restraint of monopolies is part of the agency's statutory obligation or the public interest is not included in the agency's standard.[79]

If the nation continues to rely upon administrative agencies as the custodians of the public interest in some areas, the protectors must be energized to better enable them to adequately fulfill their designated function. Since existing supervisory agencies manifest a need for increased adjustment between the policies of regulation and competition, creation of a Commission for Coordination of Regulatory Agencies is indeed warranted. The end result of statutory evolution in this area should be effective protection of the public, whether by regulatory acts or by the antitrust laws. Where supervision is not complete, there is a role for commercial rivalry to play. Once complete regulation has been chosen, however, no room remains for the conflicting concept of promoting competition.

STATE TAXATION OF VEHICLES MOVING INTERSTATE: THE INTERVENTION OF THE SUPREME COURT

In their widening search for sources of revenue the states find themselves subject to control by courts acting under various clauses of the federal Constitution. The taxpayer, on the other hand, finds the Constitution and the courts a sometime protection against what may seem to him the depredations of money-hungry state legislatures and tax administrators. The commercial enterprise which operates in more than one state is in the fortunate position of having two constitutional shields in its armory which are granted to few other taxpayers—the due process clause of the Fourteenth Amendment and the commerce clause.

The mandate of the due process clause with respect to state taxes is that a tax "bear fiscal relation to the protection, opportunities, and benefits given by the state."[1] Despite difference of opinion among members of the present Supreme Court regarding applications of this test,[2] the basic criterion has not been challenged. The commerce clause

79. "Officials of the government are aware of and, for the most part, responsive to their duty to respect the laws of the United States and to conform to its policies. Hence they are likely to keep their actions reasonably consistent with the competitive policy in so far as they have it in mind." *Id.* at 310.

1. Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940).
2. See Mr. Justice Jackson's dissent in State Tax Commissioner v. Aldrich, 316

requirement is not so clear. In one formulation it demands that the states levy no taxes which unduly burden interstate commerce, *i.e.*, that they do not tax so as to place interstate commerce at a competitive disadvantage with respect to intrastate commerce.[3] Eliminating, for the moment, consideration of differences in types of taxes and tax rates from state to state, the competitive disadvantage for interstate commerce is a result either of direct discrimination by a taxing state against interstate operators, or of taxation by more than one state which raises the tax base on which the interstate enterprise pays above that of a comparable business operating wholly intrastate.[4]

Another approach would foreclose state taxation which "directly burdens" interstate commerce.[5] Still a third point of view is espoused by Mr. Justice Black, who suggests that the problem of commerce clause limitations upon the states right to tax should be handled by Congress.[6] Pending legislative action, he would not use the commerce clause to strike down any state taxes except those which openly discriminate against inter-

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U.S. 174, 185 (1942) which argues against the distinction taken by the present court between due process requirements for property taxes on tangibles and those on intangibles. *Id.* at 201.

3. *See* McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45, n.2 (1940).

4. The latter source of trouble for interstate commerce was characterized as "multiple burdens" in the late Mr. Justice Stone's test for the commerce clause validity of state taxes. See Western Live Stock Co. v. Bureau of Internal Revenue, 303 U.S. 250 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).

5. This approach prevailed prior to the Stone court and there has been a return to it since 1946. See Spector Motor Service, Inc. v. O'Conner, 340 U.S. 602 (1951); Freeman v. Hewit, 329 U.S. 249 (1946); Note, 56 YALE L.J. 898 (1947).

Much discussion has been devoted to the nature of the test. The literature is so extensive that it would be fruitless to cite more than a few examples. One of the earliest and best analyses occurred in Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States,* 31 HARV. L. REV. 321, 572, 721, 932 (1918). See in particular 572-618 and 721-778. For recent points of view see Barrett, *State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," Or What Have You?,* 4 VAND. L. REV. 496 (1951), and the literature cited in note 1 therein. The crux of the test appears to be the determination that a particular transaction is or is not interstate commerce and the injunction that, if it is, it may not be "directly burdened" by state taxes. No consistent definition of a "direct" as opposed to an "indirect" burden has as yet been developed, however, with the result that the test provides no guide except the individual decisions of the Court under it. See Powell *supra* and Barrett *supra.*

It is supported on the ground that it avoids the difficulty of the "multiple burdens" approach, which lies in the attempt under that test to estimate the effect of a state tax upon interstate commerce. "Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated tax, might mitigate the obvious burden generally created by a direct tax on commerce." Freeman v. Hewit, *supra* at 256.

6. *See* McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 185 (1940) (dissent); Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938) (dissent); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 301 (1944) (concurring).

state enterprise.[7] His argument moves on two levels. The first is the proposition that there is no constitutional justification for judicial restriction of the manner of state taxation in these areas; the questions involved are legislative in character.[8] The second is the contention that the judicial process itself cannot cope with the problem; the case-by-case approach is too fragmentary for the economic complexities which underlie adjudication.[9]

Factual circumstances rarely respect attempts to keep them neatly pigeonholed under a specific legal heading. In the immediacy of a particular dispute between a tax administrator and an interstate taxpayer, due process and the commerce clause emerge as dual aspects of a single problem which can be distinguished but not separated. The validity of this assertion is borne out by an examination of the property tax,[10] as it is applied to vehicles which move interstate.[11] Analysis and evaluation of the role of the Court in this area demands awareness of the policies which each clause has come to symbolize and an attempt to determine the consequences of the coalescence of those policies under the stress of practice.

The Present State of the Law

Thus far the Court itself has undertaken the task of developing and applying rules to govern property taxation of vehicles moving interstate. Prior to 1949, the Court enunciated one reasonably clear rule for watercraft,[12] and a different and more vaguely defined rule for railroad cars;[13] the members were unable to agree upon any single rule for aircraft.[14] In the last three years, however, there has been a trend

7. *See* Adams Mfg. Co. v. Storen, *supra* note 6, at 332-333.

8. *Id.* at 328; *see* McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 186 (1940); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 301 (1944); *cf.* his general position on the question of commerce clause limitations on state regulation of interstate commerce, So. Pacific Co. v. Arizona, 325 U.S. 761, 784 (1944) (dissent).

9. McCarroll v. Dixie Greyhound Lines, *supra* note 8, at 188; Northwest Airlines. Inc. v. Minnesota, *supra* note 8, at 302.

10. The property tax, one of the oldest of all state taxes, is today of little significance for revenues on the state level, but still of great importance for governmental units below that level. *Compare* 1952 CCH Tax Systems 303, *with id.* at 310-315.

11. Only three kinds of vehicles are considered: railroad cars, aircraft, and watercraft. Motor vehicle (truck and bus) owners are excluded on the ground that property taxes on their vehicles are too small a portion of their total tax load to be of significance. See *Carrier Taxation*, H.R. Doc. No. 160, 79th Cong., 1st Sess. 172, 182 (1945).

12. See notes 16, 17 *infra*.

13. See notes 18, 19 *infra*.

14. The only case in the Supreme Court dealing with state property taxation of aircraft is Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944). The vote in

toward uniformity and clarity. The agents of this clarification, two cases in the Supreme Court dealing with property taxes on vessels moving on inland waters, indicate that the "railroad" rule is to govern generally henceforth.[15]

Before the change occasioned by these cases, the "vessel" rule provided for taxation by the domiciliary state only,[16] except that where a vessel was operated solely within the borders of one non-domiciliary state during the tax period, such a state was permitted to tax.[17] The "railroad" rule required apportionment of the tax base between the states in which the vehicle operated.[18] The vagueness of this rule was

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that case was five to four and there was no majority opinion for the Court. See note 29 *infra.*

15. Standard Oil Co. of Ohio v. Peck, 342 U.S. 382 (1952); Ott v. Mississippi Barge Line, 336 U.S. 169 (1949). Prior to these cases the same rule applied to ocean-going vessels and to ships plying inland waters, St. Louis v. Wiggins Ferry Co., 11 Wall. 423 (U.S. 1871). See Hays v. Pacific Mail S.S. Co., 17 How. 596 (U.S. 1855). But the *Ott* ruling was restricted specifically to watercraft on inland waters, *id.* at 173, as was the *Peck* holding, *id.* at 383-384.

16. That is, the state of the domicile of the owner. Hays v. Pacific Mail S.S. Co., note 15 *supra* (forbidding a property tax on ocean steamers by a non-domiciliary state); St. Louis v. Wiggins Ferry Co., note 15 *supra* (applying the *Hays* holding to a river ferry); Morgan v. Parham, 16 Wall. 471 (U.S. 1873) (applying the *Hays* holding to river steamers where, in contrast to the *Hays* and *St. Louis* cases, the state of domicile was not also the state of a major terminal on a regular route traveled by the taxed vessels); Transportation Co. v. Wheeling, 98 U.S. 273 (1879) (allowing a domiciliary state to tax on an unapportioned base); So. Pacific Co. v. Kentucky, 222 U.S. 63 (1911) (permitting domiciliary Kentucky to tax on an unapportioned base ocean-going ships which touched at ports in several states but never moved in domiciliary waters).

In the first four cases cited above the state of domicile was also the state in which the vehicles in question were "registered" under various congressional statutes, *i.e.,* it was the state of the "home port." For a collection of these statutes and discussion of the notion of "home port" see Ambler, *Personal Property Taxes on Vehicles Regularly Engaged in Interstate or Foreign Commerce,* 20 WASH. L. REV. 1, 3 n.4 and accompanying text (1945). In Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409 (1906) a state of the "home port" of certain vessels which was not the state of domicile was not allowed to tax at all. The Court thus decided that, with one exception (see note 17 *infra*), domicile was the sole determinant of state right to tax watercraft.

As hereafter used, the term "vessel rule" will refer to the rule which had developed prior to the *Ott* and *Peck* cases.

17. Old Dominion S.S. Co. v. Virginia, 198 U.S. 299 (1905).

18. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891) (sanctioning an apportioned tax by a non-domiciliary state on the capital stock of the corporate owner of the vehicles, explicitly treating the tax as a property tax on all the property of the corporation); American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1890) (permitting an apportioned property tax by a non-domiciliary state); *accord,* Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149 (1900). Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905) has been interpreted as forbidding any taxation by the domiciliary state of *cars* permanently outside its borders, *see* So. Pacific Co. v. Kentucky, 222 U.S. 63, 74 (1911), or as forbidding to the state of domicile taxation of that portion of a set of cars which was attributable to other states under an apportionment scheme, *see* Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 311 (1944) (dissent). For later applications of the rule see Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158 (1933) (requiring apportionment by a non-domiciliary state within

created by two cases which indicated that the domiciliary state might be authorized to tax on an unapportioned base even though the vehicles could sustain or had already sustained apportioned taxes in other states.

In *New York Central Railroad Company v. Miller*[19] the taxpayer requested a deduction from the tax base to provide for those of its cars which were operated outside of New York, the state of domicile, on loan to other railroads "by the familiar course of railroad business."[20] All of the cars spent a portion of the tax year within New York, which was also the taxing state. Mr. Justice Holmes, speaking for a unanimous Court, stated: "It does not appear that any specific or average number of cars acquired taxable situs outside of New York. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home."[21] In effect he thus overruled *American Refrigerator Co. v. Hall*[22] and *Union Refrigerator Co. v. Lynch*[23] which sanctioned taxes by non-domiciliary states (on apportioned bases) where the factual relationship of the cars taxed with the taxing state was almost exactly that which exists with regard to non-domiciliary states in the *Miller* case.[24] This process of contracting the scope of the rule of apportionment with respect to the domiciliary state was carried further by the Supreme Court in its sole decision dealing with state property taxes on aircraft, *Northwest Airlines, Inc. v. Minnesota*.[25] There the planes were

which the central terminal for oil tank cars was located), and Union Tank Line Co. v. Wright, 249 U.S. 275 (1919) (see note 66 *infra*).

19. 202 U.S. 584 (1906). The tax was a capital stock franchise tax, but, as in the *Pullman* case, the Court treated it as a tax on the company's property. *See id.* at 595.

20. *Id.* at 594.

21. *Id.* at 597. It is possible that Mr. Justice Holmes was attempting to avoid the due process issue of jurisdiction to tax, since he did not approve of the rule restricting taxation of tangibles to the locus of use. *See* Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 211 (1900) (dissent), but he could do so only by ignoring previous cases, see note 24 *infra*.

22. 174 U.S. 70 (1899).

23. 177 U.S. 149 (1900).

24. ". . . [S]aid cars never were run in said state in fixed numbers nor at regular times, nor as a regular part of particular trains." American Refrigerator Transit Co. v. Hall, 174 U.S. 70, 72 (1899); ". . . said cars were within the said state of Utah at no regular intervals nor in any regular number . . . nor were they confined to any particular route or routes, nor in any particular trains . . . but are and were run indiscriminately over the lines of the railroad over which the consignors of freight shipped in such cars choose to route them in shipping." Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149, 150 (1900).

25. 322 U.S. 292 (1944).

operated on regular routes to seven states other than Minnesota, the domiciliary state, where the company had a major terminal, repair shops and its central business offices. In holding that the domiciliary state could tax on an unapportioned base, Mr. Justice Frankfurter evidently assumed that the "railroad" rule applied, for he claimed that his decision was based upon the *Miller* case.[26] Here, too, he asserted, no defined part of the domiciliary corpus" had been shown to have acquired situs outside the state of domicile.[27] As it happened, the planes were being taxed on apportioned bases in six of the seven non-domiciliary states in which they moved.[28] Taking this decision at its face value, it is difficult to see what is left of the principle of apportionment as applied to the state of domicile. Near the end of his opinion, Mr. Justice Frankfurter seems to argue that he is not applying and would not apply the "railroad" rule at all.[29] The confusion engendered by these decisions turns upon the ambiguous use of the term "situs". Underlying both is the assumption that until a vehicle acquires tax situs in a non-domiciliary state it is taxable at full assessed value at the state of domicile.[30] But, if "situs" is to have any meaning beyond indicating that a state may constitutionally levy *some* tax upon particular property, there must be an agreed criterion which determines the point at which such taxation may begin. The cases dealing with this question may perhaps be read as discussions of proposed measures for the acquisition of situs, with the facts in each, concerning the connection of the vehicles with non-domiciliary states, constituting the point proposed for that acquisition. But until some standard is formulated, the assertion that a vehicle has or has not acquired situs in any state is a conclusion that its speaker wishes the Court to draw and not a reason for that conclusion.

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26. *Id.* at 293.

27. *Id.* at 295.

28. *Id.* at 325; see also *Multiple Taxation of Air Commerce,* H.R. Doc. No. 141, 79th Cong., 1st Sess. 27 (1945).

29. 322 U.S. 292, 300 (1944). It is almost impossible to tell just what rule Mr. Justice Frankfurter thought he was applying. At one point he seems to allow Minnesota to lay an unapportioned tax because "[n]o other state can claim to tax as the state of domicile as well as the home state of the fleet, as a business fact." *Id.* at 294. Two Justices voted with Mr. Justice Frankfurter. Mr. Justice Black concurred specially on the basis of his position that, until Congress acts, the Court ought not use the commerce clause to limit state right to tax. Mr. Justice Jackson concurred specially on the ground that the right to tax ought to be limited to the "home state" of the fleet. Mr. Justice Stone and three others dissented, arguing that apportionment was required. For an extensive analysis see Powell, *Northwest Airlines v. Minnesota—State Taxation of Airplanes—Herein also of Ships and Sealing Wax and Railroad Cars,* 57 HARV. L. REV. 1097 (1944).

30. *See* Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 295, 299 (1944); So. Pacific Co. v. Kentucky, 222 U.S. 63, 68 (1911); New York Central R. R. v. Miller, 202 U.S. 584, 597 (1906).

The *Ott* and *Peck* cases reverse the trend toward narrowing the application of apportionment. Prior to the *Ott* decision, the "vessel" rule had been applied to the extent of sanctioning an unapportioned property tax by a state of domicile, Kentucky, upon ocean liners which did not and could not move in domiciliary waters.[31] The rationale of the decision was that, as the ships were not operated exclusively within any one non-domiciliary state, they did not acquire situs outside of Kentucky. The *Ott* case permitted an apportioned tax by a non-domiciliary state on barges moving regularly between terminals within and without the taxing state.[32] The *Peck* case refused to allow an unapportioned tax by domiciliary Ohio, where the only connection of the vessels with Ohio was an occasional stop for repairs or supplies in Cincinnati while the ships generally moved between terminals on the lower Mississippi River and ports in Indiana and Kentucky.[33] It directs apportionment of the tax base. Henceforth the state of domicile is to receive no special privilege, saving perhaps in the situation in which vehicles are so sporadically present in any state as to make apportionment impracticable, upon which question the Court was silent.

Alternatives Before the Court

From the point of view of the commerce clause, the alternatives for decision by the Court reduce themselves to three. Assuming the multiple burdens approach, only the restriction to one state of the right to tax or the apportionment of the tax base among the states in which the taxed vehicle operates can avoid a disadvantage for the interstate operator. It is obvious that the "vessel" rule is a form of the first alternative[34] and that the second possibility embraces the "railroad" rule.

31. So. Pacific Co. v. Kentucky, *supra* note 30.

32. Ott v. Mississippi Barge Line, 336 U.S. 169 (1949). Mr. Justice Jackson dissented without opinion, presumably on the basis of his adherence to a "home port" doctrine.

33. Standard Oil Co. of Ohio v. Peck, 342 U.S. 382 (1952). Mr. Justice Douglas, writing for the Court, cited *Union Refrigerator v. Kentucky,* evidently assuming the position of the dissent in the *Northwest Airlines* case. See note 29 *supra.* He took the statements of Mr. Justice Holmes and Mr. Justice Frankfurter in the *Miller* and *Northwest Airlines* cases at face value and distinguished those cases on the ground that there the vehicles were so sporadically absent from the state of domicile as to preclude the application of apportionment. He thus avoided the necessity of overruling those cases, though he had to misread the facts in order to do so. See note 24 *supra.* It would seem extremely unlikely that the *Miller* and *Northwest Airlines* cases are today controlling precedents on their own facts. To this extent the views of the dissent in the *Northwest Airlines* case appear to be the law today. The necessity of a special category for vehicles moving too irregularly for the application of the apportionment process, however, is discussed at p. 219 *infra.*

34. The same is true of Mr. Justice Jackson's proposal to limit the right to lay property taxes on aircraft to the "home state" of the fleet, see note 29 *supra,* and of

The third course, that proposed by Justice Black, advocates a refusal to act, except for open and direct discrimination against interstate enterprice, until Congress has acted.[35]

The due process clause, as presently interpreted, alters only one of these approaches. Superficial examination indicates that apportionment would seem to be required in all cases. Under present conceptions, physical location is the primary determinant of due process jurisdiction to tax tangible property, since the relevant benefits bestowed by the taxing state are those concerned with property use.[36] If a state does not provide all of the benefits involved in the use of a vehicle, it should not be permitted to tax that vehicle at full assessed value. The "vessel" rule, however, has found its justification in the proposition that watercraft have such slight connection with any particular state (as compared, for instance, to railroad cars) that only the state of domicile can be thought of as substantially benefiting the taxpayer.[37] It is possible, then, to justify either the "vessel" or "railroad" rule on due process grounds as that clause is presently interpreted. Mr. Justice Black's position would be impossible, however, so long as the Court interjects physical location as a prerequisite to the right to tax tangibles.[38]

Mr. Justice Rutledge's suggestion that the right to impose sales taxes upon interstate transactions be limited to the state of the market. See his concurring opinion in Freeman v. Hewit, 329 U.S. 249, 259 (1946).

35. See p. 213, *supra*. The "direct burdens" approach to the commerce clause does not present a fourth alternative to those listed. This is so because property taxes on property which is within the due process jurisdiction of a taxing state have long been held to be indirect burdens on commerce and therefore permissible under this test. Indeed, their validity seems to have been assumed before the formulation of the "direct burdens" test. See Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); Marye v. B.&O. R.R., 127 U.S. 117 (1888). Perhaps the first formulation of that test is the following: "It comes rather within that large class of state action . . . which, while indirectly affecting, cannot be considered as a regulation of interstate commerce, or a direct burden on its free exercise." Cleveland, C.C. & St. Paul Ry. v. Backus, 154 U.S. 439, 447 (1894). For a more modern instance of the application of the "direct burdens" test to property taxes see Union Tank Line Co. v. Wright, 249 U.S. 275 (1919). It will be shown that, as presently applied to property taxes upon tangibles, due process leads to the same alternatives as the "multiple burdens" approach to the commerce clause—a "vessel" and a "railroad" rule. See Note 37, *infra* and accompanying text.

36. *See* Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905); *cf.* Treichler v. Wisconsin, 338 U.S. 251 (1949); City Bank Farmers Trust Co. v. Schnader, 293 U.S. 112 (1934); Frick v. Pennsylvania, 268 U.S. 473 (1925).

37. *See* Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

38. In the case of intangibles the Court has allowed either the state of domicile or the state of actual usage to tax on an unapportioned base. Curry v. McCanless, 307 U.S. 357 (1939). Where intangibles are used in connection with the central offices of a business concern, the Court has spoken of the state in which those offices are located as the "commercial domicile" of the enterprise and has allowed taxation at full assessed value. First Bank Stock Corp. v. Minnesota, 301 U.S. 234 (1937); Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936).

The Position of Mr. Justice Black

Mr. Justice Black's specific stand with respect to property taxes on vehicles is couched in the terms of the first level of his general argument concerning the negative implications of the commerce clause grant of power to Congress.[39] He argues that there is no constitutional basis for the Court's assuming either the function of determining the total tax base upon which an interstate enterprise may be taxed by the states in which it operates or that of telling each state how much of that total tax base it may receive.[40] The proposition concerning the total tax base refers to the root question of whether the commerce clause is to be given any negative implication as to state right to tax, beyond that of preventing direct discrimination against interstate commerce. The essence of the multiple burdens test is the judicial equation of tax base of the interstate enterprise to that of a comparable intrastate business. In the performance of this function, the Court is, in fact, determining the total tax base. To say that the Court is not constitutionally justified in doing this, is to deny the existence of such negative implications.

The other task of the Court—determination of the amount each state may receive—is another matter. Even if one concedes the validity of the multiple burdens approach to the commerce clause, there is no standard in that clause for the resolution of *this question.* So long as competitive disadvantage for interstate enterprise is avoided, the multiple burdens test is indifferent not only to the choice of a "vessel" or a "railroad" rule but also to the portion each state receives. Under an apportionment scheme, before one can conclude that any particular tax is responsible for a multiple burden on interstate commerce, the share of the tax base allocable to the taxing state must be determined, but the measure of that share cannot be derived from the multiple burdens test. Analogously, under a rule of the "vessel" type there is no basis in the commerce clause for choosing the fortunate state which is to be allowed to tax.

The bases for these choices may perhaps be discovered in the due process clause, however. The extant due process ground for the choice

39. See p. 214 *supra.*

40. Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 301 (1944). Mr. Justice Black dissented without opinion in the *Peck* case. His statement in the *Northwest Airlines* case spoke of the total amount which the states could collect rather than the total base on which they could tax, but it is clear that the Court has never gone beyond determination of the permissible total tax base. See Hellerstein and Hennefield, *State Taxation in a National Economy,* 54 HARV. L. REV. 949, 968 (1941).

41. See p. 219 *supra.*

of the domiciliary state by the "vessel" rule[41] may perhaps be challenged, but the attack will use due process reasoning, *e.g.*, that the state in which the major business offices of an enterprise are located confers more significant benefits than does the state of domicile. Likewise, where the Court has been asked to determine the validity of a method of apportionment, it has done so in the context of due process policy. This is clearest as to corporate net income taxes, which have been deemed valid without either apportionment or restriction to one state so far as the commerce clause is concerned[42]—due process alone requires apportionment.[43] The criterion used by the Court has been that portion of the taxpayer's net income which is reasonably attributable to the taxing state.[44]

Cases involving apportionment of property taxes on interstate enterprises, all of whose property has been assessed as a unit, appeared in the Supreme Court both before and after the due process limitation on state taxation was announced.[45] Prior to its introduction, the cases were litigated ostensibly upon the commerce clause.[46] Taxes upon property within the "jurisdiction" of the taxing state, however, were validated as "indirect burdens" on commerce, so that the issue was what would now be termed due process.[47] The standard propounded by the Court was that proportion of the total assessed value of the taxpayer's property which was reasonably attributable to the taxing state.[48] Decisions on this subject have since assumed that the same standard applies.[49]

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42. U.S. Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918).

43. This is true for non-domiciliary states, International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435 (1944), but not for the domiciliary state, which may tax the net income of its residents without apportionment in so far as the due process clause is concerned. Guarantee Trust Co. v. Virginia, 305 U.S. 19 (1938); New York *ex rel.* Whitney v. Graves, 299 U.S. 366 (1937); New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937); Lawrence v. State Tax Commission, 286 U.S. 276 (1932); Shaffer v. Carter, 252 U.S. 37 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

44. Butler Brothers v. McColgan, 315 U.S. 501 (1942); Norfolk & Western Ry. v. North Carolina, 297 U.S. 682 (1936); Hans Rees Sons', Inc. v. North Carolina, 283 U.S. 123 (1931); Bass, Rattliff & Gretton v. State Tax Commission, 266 U.S. 271 (1924); *accord*, Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).

45. It is difficult to pick the exact point at which the jurisdictional requirement became associated with the due process clause, but the cases of Adams Express Co. v. Ohio, 165 U.S. 194 (1897), and Louisville & J. Ferry Co. v. Kentucky, 188 U.S. 385 (1903), certainly bracket the period in which this occurred. See Powell, *Taxation of Things in Transit*, 7 VA. L. REV. 167, 245, 429, 497 (1920).

46. See, *e.g.*, Pittsburgh, C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894).

47. See note 35 *supra*.

48. See note 46 *supra*.

49. See Nashville, Chattanooga & St. L. Ry. v. Browning, 310 U.S. 362 (1940); Southern Railway Co. v. Watts, 260 U.S. 519 (1923); Cream of Wheat Co. v. County of Grand Forks, 253 U.S. 329 (1920); Wallace v. Hines, 253 U.S. 66 (1920).

One may conclude that the Court has evolved the following standard:

> With respect to any particular tax there is a total tax base to which a tax rate is applied. Such a base represents a particular value in the hands of the taxpayer, *e.g.* property or income, which he enjoys under the protection of the state. For the purposes of that tax the significant benefits or protection afforded the taxpayer by any state are roughly proportional to the fraction of that value which can be attributed to his activities in that state. Apportionment is required in proportion to that fraction.

The particular activities which are important will vary with the nature of the tax. Corporate income taxes demand apportionment upon the basis of the location of income-producing activity. Property taxes demand apportionment based on the location of the property's use. The significant activities will also change with the character of the taxpaying enterprise. The relationship of a merchandising corporation to a particular state is not to be measured by the same factors as that of an airline.[50] Even different enterprises of the same general character may require somewhat diverse treatment.[51] None of these considerations obviate the fact that, with regard to property taxes on tangibles, there is a general standard for apportionment derivable from due process.

With respect to property taxes on intangibles[52] and others, such

50. A typical formula applied to merchandising companies paying a corporate net income tax is one based on an average of the factors: (a) tangible property within the state divided by total tangible property, and (b) sales within the state divided by total sales. N.C. GEN. STAT. §§ 105-134 (II) (1950). Compare this with the proposed uniform statute for taxation of airlines, which offers an apportionment formula based on an average of the factors: (a) arrivals and departures within the taxing state divided by total arrivals and departures, (b) revenue originating within the taxing state divided by total revenue, and (c) tons handled in the taxing state divided by total tons handled. REVENUE ADMINISTRATION (1945) (Proc. Nat. Ass'n of Tax Administrators) 22; *cf.* (1946) PROC. NAT. TAX ASS'N. 285-294 which suggests a similar federal statute.

51. A familiar formula for unit assessed property taxes on railroads has been one based on track mileage within the taxing state divided by total track mileage. See Pittsburgh, C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894); Nashville, Chattanooga & St. L. Ry. v. Browning, 310 U.S. 362 (1940). But where the taxing state was a "bridge" state, *i.e.*, the railroad had no terminals within it, the court struck down an apportionment based on track mileage on the ground that it allocated an unreasonable fraction of the total value of the system to the taxing state. Wallace v. Hines, 253 U.S. 66 (1920).

52. Since Curry v. McCanless, 307 U.S. 357 (1939), resurrected Blackstone v. Miller, 188 U.S. 188 (1903), even though both are inheritance or death tax cases, decisions following the *Blackstone* ruling in authorizing more than one state to lay unapportioned property taxes on the same intangibles are also presumably of some force as precedents. See, *e.g.*, Fidelity and C. Trust Co. v. Louisville, 245 U.S. 54 (1917) (domiciliary allowed to tax); Liverpool and L.&G. Ins. Co. of New York v. Board of Assessors, 221 U.S. 346 (1911) (non-domiciliary permitted to tax); Metropolitan Life

as net income taxes,[53] however, the domiciliary state has been permitted to levy upon an unapportioned base regardless of the extent to which the taxpayer's significant activities are located in other states. These decisions rest upon the assumption that the benefits of domicile provide the necessary *quid pro quo* for the tax. It is difficult to see why this contention does not also apply to property taxes on tangibles. Once the assumption is granted, distinction on the ground that—as a practical matter—intangibles are easier to hide and so escape taxation more readily, is tenuous at best.[54] Beyond the field of the property tax, not even that ground can be adduced.

It is possible, however, that the original assumption that the benefits of domicile are always relevant to such taxes may be qualified. If it is granted that the *quid pro quo* required of a state is altered by the character and meaning of the tax it levies, then it can be argued that domicile—though appropriately considered with regard to, for instance, death and inheritance taxes—is an irrational factor for taxes concerning commercial enterprise. Rather, the location of economic activity would seem to be of prime importance.[55] Since the major cases allowing unapportioned taxation of intangible property at the domicile of the owner as well as at the location of use, have been death tax cases,[56] they may thus be distinguished. A similar argument may be utilized to differen-

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Ins. Co. v. New Orleans, 205 U.S. 395 (1907) (non-domiciliary permitted to tax). It can certainly be argued that apportionment is inapposite for property taxes on intangibles since the relevant business activity is usually confined to one state. If one were to grant this point, however, the state of "commercial domicile" would seem a more appropriate choice than that of legal domicile. See note 38 *supra,* and, in particular, Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936), for a discussion of the right of the state of "commercial domicile" to tax intangibles at full assessed value.

53. See note 43 *supra.*

54. This is extensively and convincingly argued in Bittker, *Taxation of Out-of-State Tangibles,* 56 YALE L.J. 640 (1947).

55. Consider, for instance, the following: "It is believed that state income tax laws should result in taxation by a state of only that segment of income of a business which is commensurate with the economic activity performed within the state." Preliminary Report of Committee on Tax Situs and Allocation, (1949) PROC. NAT. TAX ASS'N, 241.

56. See Central Hanover Bank and T. Co. v. Kelly, 319 U.S. 94 (1943); State Tax Commissioner v. Aldrich, 316 U.S. 174 (1942); Graves v. Schmidlapp, 315 U.S. 657 (1942); Graves v. Elliot, 307 U.S. 383 (1939); Curry v. McCanless, 307 U.S. 357 (1939). Cases such as Fidelity & C. Trust Co. v. Louisville, 245 U.S. 54 (1917) (see note 52 *supra)* might be distinguished not on their facts but on the ground that the Court, in reopening possibilities of double taxation of intangibles, did so only in the death tax area, so that those cases are not revived along with Blackstone v. Miller, 188 U.S. 188 (1903).

57. Guarantee Trust Co. v. Virginia, 305 U.S. 19 (1938); New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937); Lawrence v. State Tax Commission, 286 U.S. 276 (1932), may all be handled in this manner.

tiate personal from business income taxes.[57] If it is suggested that the distinction is difficult to draw in non-corporate enterprises where the personal affairs of the owner are not clearly demarcated from those of the business, the reply must be that, however difficult, the distinction is required not only by a fair concept of due process but also by the commerce clause, which must figure in any of the situations dealt with herein.[58] The approach thus outlined approves the result reached in the *Peck* case, but rejects the distinction between tangibles and intangibles underlying it.[59] A due process standard for apportionment is applicable wherever apportionment itself is justified.

The problem of when to apply either an apportionment or a "vessel" rule may likewise be solved on a due process basis. Due process may be thought of as requiring apportionment in all situations except those in which the vehicle in question has no substantial connection with any state.[60] Some measure of a taxpayer's relationship to the taxing state other than the benefits involved in the use of the vehicle must then be adopted. Domicile, major place of business and home port vie for recognition. The Court has thus far selected domicile as the locus of significant benefits bestowed upon the taxpayer in such cases.

While Mr. Justice Black has not pressed the second level of his general commerce clause argument in the particular context of property taxes on vehicles, it is certainly appropriate here. The attempt to satisfactorily administer any rule in this area might well strain the judicial process beyond the limits of its competence. This assertion seems to draw strength from consideration of the complexities introduced by

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58. To permit unapportioned taxation by the state of domicile and the state of business activity would be to cause a multiple burden on interstate operations. Of course, since the "direct burdens" approach depends in this area upon the interpretation of due process taken, its application would destroy this argument.

59. The only ostensible theoretical basis of the *Peck* decision is the insistence that due process jurisdiction to tax tangibles follows the physical location of the property, since the taxpayer argued only due process before the Ohio Tax Commissioner (see Transcript of Record, pp. 51, 58, Standard Oil Co. of Ohio v. Peck, 342 U.S. 382 [1952], the Ohio Board of Tax Appeals (see *id.* at 15), the Supreme Court of Ohio (see Standard Oil v. Glander, 155 Ohio St. 61, 98 N.E.2d 8 [1951]), and the Supreme Court of the United States (see Brief for Appellants, p. 12, Standard Oil Co. of Ohio v. Peck, 342 U.S. 382 [1952]). The commerce clause, under the direct burdens test, is indistinguishable from due process here. See note 35, *supra.* The multiple burdens test requires only a choice between apportionment and the "vessel" rule. Mr. Justice Douglas, however, treated Ott v. Mississippi Barge Lines, 336 U.S. 169 (1949) as settling the use of apportionment for vehicles on inland waters. He may, thus, have had the commerce clause in mind when he said that unapportioned taxation at the domicile was precluded. "Otherwise there would be multiple taxation of interstate operations. . . ." Standard Oil Co. of Ohio v. Peck, 342 U.S. 382, 385 (1952).

60. *Supra,* p. 219.

differences from state to state in tax rates, types of taxes, exemptions and other apparatus of tax systems. So long as such dissimilarities exist, the interstate enterprise may not be on a level of equality with intrastate operators of comparable size and character. Its burden may be greater or less than that of the local enterprise, and neither an apportionment scheme nor restriction of taxation to one state can, of itself, equalize it.[61] The force of this argument, however, is weakened considerably by the reflection that nothing short of complete uniformity of state taxes applicable to interstate business or the substitution of a uniform federal tax can secure absolute equality of tax burden. Congress would be unlikely to take the drastic steps necessary to ensure either alternative. Further, the argument as to variances in state tax systems applies against the "multuiple burdens" approach alone, as it is only that test which attempts to equalize the relative positions of intrastate and interstate commerce. The "direct-indirect burdens" test, by attempting something less difficult of achievement, if more vaguely defined, than the absence of competitive disadvantage for interstate commerce, escapes this complexity.

Adoption of the rule of apportionment is subject to more serious objections from the point of view of the practicability of its administration by the Court. From the inception of its application, at the level of the state tax administrator, the process of apportionment is not an easy one. An equitable method must be flexible enough to be applicable to widely different kinds of taxpayers. Much must, in the end, be left to the discretion of the tax administrator.[62] More important, to the extent that the states do not use uniform apportionment factors, there is certain to be inequality of tax burden of the kind caused by differences

61. The reader can convince himself of this by considering the case of a perfect apportionment by all the states involved. The interstate taxpayer would then pay an amount strictly comparable to that paid by an intrastate enterprise if comparable local enterprises in every state were subject to the same taxes, assessment rates, and tax rates. Where there are substantial differences of this nature in the taxes applicable to an interstate enterprise, it may carry an actual load equivalent to that of business wholly within any *one* of the states in which it operates, but never equal to that of local operators in *all* of those states. Restricting the right to tax to one state also cannot put the interstate operator on a level of equality with intrastate competitors in all the states in which it does business. That there are significant differences in tax systems hardly requires demonstration.

62. "It would certainly be impossible to demonstrate any single system of allocation providing results that were correct in any economic sense. . . . The problem is as difficult of solution as dividing the value of a pair of shears." Lynn Stiles (Supervisor of Research and Railroad Assessor, Ill. Revenue Dept.), (1948) PROC. NAT. TAX ASS'N, 461-2. "We would be spared a great deal of nonsense about railroad allocation if it were generally understood that there is no 'correct' allocation formula—that the allocation process is, of *necessity,* arbitrary." Ronald Welch (then of the Cal. State Board of Equalization), *id.* at 469.

in tax systems, and, since each state would probably employ those factors most favorable to itself, such non-uniformity is most likely to result in a disadvantage for the interstate enterprise.

Tax administrators have, through national organizations, attempted to develop uniform apportionment formulas.[63] Since statutes in many states accord wide discretion to the administrator,[64] such efforts may have a significant effect, although it is certainly too soon to draw valid conclusions. Cooperation between state tax administrators is not enough of itself to ensure uniformity Interstate cooperation at the level of state legislatures is required, but since each state's desire and legitimate need for revenue indicates non-uniformity, it is improbable that this can be in any sense a final solution. The problem demands a clearly enunciated standard which can be enforced upon the states, upon which apportionment is to proceed. At present, the Supreme Court and the federal court system are the only institutions performing this function.

Certainly the Court has displayed no enthusiasm for holding a tight rein on the states. No apportionment scheme will be upset unless clearly arbitrary, the burden of demonstrating arbitrariness is upon the taxpayer.[65] Only rarely has that burden been carried successfully in the Supreme Court.[66] It seems unlikely that the Court will go beyond its enunciation of the basic standard. Mr. Justice Black's argument, then, assumes that this is inadequate and that another group, congressional or administrative, can accomplish more. With respect to Congress, the question of whether political pressure to favor particular states might

63. For a net income tax formula see (1947) PROC. NAT. TAX ASS'N 177, (1949) PROC. NAT. TAX ASS'N 239; (1950) PROC. NAT. TAX ASS'N 349; (1951) PROC. NAT. TAX ASS'N 456. For an "operating characteristics" formula for apportionment of unit-assessed property taxes on railroads see REVENUE ADMINISTRATION 1947, 25; REVENUE ADMINISTRATION 1948, 38, REVENUE ADMINISTRATION 1949, 59. For an apportionment formula applicable to property taxes on aircraft see note 50 *supra*.

A full answer to the question of how serious the problem of non-uniformity of apportionment factors actually is would involve a close analysis of the methods of apportionment in use with respect to these taxes. Such analysis lies beyond the scope of this discussion. *Cf.*, however, "[u]niformity of allocation factors is not a major problem in railroad taxation. Far greater inequities occur in the matter of system valuation. " Richard C. Beckett (General Attorney, Ill. Central Railroad Co.), (1948) PROC. NAT. TAX ASS'N, 458, and also H.R. Doc. No. 141, *supra* note 28, at 84-5.

64. See, *e. g.*, the California statute on the corporate net income tax. CAL. REVENUE AND TAXATION CODE (Deering), § 24301 (Supp. 1951).

65. Nashville, Chattanooga & St. L. Ry. v. Browning, 310 U.S. 362 (1940), Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).

66. See Hans Rees Sons', Inc. v. North Carolina, 283 U.S. 123 (1931), Wallace v. Hines, 253 U.S. 66 (1920). One case, Union Tank Line Co. v. Wright, 249 U.S. 275 (1919), invalidated an apportionment scheme for property taxes on railroad cars on the ground that it was arbitrary.

become overwhelming is certainly arguable. More generally, the need for constant revision of apportionment factors as further experience is gained, indicates that a permanent agency in the form of a federal administrative body is required. Such a body, possessing the expertise to determine apportionment factors and the power to compel uniformity in their use, might well be more efficient than the Court.[67]

The supposition that judicial administration would prove impracticable does not apply, however, to the "vessel" rule. The outstanding feature of that rule is that, once the choice of the fortunate state is made, administration is a problem neither for the state tax administrator nor for the Court. Proponents of the "vessel" rule have made much of the comparative ease of its application. Mr. Justice Frankfurter, in the *Northwest Airlines* case, apparently recommended the extension of the "vessel" rule to aircraft when he characterized the rule of apportionment as "beset with friction, waste, and difficulties."[68] Mr. Justice Minton, dissenting in *Standard Oil v. Peck*[69] raised the specific objection that where, as in that case, ships move on rivers which form the boundaries of several states, their location in any one state at any particular time is unascertainable.[70] Hence apportionment is impossible. He agrees with Mr. Justice Black as to the impracticality of the rule of apportionment but moves toward the "vessel" rule in the alternative rather than toward congressional action. There is a basic objection to the "vessel" rule, but it must be made on grounds other than administrative feasibility.

Problems of the "Vessel" Rule

Reasonableness of a rule which reserves the privileges of taxation to the domiciliary state in all cases, is, at least, questionable.[71] One can hardly quarrel, however, with the proposition that some vehicles meander so irregularly that they have substantial connection with no state, thus making apportionment a practical impossibility as well as theoretically unjustified from a due process point of view. In such situations choice

67. The problems of congressional or federal administrative action in this field are discussed in Hellerstein and Hennefield, *supra* note 43; Sutherland and Virciguerra, *The Octroi and the Airplane*, 32 CORNELL L.Q. 161 (1946); and H.R. Doc. No. 141, *supra* note 28, at 47-51.

68. Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 300 (1944). Attribution of hostility to the rule of apportionment to Mr. Justice Frankfurter must be qualified by the fact that he voted for that rule in both the *Ott* and *Peck* cases. There is also reason to believe that his *Northwest Airlines* opinion was a call for congressional action. See H.R. Doc. No. 141, *supra* note 28, at 155.

69. 342 U.S. 382, 385 (1952).

70. *Id.* at 386.

71. See pp. 220-221 *supra*.

of the taxing state is, of necessity, somewhat arbitrary. The cogent argument against the "vessel" rule is that this description does not fit the overwhelming majority of situations involving watercraft or aircraft. If state protection of their right of way has less importance for watercraft owners than for railroad companies, the benefits bestowed at terminals are not less substantial. This indicates that the factors by which an apportionment of the value of a vessel or an airplane is made should be, in most cases, terminal factors such as tons handled.[72]

It is on the basis of such consideration that Mr. Justice Minton's argument may be answered. He assumes that the only significant factors in apportionment of the value of the vessels in the *Peck* case embody time or distance within the taxing state's borders. If terminal factors are better indices, then apportionment would find no difficulty in the case of watercraft moving on a river-boundary between states. There is, of course, room for disagreement as to the proper factors applicable.

The "vessel" rule's effect upon the general state interest in revenue is perhaps as significant as any specific due process claims of non-domiciliary states in requiring rejection of broad application of that rule. In this respect the choice of domicile as the determinant of state right to tax has, in an era of corporate enterprise, proven unfortunate. Since the major states of corporate domicile[73] exempt all tangibles from property taxes, a large segment of the water carrier industry has been substantially freed from all property taxation upon their vehicles.[74] Realization that vessels constitute a substantial portion of the total investment of water carriers[75] and that the great majority of these operate interstate,[76] induces the suspicion that there is an untapped vein of revenue for the states in taxation of watercraft. Selection of a state other than that of legal domicile, *e.g.*, commercial domicile, for a rule of the "vessel" type might increase state revenue considerably. Apportionment would probably increase it even more.[77]

72. This is the type of formula proposed in H.R. Doc. No. 160, *supra* note 11, at 286-7, 296, for watercraft and the kind suggested for aircraft by the Nat. Ass'n of Tax Administrators. See note 50 *supra*.

73. New York, Pennsylvania, and Delaware.

74. For evidence for this assertion and discussion of the problem see H.R. Doc. No. 160, *supra* note 11, at 278-9.

75. *Id.* at 268, 283.

76. *Id.* at 278.

77. *Id.* at 286, where the amount of revenue the states should gain from a shift, either to "commercial domicile" or to apportionment, is estimated. For a report of the opinion of tax administrators and a discussion of defects of the "vessel" rule see H.R. Doc. No. 141, *supra* note 28, at 45-47.

Conclusion: Congress and the Court

Consideration of the enormous problem of the revenue needs of state and local governments in the context of particular constitutional limitations on the taxing powers of the states is, for many, beyond the province of the judicial process. As a background to litigation, fiscal requirements can perhaps create a presumption in favor of the states, but decisions based upon them have passed from the determination of constitutional principle to the exercise of the legislative function. Factors of this nature lend appeal to Mr. Justice Black's position. Standards for apportionment may be provided by the due process clause; the decision to apply a "vessel" or a "railroad" rule may be justified by reference to the same principle. But if apportionment is to be applied consistently beyond the field of property taxes on tangibles, an extensive reinterpretation of precedents is necessary,[78] and that reinterpretation would make due process a consciously wielded instrument for determination of state tax policy on a broad front. Beyond this, when the Court establishes rules governing taxation of economic enterprises, it cannot ignore the effect of its actions upon other nominally extra-constitutional matters. For example, one consequence of the "vessel" rule has been to bestow upon water carriers an advantage with respect to their air and land competitors.[79] Even if one grants that the administrative difficulties of apportionment might be overcome, Mr. Justice Black's position still has appeal. Should those difficulties prove insuperable, his argument would appear to become convincing.

But the unverified assumption at the base of Mr. Justice Black's thesis is that Congress can and will perform the function thrust upon it. Aside from the impulses toward favoritism that would beset its path, there is tremendous hostility to any entrance of federal power in this area. Following the *Northwest Airlines* case, the Civil Aeronautics Board was directed by Congress to prepare a report and recommendations on the subject of multiple taxation of air commerce.[80] That report recommended the establishment of a federal agency to control state apportionment schemes as an experiment to be followed by application to taxes on other vehicles. Since its submission, several bills have

78. See p. 223, *supra*.

79. H.R. Doc. No. 141, *supra* note 11, at 33, 49-50, 284, 306. Concerning the problem of government policy on this question see that study generally and H.R. Doc. No. 160, *supra* note 28, at 34.

80. 58 STAT. 723 (1944), as amended, 58 STAT. 926 (1944). The report was published at Multiple Taxation of Air Commerce, *supra* note 28. The recommendations are found at pp. 45-51.

been introduced on the subject.[81] None have emerged from the committees to which they were referred.

The Court's adoption of the rule of apportionment now assumes a more favorable light.[82] The administrative problem is admittedly formidable, and even partial solution requires working cooperation between tax administrators who devise and apply apportionment schemes, and the courts who declare and enforce the basic standard. That Congress retains its power to enter this field is undoubted, but until and unless it does, the responsibility for a workable solution rests with the Court. Its most recent pronouncements indicate that it has accepted that responsibility.

PROTECTION ACCORDED A PURCHASER OF LAND FROM A DEFAULT JUDGMENT PLAINTIFF

Whenever rights in real property are being litigated, the land may be privately sold or mortgaged to a stranger to the suit.[1] Such transaction may occur before final judgment, after final judgment but preceding appeal,[2] during appeal, or subsequent to the time allowed for appeal. Legislative and judicial stagnation necessitates an inquiry into the protection afforded to purchaser *after* the time for appeal has run. This investigation is thus limited in scope because a person buying property through private sale *during* the time when an appeal may be taken, is generally on constructive notice that an action relating to the land is pending.[3] The fundamental limitations upon which the buyer's rights are contingent are the operation of lis pendens after the time

81. H.R. 3446, 79th Cong., 1st Sess. (1945); H.R. 1241, 80th Cong., 1st Sess. (1947); S. 2453, 80th Cong., 2d Sess. (1948); S. 420, 81st Cong., 1st Sess. (1949).

82. Application of that rule is justified wherever the use of the vehicle in question is such that there is a substantial connection with more than one state, without regard for the fact that the vehicle is a railroad car, a water vessel, or an airplane. In this connection, the limitation of the *Ott* and *Peck* holdings to vessels moving on inland waters, see note 15 *supra*, hardly seems *a* priori justified for all cases of taxes on ocean-going ships.

1. A private sale must be distinguished from a judicial sale with reference to the rights of purchasers. The purpose of protecting a purchaser at a judicial sale is not merely to keep land alienable, but primarily to promote bidding at public sales. Lord v. Hawkins, 39 Minn. 73, 38 N.W. 689 (1888); Mach v. Blanchard, 15 S.D. 432, 90 N.W. 1042 (1902).

2. See the discussion of the rights of a purchaser where judgment is set aside before time for appeal has run in Tainter, *Restitution of Property Transferred Under Void or Later Reversed Judgments*. 9 Miss. L.J. 157, 179 and n.133 (1936).

3. *E.g.*, Maedel v. Wies, 309 Mich. 424, 15 N.W.2d 692 (1944); Stuart v. Coleman, 78 Okla. 81, 188 Pac. 1063 (1920).