.
business nor vessel was taxed. Hence, the first Import-Export policy was vindicated.\footnote{148} Second, the Washington tax was held to have no impact on federal import revenues as it merely compensated the state for services and protection extended to the stevedoring business.\footnote{149} Third, the \textit{Washington Stevedoring} Court further refined the \textit{Michelin} policies by equating the third import-export policy of preservation of interstate harmony with the "four safeguards" of the Commerce Clause which were already shown to have been vindicated.\footnote{150}

The Court, also clarified two crucial issues not resolved by \textit{Michelin}: whether a tax relating to goods in transit would be an "Impost or Duty" and whether the three policies should apply to taxation involving exports as well as imports.\footnote{151} The fact that goods were in transit when the tax was imposed was held not to transform that tax into an "Impost or Duty". As long as the levy falls upon the service of stevedoring as distinct from the goods themselves, it will not be a prohibited "Impost or Duty." The Court was careful to reserve for another day.\footnote{152} "the question of the applicability of the \textit{Michelin} approach when a State directly taxes imports or exports in transit. . . ."\footnote{153}

Moreover, \textit{Michelin} was extended to exports as well as imports. So long as the first and third policy interests are maintained, a tax related to exports would not be considered an "Impost or Duty" any more than a tax related to imports.\footnote{154} Therefore the gross receipts from loading exports were held to be equally and constitutionally subject to the Washington business and occupation tax as were the gross receipts from unloading imports.\footnote{155}

Although the \textit{Washington Stevedoring} Court specifically equated the interstate harmony requirement of the Import-Export Clause with the four Commerce Clause factors,\footnote{156} and specifically distinguished the first two Import-Export Clause policies from any Commerce Clause consideration,\footnote{157} a further analysis of \textit{Michelin} indicates that the underlying approach of the

\footnotesize{148. Id. at 1401.}
\footnotesize{149. Id.}
\footnotesize{150. Id. at 1401-02.}
\footnotesize{151. Id. at 1403.}
\footnotesize{152. See notes 160-63 and accompanying text infra for a rational solution to this problem.}
\footnotesize{153. The Court stated in a footnote:}
\footnotesize{\begin{quote}
We do not reach the question of the applicability of the \textit{Michelin} approach when a State directly taxes imports or exports in transit.
\end{quote}}
\footnotesize{\begin{quote}
Our Brother Powell, as his concurring opinion indicates, obviously would prefer to reach the issue today, even though the facts of the present case, as he agrees, do not present a case of a tax on goods in transit. As in \textit{Michelin}, decided less than three years ago, we prefer to defer decision until a case with pertinent facts is presented. At that time, with full argument, the issue with all its ramifications may be decided.
\end{quote}}
\footnotesize{98 S.Ct. at 1403 n. 23.}
\footnotesize{154. Id. at 1403.}
\footnotesize{155. Id. at 1404.}
\footnotesize{156. Id. at 1405.}
\footnotesize{157. Id.}
first two policy considerations has almost completely been merged with those underlying the Commerce Clause.

Policy Consideration One:
Exclusive Power Regulating Tariffs

Exclusive power over foreign commerce would be violated if a tax created special protective tariffs or preferences for certain domestic goods or was applied selectively to "encourage or discourage importation." 158 This definition from *Michelin* seems to indicate that only if the tax is imposed "directly" on the goods themselves will it be prohibited, a line of reasoning which would resurrect, under the Import-Export Clause, the "direct-indirect" test discarded under the Commerce Clause. 159 A focus on whether the tax is imposed merely on services or handling of goods as distinct from the goods themselves, inevitably leads us back to a constitutional construct devoid of economic significance. 160 For example, a state could levy a so-called constitutionally appropriate "indirect" transit fee based upon the volume of the stevedoring services, when, in fact, such tax is based upon the volume of goods passing through the port. 161

Therefore, the fact that a levy is imposed on services, as was done in *Washington Stevedoring*, as compared to the goods themselves, should have no bearing on whether that levy would violate the Import-Export Clause first policy consideration. Instead, the issue should turn upon whether such levy was fairly related to the services and protection provided by the state. 162 In other words, is the imposition simply making the imported goods pay their own way, as analyzed under the Commerce Clause test, or is the imposition merely exacting a transit fee for moving through the state. 163 It is difficult to imagine that such a fairly related tax could be considered as impinging upon the federal government's exclusive power over foreign commerce by creating special protective tariffs.

Policy Consideration Two:
Exclusive Right to All Revenues
From Imposts and Duties on Imports and Exports

A tax on imports will not, according to *Michelin*, deprive the federal treasury of its entitled revenues unless it is a levy "on the commercial privilege of bringing goods into [the] country . . . ". 164 is based on the

159. Id. at 286-87. See also notes 41-47 and accompanying text supra.
160. The *Washington Stevedoring* Court considered such a distinction to be "without economic significance". 98 S.Ct. at 1403.
161. See 98 S.Ct. at 1405-06 (Powell, J., dissenting).
162. The fourth factor set forth in *Washington Stevedoring's* Commerce Clause analysis.
163. Michelin Tire Corp. v. Wages, 423 U.S. at 290.
164. Id. at 287.
foreign origin of the imported goods, or is selectively imposed "so as substantially to impair or prohibit importation."\footnote{165}

However, the Import-Export Clause does not prohibit a state from apportioning "the cost of such services as police and fire protection among the beneficiaries according to their respective wealth."\footnote{166} The crucial concepts applied under this analysis, are in fact the fair apportionment and nondiscrimination concepts applied in the Commerce Clause analysis. The Court in \textit{Michelin} indicated that an importer should be able to bear his share of the cost of state services just as would his competitors who handle only domestic goods.\footnote{167} State taxation which results in an incidental diminution of federal impost revenues by creating an additional economic burden on the imported goods, is not prohibited under this policy consideration so long as such taxes are uniform in application.

Prevention of these incidental effects were not even "remotely an objective of the Framers in enacting the prohibition."\footnote{168} If the taxes are imposed in a non-discriminatory fashion and are fairly related to the services provided to the importer, the second policy consideration of the Import-Export Clause will be vindicated, a vindication identical with the rationale applied under the Commerce Clause analysis.

**CONCLUSION**

The \textit{Washington Stevedoring} decision has accomplished a great deal in dispelling confusion concerning the scope of constitutional limitations on the state's power to tax interstate commerce. The Court has finally synthesized a set of rational factors which can be consistently applied when testing this power. Further analysis, however, indicates that these factors will provide only the narrowest of limitations on state taxing power. The reasons are two-fold. First, the factors themselves, though rational on their face, are inherently vague in application in that they lack the technical precision necessary to clearly inform the taxpayer of its liability. The real problem lies not with the analysis developed but with the nature of the judicial decision as a medium for solving an inherently technical problem. Secondly, given the inevitably liberal interpretation of the factors applied in \textit{Washington Stevedoring}, it is almost assured that the Court will not, in the future, interfere or intervene in what is, or should be, a matter for legislative resolution. The Court has implicitly acknowledged that complex state taxation issues ought to be resolved by expert tax administrators acting under legislative guidance and not by the Court armed with the overbroad language of judi-\footnote{165. Id. at 288.} \footnote{166. Id. at 287.} \footnote{167. Id.} \footnote{168. Id.}
cial decision. Confronting problems of a highly technical and complex nature is perceived as beyond the Court’s capability to resolve except in cases where the tax imposition has flagrantly violated constitutional limits.

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