

Congress should begin formulating policies on this problem. The tremendous burden of attempting to analyze all the facets of this issue in every case would seem to require reliance by the Commission on some sort of general standard, whether Congressionally prescribed or internally developed. Perhaps, on the other hand, the time has not yet arrived when it would be feasible for Congress to establish a definite policy. In either event, the Federal Power Commission should be making more penetrating decisions. The co-ordinating function prescribed by 7(b), necessary in any economy allowing both private and public power development, simply makes no sense in the absence of some sort of general policy. It is not possible for the Commission to specify a national policy, but it should commence to develop a nucleus of standards. The ultimate decision would remain with Congress, where it belongs; when the judgment of Congress and the Commission do not coincide, the *New York Power Authority* case demonstrates the FPC's ability to reverse itself after the two year waiting period.¹⁰⁰ This approach would stimulate Congressional establishment of a federal water policy.

HIGHWAY TAXATION AND REGULATION: THE CASE FOR FEDERAL ENTRY

Gaining momentum from every cry of "Foul!" emanating from truckers is the idea that federal intervention alone can prevent state legislatures from erecting figurative regulatory and tax barricades in the path of interstate commerce.¹ However, Congressional leaps into the

Edelmann, *The T.V.A. and Inter-Governmental Relations*, 37 AM. POL. SCI. REV. 455 (1943); Hardman, *Competition in Public Service—a New Interpretation*, 48 W. VA. L.Q. 271 (1942); Edelmann, *Public Ownership and Tax Replacement by the T.V.A.*, 35 AM. POL. SCI. REV. 727 (1941); and Trimble, *Constitutionality of Government Competition with Business*, 13 TEMP. L.Q. 201 (1939).

The general advantages of the government's use of the corporate device, as opposed to administrative agencies, are outlined and discussed in Dimock, *Government Corporations; A Focus of Policy and Administration*, 43 AM. POL. SCI. REV. 899, 1145 (1949); Lilienthal and Marquis, *The Conduct of Business Enterprises by the Federal Government*, 54 HARV. L. REV. 545 (1941); Watkins, *Federal Ownership of Corporations*, 26 GEO. L.J. 261 (1938); McIntire, *Government Corporations as Administrative Agencies: An Approach*, 4 GEO. WASH. L. REV. 161 (1936); and *Government-Controlled Business Corporations: A Symposium*, 10 TULANE L. REV. 79 (1935).

100. Even if Congressional standards are developed, the possibility will continue to exist that Congress and the FPC (or any agency performing a similar function) may disagree over the desirability of a particular project.

1. Interstate truckers have voiced objections to virtually every phase of state highway control which has affected them; especial vehemence has been directed toward the aspects of weight regulation and tax discrimination. See generally PURCELL, *INTERSTATE BARRIERS TO TRUCK TRANSPORTATION* (U.S. Dept. Agric. 1950); HILLMAN AND ROWELL, *BARRIERS TO THE INTERSTATE MOVEMENT OF AGRICULTURAL PRODUCTS BY MOTOR VEHICLE IN THE ELEVEN WESTERN STATES* (U. of Ariz. Agricultural Experiment Station 1953).

field, propounded by influence groups of varied interests, have been prevented by the very newness of such plans; the thought of federal intrusion into an area heretofore practically reserved² to the states has proved an effective deterrent. Yet the idea persists, its vitality ensured by the present inadequacy of state attempts at solution of the highway problem.³ Consideration of highway taxation and regulation in the light of potential federal entry seems to be in order, if not overdue.

The ordinary wear and tear of natural factors, such as climatic conditions, coupled with the constant effects of motor vehicles on the highways, forces states to construct roads with capacities to withstand them.⁴ To protect these roads from the pressures of motor vehicles too heavy for them,⁵ the states prescribe the allowable weight of vehicles

The notion that the federal government should intervene in the area is still in its infancy. That highway control is a relatively exclusive state function was, until recently, undoubted; federal interposition, other than as a fund-furnisher by way of the Federal-Aid Highway Acts, 23 U.S.C. c. 1 (1946) was directed toward freight and passenger rate control through the MOTOR CARRIER ACT of 1935. 49 STAT. 543 (1935), 49 U.S.C. §301 (1946). However, recent Congressional committee hearings indicate a rising federal interest in the highway problem. *Hearings before Subcommittee on Domestic Land and Water Transportation of the Committee on Interstate Commerce Pursuant to S. Res. 50, 81st Cong., 2d Sess. (1950)*. Emphasizing the increased support accorded federal intervention is the introduction of H. R. 1652, 82d Cong., 1st Sess. (1951), which proposed to bring full federal force to bear on interstate truck taxation; although the bill died in committee, the fact of its presentation indicates the practical relevance of federal entry.

Further indicia of the increasing approval of such a plan lies in the fact that legal writers have begun to propagate the idea. See, e.g., Notes, 100 U. OF PA. L. REV. 71 (1951); 5 STAN. L. REV. 306 (1953).

2. Highway transportation has always been considered peculiarly appropriate to state control, with few exceptions. See note 1 *supra*. A study of any but recent reports and writings on the subject reveals almost a total absence of any intimation that the federal government belongs in the field, with, of course, the noted exceptions. See, e.g., Kauper, *State Taxation of Motor Carriers*, 32 MICH. L. REV. 1, 171, 351 (1933).

3. Critics of unsuccessful state attempts at solving the problem are as numerous as the attempts, which are legion. For a springboard into the numerous literary attacks on state methods of highway regulation and taxation, see FACTUAL DISCUSSION OF MOTOR-TRUCK OPERATION, REGULATION, AND TAXATION (U.S. Dep't Commerce 1951) (hereinafter cited as FACTUAL DISCUSSION); PURCELL, *op. cit. supra* note 1; COUNCIL OF STATE GOVERNMENTS, HIGHWAY SAFETY: MOTOR TRUCK REGULATION (1950) (hereinafter cited as COUNCIL OF STATE GOVERNMENTS REPORT).

4. See *Hearings, supra* note 1, at 713.

Trucking interest groups often claim, in attempts to effect increases in state maximum weight limits, that heavy trucks are not the greatest road damagers but that soil and climatic conditions are more destructive than any form of road use. Actually, though, little evidence exists of extensive damage due to these conditions, while evidence of excessive damage due to trucks is overwhelming. COUNCIL OF STATE GOVERNMENTS REPORT 67.

5. State highway officials, the Interstate Commerce Commission, the National Grange, the American Automobile Association, and The National Association of Railroad and Public Utilities Commissioners are in general accord that, while overloaded trucks constitute a small percentage of trucks on the highways, these violators are the greatest single factor in highway deterioration. COUNCIL OF STATE GOVERNMENTS REPORT 69-99. Recent intensive and thorough scientific road tests in Colorado and New Jersey strongly support the conclusions of these highway technicians. See note 25 *infra*.

using their highways.⁶ Trucking companies operating solely within the confines of a single state can conform with little difficulty to that state's requirements. However, many companies operating through more than one state find themselves blocked by limitations varying from state to state.⁷ Upon reaching the border of a state with a limit lower than the weight of the vehicle plus cargo, the trucker is confronted with several alternatives. He may partially unload, transferring the excess to another truck.⁸ He may assume the risks of fine or truck seizure by attempting to cross the state carrying the overload.⁹ Or he may decide, long before

6. Of course, other regulatory limitations have been created by the states, *e.g.*, requirements for certain types of brakes, safety glass, certain numbers and types of lights and signaling devices. MCCARTY, STATE REGULATION AND TAXATION OF HIGHWAY CARRIERS 6-9 (U. of Cal. Bureau of Public Administration 1953). Limitations are also placed on other measures of size, such as height, length, and width. However, most aspects of both safety requirements and size limits are relatively easy to comply with and fairly well standardized by the states. *Id.* at 1-2. Apparently, the real regulatory bane of the interstate trucker's existence stems from the lack of uniformity in state weight limitations. The American Association of State Highway Officials selected 18,000 pounds axle load as the maximum allowable under existing highway conditions, although several states have adopted higher limits. COUNCIL OF STATE GOVERNMENTS REPORT 62 *et seq.* Since the axle load of vehicles is the main determinant of highway capacity, this limit is mathematically calculated according to highway design. FACTUAL DISCUSSION 43-44. Thus, to prevent truckers from carrying road-damaging loads by distributing the weight of the cargo over many axles, total truck weight limits as well as axle load limits are in common use. See, for an excellent graphic collection and presentation of state weight and axle load limits, ASSOCIATION OF AMERICAN RAILROADS AND ASSOCIATION OF WESTERN RAILWAYS, DIGEST OF STATE LAWS PERTAINING TO THE REGULATION AND TAXATION OF MOTOR VEHICLES 2-7 (1952) (hereinafter cited DIGEST OF STATE LAWS).

7. Some evidence of a trend toward uniformity is seen since the war, especially within certain geographical regions. The truckers' goal of high limits has been most nearly achieved in the Western states. However, truckers hauling goods from the West to other parts of the country are confronted by much lower maximums in the Midwestern states. For example, maximum combination weights in the eleven Western states ranged upward from 72,000 pounds to 79,900 pounds; but North and South Dakota, Nebraska, Kansas, Oklahoma, and Texas form a solid wall between the Eastern and Western portions of the country with weight limits below 64,650 pounds, Texas having a limit of 58,420 pounds.

Conceivably this absence of uniformity could operate to limit interstate truckers to relatively short hauls. This is best illustrated by the Rhode Island situation. That state, with an 80,000 pound maximum combination weight, is bordered on one side by the ocean, and on the others by states having 50,000 pound limits. Thus the activities of interstate trucker domiciliaries of Rhode Island are effectively limited by Connecticut's and Massachusetts' laws. DIGEST OF STATE LAWS 2. The Western states seem most critical of the low maximums of other areas. Their complaints, as voiced by an Arizona research agency, are predicated upon the necessity for speedy movement of agricultural products: "Nonuniformity of requirements and procedures between states is the most important 'barrier' to interstate movement of agricultural products by motor vehicle within and from the Western area. This is especially the case with regard to the more seasonal and highly perishable agricultural products, such as fresh fruits and vegetables." HILLMAN AND ROWELL, *op. cit. supra* note 1, at 3.

8. The expense of choosing this alternative would seem to preclude its serious consideration.

9. While some truckers driving overloaded vehicles violate the law unwittingly, most of them seem willing to gamble against being apprehended. The frequency of

reaching the boundary, to circumvent that state completely.¹⁰ Obviously, no one of these evasive actions is a Joshua's horn to the walls erected between states by disparities in weight maximums.

Uniformity is the self-evident panacea for these regulatory trade barriers. The American Association of Highway Officials has proposed standard weight and length limits which have received more than token approval by several states.¹¹ Many states, however, refuse to consider altering their limits to conform to a master plan which may fail to consider the unique characteristics of their own highway systems.¹² As a result, despite attempts at uniformity by interstate agreement and notwithstand-

arrests made by state enforcement officers indicates a willingness on the part of truckers to accept fines for overloading as a cost of doing business; the Bureau of Internal Revenue even considers these fines to be business deductions. BRANHEAM, TRANSPORTATION FACTORS AND NATIONAL TRANSPORTATION POLICY: A PARTIAL ANALYSIS 127 (Purdue Engineering Extension Dep't 1951). On the other hand, the incidence of violations evidently decreases as the penalties become more stringent; the number of arrests being made are on the decline in states which impose extremely heavy fines (\$500 to \$1000), suspend drivers licenses, or impound vehicles. COUNCIL OF STATE GOVERNMENTS REPORT 101-102.

The task of enforcement, of course, is difficult and expensive; "weighing parties," state police patrols, and scales involve large expenditures. However, active enforcement programs have converted a one-time strict protective measure into big business, easily financing the necessary machinery. *Id.* at 101-103. Kentucky, for example, received returns of slightly less than a million dollars in a single year, averaging \$2,509 per day in fines. Hughes, *Check Point*, Louisville Courier Jourual Magazine, Oct. 11, 1953, p. 7.

10. While circumvention of a state is not always expedient, partisans of the truckers contend that states may find themselves losing expected tax revenues by the imposition of strict regulatory standards, especially those states easily by-passed. The logic of this argument is obvious, but practical experience indicates great possibility of a contrary result; *e.g.*, certain states have increased revenues greatly by stringent limit-enforcement. See note 9 *supra*.

11. While many states have conformed to AASHO recommendations, COUNCIL OF STATE GOVERNMENTS REPORT 62, a cursory glance at the limits imposed by the states indicates general nonconformity. DIGEST OF STATE LAWS 2-7.

12. Adoption by all states of uniform limits is the recognized but uncrowned champion of suggested cures for regulatory ills. But uniformity is an end; the roots of the difficulty lie in finding the satisfactory means. Due to differences in construction methods, materials, geographical and climatic conditions, and a host of other factors, state self-imposed conformity to independently established standards is impractical. Thus the road to uniformity is blocked by the absence of a method of standardizing highway conditions throughout the states. See HILLMAN AND ROWELL, *op. cit. supra* note 1, at 3 and 45-46; PURCELL, *op. cit. supra* note 1, at 7; LOCKLIN, ECONOMICS OF TRANSPORTATION 697 (1947).

Each of these authorities sanctions the standards established by the American Association of State Highway Officials. See note 11 *supra*. One proposal prescribes that each state enact the AASHO standards into law, then suggests declaring a moratorium on increasing size and weight limits pending completion of scientific investigations presently being conducted and, if necessary, until highways can be strengthened or renewed. COUNCIL OF STATE GOVERNMENTS REPORT 101, 103. The impracticalities of this plan are immediately evident upon realization that the AASHO standards are higher than those in present application in some states, lower than those used in others. Those states have established maximums according to their opinion of the durability of their own highways and are unlikely to be willing to amend their standards to their own detriment. Neither is it probable that they will bind themselves to a moratorium of indefinite duration. For

ing a general increase in state weight limits, these restrictions continue to loom as obstacles to interstate commerce.

The taxation complex presents problems of an interstate nature similar to those involved in regulation.¹³ At the same time it is fraught with perplexities dissociated from state-to-state relationships, primarily concerning allocation¹⁴ of the responsibility and, therefore, the burden of financing the highways. Levies upon highway transportation are traditionally user taxes, premised upon a benefit theory; this rationale assumes that those parties responsible for the construction and maintenance of highways should bear the expense or that those vehicles which receive the value from such expenditures should reimburse the state.¹⁵

a comparison of AASHO recommendations with existing state regulatory limits, see COUNCIL OF STATE GOVERNMENTS REPORT 62-65.

13. That is, the erection of "trade barriers" blocking interstate truckers' entry into certain states. Here, as in regulation, truckers face alternative methods of dodging the state law—by tax avoidance or evasion. In regard to both regulation and taxation, an interesting argument is made as to the ultimate effect of these legislative actions upon the economy. "Transfer costs," including the expense of conforming to regulatory limits or the fines paid when caught violating them, and the tax burden are ultimately passed forward to the consumer or backward to the shipper with the trucker seldom absorbing those expenses. Eventually, then, the whole economy is affected by state highway legislation, possibly resulting in increased production costs and decreased consumption of truck-transported goods. HILLMAN AND ROWELL, *op. cit. supra* note 1, at 17.

14. The taxation aspect of the general highway problem is divided into two inter-related but distinguishable phases. In an attempt to reduce chaos to mere confusion, "allocation" in connection with user taxes shall hereinafter refer to the distribution of the highway tax burden among weight classes of vehicles, while "apportionment" shall signify the division of taxing jurisdiction among the states and shall concern equitable taxation of interstate truckers in relation to those operating solely intrastate.

15. Until the motor vehicle became a feasible mode of transportation, highways were supported by general tax revenues. Shifting the tax burden in response to sharply rising costs, states adopted the "benefit" theory in contrast to the principle which formerly prevailed in highway financing, "ability to pay"; the latter is the conventional foundation of prevailing types of income taxes. Zettel, *Taxation for Highways in California*, 1 NAT. TAX J. 207, 209 (1948). Perhaps the best justification for highway user taxes is the argument that, unless users pay the full costs of the services they enjoy, highway transportation is subsidized. See BOWEN, *TOWARD SOCIAL ECONOMY* 164 *et seq.* (1948) and authorities cited; see also note 25 *infra*. This contention rests not so much on the claim that the benefits government confers in constructing highways are received by a narrowly defined group (since even buyers of truck-transported goods and manufacturers of motor vehicles benefit in some sense) as on the fact that there are alternative and competing modes of transportation. Without special justification, such subsidization gives highway transportation an advantage not based on efficiency and hence promotes a misallocation of resources. See Zettel, *supra* at 210. For an analysis of the comparative tax burdens of the major forms of transportation, see *Carrier Taxation* H.R. Doc. No. 160, 79th Cong., 1st Sess. 349-396 (1945).

Actually, three major groups profit in some manner from the existence of highway systems: motor vehicle owners, property owners, and the general public. The problem of allocating responsibility among these classes of beneficiaries is a monumental task and seemingly not ripe for solution. This discussion, however, will deal specifically with the user tax on motor vehicles. But the necessity for solution to the tripartite allocation issue cannot be assumed away and always lurks in the background of the highway taxation area. See FACTUAL DISCUSSION 90; COUNCIL OF STATE GOVERNMENTS REPORT 105; see also note 30 *infra*.

Existing highway tax programs have been stratified by legal writers into three classes.¹⁶ The registration fee, the "first structure" tax, has uniformly been accepted as the basic levy on motor vehicles,¹⁷ having received judicial approval early in its evolution.¹⁸ The "second structure" fuel tax is firmly imbedded in highway financing plans as the most important fund-raising implement;¹⁹ these levies are the counterpart, from the stand point of administration and collection, of the sales tax so prominent in the revenue schemes of many states.²⁰ "Third structure" taxes, manifested in the form of ton-mile, weight,²¹ and gross receipts

The most generally accepted measure of benefits received by highway users is "costs occasioned." There is, however, a broader and somewhat vaguer "value" concept of which the gross receipts tax and the ton-mile tax are said to be examples. See Factual Discussion 93 *et seq.*

16. Speculation is in order as to the origin and utility of the "structurization" idea. Writers are prone to accept the classification as a convenient method of distinguishing the three taxes. Actually, the division into three classes can be justified on several bases, although doubt exists that any of these was actually considered in categorizing the taxes. Of course, each group bears certain marked characteristics which allow the taxes to be classified as to these traits; *e.g.*, registration taxes are generally levied according to weight factors, while fuel taxes are imposed upon the amount of fuel consumed. However the factor running through each third structure tax is their "afterthought" nature. Once the basic tax program comprised of registration and fuel taxes ceased to produce necessary revenues, states adopted the special, or third structure, levy as an additional revenue source. Kauper, *supra* note 2, at 203-204.

Perhaps the distinction which comes closest to justifying categorization lies in the methods of collection peculiar to each type. Registration taxes are collected prior to vehicle operation. Fuel taxes are paid each time fuel is purchased. The third structure taxes necessarily are collected at the close of the tax period.

17. Each of the forty-eight states and the District of Columbia levies a registration fee in some form; these fees generally account for a large part of all revenue from highway user taxes, in most states ranging from 1/3 to 1/4 of the total. COUNCIL OF STATE GOVERNMENTS REPORT 160-161.

18. *Hendrick v. Maryland*, 235 U.S. 610 (1915), paved the way for broad state highway tax jurisdiction. The Supreme Court declared valid a state registration tax upon nonresident motorists operating private automobiles. The court later upheld a registration tax imposed upon carriers for hire traveling interstate. *Clark v. Poor*, 274 U.S. 554 (1927).

19. In every state the fuel tax provides much more revenue than does the registration tax, the greatest difference, as of 1948, arising in Georgia where approximately eight fuel tax dollars were collected for every dollar derived from the registration tax. COUNCIL OF STATE GOVERNMENTS REPORT 160-161.

20. The obvious distinction between the fuel tax and an ordinary sales tax is that the fuel tax is intended as a method of paying for highway use; the state offers a tangible *quid pro quo* in the form of highway facilities. Thus it is argued that, unless fuel tax revenues are earmarked specifically for highway purposes, that tax is no more nor less than a sales tax. Kauper, *supra* note 2, at 22-23. However a tendency to view highway tax diversions with disfavor was recognized as early as 1930, *ibid.*, eventually leading to suggestion of a constitutional amendment prohibiting such diversion. COUNCIL OF STATE GOVERNMENTS REPORT 104. Today, only 6.3 percent of highway tax revenues are applied to nonhighway purposes. HIGHWAY STATISTICS 42 (U.S. Bureau of Public Roads 1951).

21. This levy seems misclassified in the third structure, resembling the registration fee sufficiently to appear merely an extension of that device. States imposing weight taxes generally impose relatively low registration fees; *e.g.*, Illinois, with a flat registration fee of \$5, would collect as a weight tax \$154 from a ten-ton truck. DIGEST OF STATE LAWS 42. Following the logic of "structurization according to method of collection," see

taxes, are special levies imposed exclusively on carriers.²³

Registration taxes are levied in sharply graduated progression according to some weight factor,²³ neglecting the differences in costs occasioned by the varying degrees of use of the highway system made by vehicles of the same weight.²⁴ Fuel taxes do, in some measure, reflect wear to the roads in the sense that the vehicles which cause the greatest damage because of their weight or mileage traveled consume more fuel. Casual observation would indicate, however, that this tax fails to place sufficient responsibility upon the larger trucks. The amount of fuel used ordinarily increases with the weight of the consuming vehicle at a decreasing rate. Thus, the larger vehicles make proportionately smaller total fuel tax payments than do passenger vehicles.²⁵ But while the defects of both the fuel tax and the registration tax may render these taxes inequitable, their administrative simplicity has made them attractive to the states.²⁶

note 16 *supra*, the weight tax is definitely first structure. Both the weight and the registration taxes are imposed at the beginning of the tax period.

22. These are in fact referred to as "special" motor carrier taxes, COUNCIL OF STATE GOVERNMENTS REPORT 108, applying only to trucks. Besides those customarily accorded passenger cars, exemptions are often granted trucks according to the purpose of their operation: *e.g.*, private carriers exempted in Alabama, Louisiana, and South Dakota (Naturally, any gross receipts tax exempts private carriers since they have no gross receipts.); contract carriers exempted in South Carolina. DIGEST OF STATE LAWS 24, 53, 110, 113.

23. States vary as to the particular weight factor to be taxed, generally selecting gross weight, unladen weight, manufacturer's rated capacity, or capacity with fees graduated according to weight. The "rated capacity" factor may be objectionable since it is frequently understated in comparison to actual payload. COUNCIL OF STATE GOVERNMENTS REPORT 108.

24. This tax is imposed at the beginning of the tax period and, therefore, must be based solely upon truck weight. The tax may easily prove discriminatory against those trucks which use the state highways only occasionally; *i.e.*, the truck which travels only 1,000 miles each year within the state will be taxed an amount equal to the levy on a truck which travels 20,000 miles intrastate.

25. FACTUAL DISCUSSION 89; COUNCIL OF STATE GOVERNMENTS REPORT 106, 113. According to most authorities, though highway users as a class may pay their way, truckers fail to meet their share of responsibility; the discrimination against passenger cars by the fuel tax strengthens that claim. The Federal Board of Investigation and Research, and, more recently, the Council of State Governments have reported that, with some exceptions, the commercial motor carrier is generally undertaxed; a Nebraska survey disclosed similar findings. FACTUAL DISCUSSION 68-69; COUNCIL OF STATE GOVERNMENTS 113-114. Compare BRANHAM, *op. cit. supra* note 9, at 128-131.

Such discrimination against smaller vehicles has provided much fuel for the fire which railroad interest groups attempt to build under legislatures; the railroads cry "subsidization" and demand heavier taxes and more stringent regulatory limits on trucks. MACKIE, THE HIGHWAY FREIGHTER PROBLEM 33-56 (Association of American Railroads 1950); PARMELEE, REBUTAL AND SUPPLEMENTAL STATEMENT OF THE ASSOCIATION OF AMERICAN RAILROADS 13-14 (1950). Both reports were submitted on behalf of the railroad industry in *Hearings, supra* note 1. Compare note 15 *supra*.

26. See note 16 *supra*. Because these two taxes are collected prior to highway use, they produce large returns at small cost. See Zettel, *supra* note 15, at 220, as to the gasoline tax. The third structure taxes, on the other hand, are generally collected at the end

When states have gone beyond the first two tax levels because of need for greater revenue, they generally have attempted to provide more accurate measures of benefits actually received. Unfortunately, the perfect theory of allocating the tax burden has not been discovered.²⁷ No affirmative proof exists that the product of weight times distance, as utilized in the ton-mile tax, is a yardstick of value conferred, nor is it a sufficient measure of costs.²⁸ By the same token the accuracy of the gross receipts tax as a measure of value can be doubted upon consideration that gross receipts are largely determined by factors extraneous to highway use, such as fluctuating economic conditions; of course, they are completely inappropriate as a measure of costs. At the same time, the quest for precision evidenced by adoption of the gross receipts or the ton-mile tax has resulted in staggering record keeping burdens for both truckers and state administrators.²⁹

Finally, there is increasing recognition of the contention that the user tax itself is insufficient to allocate properly the highway burden. Pushing the logic of the benefit theory to the wall, the general public, unburdened by taxes earmarked for highway purposes, enjoys an unearned increment of economic benefit from the existence of road systems; the instrument generally suggested for assessment of their responsibility is

of the tax period, thus being more difficult to administer and extremely susceptible to evasion. See PURCELL, *op. cit. supra* note 1, at 11. The gross receipts tax, while difficult to administer, provides large returns. The ton-mile tax, though, is often considered administratively impracticable since it necessarily places the burden of record-keeping on the truckers themselves. Reports from the states indicate mixed successes and failures in application of the tax; these statements, however, are based merely upon comparison of administrative costs with revenues. Naturally, no record exists as to how many truckers evaded their full responsibility. COUNCIL OF STATE GOVERNMENTS REPORT 116-118.

27. While the ton-mile and gross receipts levies, the prevalent third structure taxes, reflect the benefit principle more truly than do the registration and fuel taxes, yet more complex and presumably more precise measures have been recommended; *e.g.*, the increment theory, which attempts to determine successive cost requirements associated with an ascending scale of vehicle sizes; the operating cost theory, which purports to measure value received from highway use; the theory of differential benefits, which calculates benefits on savings accruing to different-sized vehicles from the different types of highway improvement; the space-time theory, which reflects relative amounts of space occupied by vehicles of various sizes. However, extreme difficulty of administration and data-collection have kept these theories from being seriously considered for adoption. FACTUAL DISCUSSION 93-110.

28. While the ton-mile tax has achieved much popularity, its theoretical shortcomings may negate its worth as a measure of value. For example, there is no certainty that a 35,000 pound truck moving one mile gains the same value from highway existence as does a 2,000 pound auto which travels 17.5 miles, yet the ton-mileage is the same. At the same time there is some indication that it places too great a burden upon heavier trucks in relation to the costs attributable to them. FACTUAL DISCUSSION 97 *et seq.*

29. See note 26 *supra*.

the property tax since abutting landowners are assumed to be the persons most directly affected.³⁰

The second phase of the highway tax problem, analogous to the regulatory barriers confronting interstate trucking, primarily concerns those obstacles erected by multiple taxation.³¹ For example, every trucker operating solely within a single state is required, unless statutorily exempted, to be registered with an agency of that state and to pay a fee graduated according to some aspect of the weight of the vehicle.³² The states, with Supreme Court sanction, are free to levy these same fees upon interstate carriers.³³ The typical interstate truck is likely to be a long-haul freight carrier exceeding in size the domestic carrier which often is a vehicle no larger than the average passenger car. It is probable, then, that most interstate carriers pay the fees required of upper-bracket vehicles. However, existence of this situation is not per se burdensome. The perspective changes upon realization that a particular truck may be required to register in every state whose roads it travels, regardless of degree of use.³⁴ As a result, interstate operators, while treated similarly to local truckers within each state, are multiply burdened in respect to their total operations.

30. According to some authorities, the highway user tax is but a stopgap solution until adequate machinery is developed to reflect accurately responsibilities of the major beneficiaries of highway improvement. The proposed increment theory of burden allocation directly considers in its calculations the burden presently placed upon all major beneficiaries: the motor vehicle, the property owner, and the general public. *FACTUAL DISCUSSION* 90, 93; and see Zettel, *supra* note 15, especially at 210-211, which recognizes a joint-use theory which implies joint responsibility. Mr. Zettel points out that joint use creates two allocation problems: one, the necessity of dividing highway costs between general taxpayers and highway users, and two, the necessity of allocating the burden within the beneficiary classes.

31. The multiple taxation burden is similar in effect to that caused by overt tax discrimination in favor of domestic as against interstate carriers. For a discussion of state tax discrimination against interstate commerce generally, see Heflerstein and Hennefield, *State Taxation in a National Economy*, 54 *HARV. L. REV.* 949, 963-969 (1941) and, for an instance of discrimination in the highway tax field, note 40 *infra* with respect to taxes aimed at Ohio trucks.

32. *COUNCIL OF STATE GOVERNMENTS REPORT* 107.

33. See note 18 *supra*.

34. While the allocation problem does not directly affect interstate truckers more than local ones, multiple taxation can operate as a state bar to interstate carriers as effectively as any weight limit. The border wars of the 1930's were a direct result of state attempts to prevent interstate truck entry until all fees and taxes were paid. Margaret Purcell, transportation economist, in *PURCELL, op. cit. supra* note 1, at 36-37, 88-89 graphically illustrates the taxes imposed upon a specimen vehicle operating in any particular state; the average total state tax levied upon a twenty-ton common carrier was found to be \$441 in 1940 and \$495 in 1950. This same truck, operating interstate, would be taxed that total in each state entered assuming no exemptions are granted. And, of course, that average may not truly reflect the tax picture in a particular state. Thus, the specimen vehicle, traveling along the eastern coast from Florida to Virginia would have paid, in 1950, \$967 in Florida, \$543 in Georgia, \$655 in South Carolina, \$660 in North Carolina, and \$526 in Virginia, or a total of \$3,351. Reciprocity, of course, may decrease this total somewhat. See note 36 *infra*.

Attempted solutions to the multiple taxation quandary have developed along two lines.³⁵ Reciprocity agreements, whereby a state agrees to allow trucks registered in another state to pass registration-free through it in exchange for the same privilege for its domiciliaries, definitely serve to mitigate the effects of the problem³⁶ but, by the very nature of the form in which they appear,³⁷ are not able to remedy the difficulties completely. While all states but one have authorized extension of reciprocity,³⁸ the agreements made, being revocable at will, are in a constant state of flux;³⁹ seemingly minor incidents between states often prompt termination.⁴⁰

35. The creation of interstate toll systems, while not directed at solving the interstate truckers' multiple burdens problem, might partially accomplish that as an ultimate result. The severe limitations upon the use of toll roads prevents that method of highway financing from rendering even a nearly complete salvation for the interstate trucker. Highway construction is a lengthy and expensive process, and credit in sufficient amounts is not always available to the states. The prospect of traveling coast-to-coast for the payment of but a single fee representing that truck's proportionate share of the costs of a single highway is clouded by the fact that the majority of interstate truckers cannot conduct their business entirely through toll road travel but must deviate from the pay highways or may never travel upon them in their transactions. Of course, it is impractical to consider levying tolls upon the use of each and every road. While toll roads are growing in favor among highway experts, extensive development is a thing of the future. Nevertheless, toll road travel may prove a great boon to interstate commerce. See generally OWEN AND DEARING, *TOLL ROADS AND THE PROBLEM OF HIGHWAY MODERNIZATION* (1951).

36. PURCELL, *op. cit. supra* note 1, at 100.

37. These agreements, legislatively authorized, come into existence in two ways: (1) They arise automatically, exempting nondomiciliary trucks from fees and taxes to the extent that exemptions are granted by the nondomiciliary's home state; (2) an agency or commission is authorized to negotiate with similar commissions in other states. McCARTY, *op. cit. supra* note 6, at 20. For a summation of reciprocity authorizations by states, see DIGEST OF STATE LAWS 23 *et seq.*

38. Only Arizona lacks legislative authority to grant reciprocity. DIGEST OF STATE LAWS 23 *et seq.*, especially at 26. Due to its lack of industry and, therefore, dearth of domiciliary truckers, Arizona is a "bridge" or "causeway" state; much of its highway revenue stems from taxes levied upon interstate truckers. For this state to grant free entry to those vehicles would be financially detrimental, perhaps ruinous. See Note, 100 U. OF PA. L. REV. 71, 83 (1951).

39. Automatic reciprocity is criticized because of its inflexibility; the slightest alteration of privileges granted in any state affects the privileges offered by other states with an automatic type of reciprocity. This form of reciprocity will continue to fluctuate as long as so many widely varying tax structures are in use. Negotiated reciprocity may provide more stability, but even these negotiations seldom lead to continuing reciprocity privileges; no state is willing to suffer an economic disadvantage, while each state would like to gain an advantage. Both types of agreements lack the specificity necessary for lasting reciprocity. McCARTY, *op. cit. supra* note 6, at 20-21. ". . . [I]t is not possible to say with certainty with what states and to what extent any state grants reciprocal privileges at any given time." PURCELL, *op. cit. supra* note 1, at 100.

40. Retaliation is the driving force behind most reciprocity failures. For example, the situation which has given rise to Illinois' threats to revoke its agreement with Indiana is, in itself, of somewhat less than major import. The quarrel arose when Indiana police arrested two Illinois truck drivers and later a third, for operation without Indiana Public Service Commission permits. After Indiana manifested an intention to prosecute the drivers despite Illinois Agricultural Transportation Association claims that these trucks were exempt under a reciprocity agreement, attorneys for the Association notified

Furthermore, uniformity in the degree of tax exemption allowed, which seems to be a requisite to successful application of reciprocity, may never be attained. The uniqueness of highway situations in each state has long prevented perfect accord.⁴¹ "Bridge" states, which have few domiciliary truckers and whose roads are heavily traversed by trucks merely passing through, are largely dependent upon registration fees collected from interstate trucking companies; they can hardly afford to allow registration-free entry of trucks domiciled elsewhere.⁴²

The logical alternative to reciprocity is a method of apportioning the tax payments of interstate truckers among the states in which they operate so as to avoid the discriminatory multiple burden.⁴³ This can be accomplished if state taxes actually reflect costs occasioned by interstate trucking and particular truckers during the taxable year.⁴⁴ Under this theory,

Illinois' Secretary of State of the Association's intention to move to enjoin the Secretary on honoring the existing reciprocity agreement with Indiana. Final results of this flare-up are not yet known, but the case indicates the shaky foundation upon which these agreements rest. Richmond Palladium-Item and Sun-Telegram, Sept. 30, 1953, p. 3, col. 5; Richmond Palladium-Item and Sun-Telegram, Nov. 2, 1953, p. 1, col. 3.

Also indicative of the retaliatory nature of these breakups is the situation which arose concerning ten Southern states and Ohio. These Southern states, which finally formed a veritable reciprocity union after long negotiation, see PURCELL, *op. cit. supra* note 1, at 11-12, have broken off all reciprocity arrangements with Ohio due to that state's passage of a new tax not included in existing reciprocity agreements. Louisville Courier-Journal, Dec. 4, 1953, p. 13, col. 1. In addition, three Southern states, as well as Wisconsin and North Dakota, have adopted special taxes applicable only to Ohio trucks. The other states in the group are threatening to follow the same course, and all of those states are plotting similar action against New York which adopted a tax similar to Ohio's new one. Spong, *Those New Taxes on Trucks*, Louisville Courier-Journal, Mar. 12, 1954, p. 8, col. 4.

41. Reciprocity privileges granted by some states in actuality apply to only a few truckers; in other states, the degree of exemption is so small as to amount to almost no privilege at all. Only the District of Columbia grants full reciprocity to vehicles from all states, although not receiving similar privileges in return. Some limit privileges to a certain number of trips per year, some to common carriers only, and some to carriers entering the state for nominal distances. See PURCELL, *op. cit. supra* note 1, at 11, 100. Reciprocity seldom extends beyond the registration tax to include fuel and special taxes; thus, even if the first structure taxes are waived for interstate truckers by reciprocal agreements, the problems surrounding the other taxes remain unsolved.

42 See note 38 *supra*.

43. Apportionment cannot, of course, avoid the fact that needs, and hence tax rates, vary considerably from state to state. This situation, however, does not necessarily work to the disadvantage of the interstate trucker. Compare Barrett, "*Substance*" versus "*Form*" in the Application of the Commerce Clause to State Taxation, 101 U. OF PA. L. REV. 740, 796-797 (1953); Note, 28 IND. L.J. 212, 225 (1953).

44. Actually, the apportionment formula would not adhere strictly to the cost principle. Damage due to natural conditions must be computed although it is not necessarily attributable to interstate or local commerce. Costs occasioned would be the principle in terms of which total costs would be distributed.

Costs occasioned is not the only conceivable basis for apportionment; a broad benefits principle, comparable to that which inspires the gross receipts tax, may be applied. See note 15 *supra*. For discussion of the application of this principle in other taxing areas, see Note, 28 IND. L.J. 212, 221 *et seq.* (1953), and see p. 601 *infra*.

apportioning the registration tax would involve adjustment by use of a factor measuring actual costs occasioned during a specified period of time; this necessarily demands postponement of the registration date until the end of the taxing period since the data essential to determining the apportionment factor must be collected prior to imposition.⁴⁵ Gone, then, is the administrative simplicity which at least partially justifies the registration fee.

In effect, attempting to apportion the registration fee results in converting it to fit the present conception of a third structure tax. If the most common apportionment factor, mileage, is applied to it, the end result is no more nor less than the upper-structure ton-mile tax. Under the latter levy, trucks will be taxed by a particular state only in relation to the costs attributable to that vehicle's road usage in that state; thus, there could be no multiple taxation. The gross receipts tax performs much the same function, taxing only "business done within the state";⁴⁶ to accomplish the desired apportionment, states generally tax that portion of gross receipts which corresponds to the proportion which miles traveled within the state bears to total operated mileage of a particular vehicle.⁴⁷

However, certain inherent, as well as man-made, defects bar these attempts from completely successful operation. The task of data collection, coupled with the necessity imposed upon truckers to adopt complex recording procedures, detracts in no small extent from the attractiveness of the third structure tax.⁴⁸ Further, some states have selected and applied, as a third structure levy, a pure weight tax, which does not strive to appor-

Under such a principle, an apportionment formula necessarily would be comprised of three factors: (1) a tax base, such as weight or gross receipts; (2) an apportionment fraction, which will measure extent and manner of use of the roads of a particular state by a particular truck; (3) the rate, which must be freely variable, dependent upon the needs of the state. Application of the formula will be clarified in text and footnotes following.

45. Hand in hand with the postponement of collection until year's end goes the essentiality of turning over the data-gathering responsibility to the truckers themselves. Proposals have been made for prepayment of apportioned taxes by estimate or by bond-posting, with refunds later based upon good faith showing of overestimation. This seems to render only a superficial change in existing methods; evasion is still possible since the truckers keep the records and the levy is not discharged until the final accounting. Kauper, *supra* note 2, at 205-206.

46. See, *e.g.*, IND. ANN. STAT. §§64-2601, 64-2606 (Burns 1953) (exempts interstate commerce); TENN. CODE ANN. §1248.134(a) (Williams 1952) (taxes "all receipts on business beginning and ending within this state . . .")

47. *E.g.*, PA. STAT. ANN. tit. 72, §2185 (Supp. 1952) (This statute taxes "such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this commonwealth . . . bears to the total number of miles . . . operated by such company. . .").

48. See notes 26 and 45 *supra*.

tion at all.⁴⁹ In addition, to the degree in which these taxes do not measure costs accurately, they are inequitable either to interstate truckers or to states among whom tax payments are distributed although the multiple burdens problem is avoided.⁵⁰

The ordinary motor fuel tax, predicated on the assumption that the amount of gasoline consumed by a vehicle is directly related to the use made of the roads by that vehicle,⁵¹ is in itself a method of apportioning the tax burden between interstate and local trucking;⁵² it is accepted by truckers as a necessary evil. If all gasoline consumed within a state was purchased in that state, no question of multiple taxation could arise concerning the fuel tax, but because there is a certain amount of overlapping from state to state the apportionment is but an approximation.⁵³ The fuel tax loses all semblance of apportionment in those few states which tax gasoline stored in the tanks of trucks upon entry into the state.⁵⁴ The interstate carrier, in this case, bears the fuel tax in the state of purchase and a levy on the same fuel in other states.

Because of the peculiar nature of needs and demands for each state, no form of interstate cooperation has been able satisfactorily to remedy either the regulation or the taxation ills. The Supreme Court has played

49. See notes 21 and 24 *supra*. While this appears to be merely an appendage to the registration fee, reciprocity includes only the latter fee. Usually, then, this tax has a cumulative effect from state to state. See note 41 *supra*.

50. See note 28 *supra* and accompanying text. Where such taxes underestimate costs, the trucker benefits at the expense of the state; if they overestimate costs, the state benefits financially from overtaxation.

51. Kauper, *supra* note 2, at 20.

52. As indicated earlier, see p. 584 *supra*, the motor fuel tax, despite its regressivity, actually reflects to some extent costs attributable to the consuming vehicle. Any tax which actually measures costs occasioned allocates and apportions since the interstate trucks are also members of the classes considered in burden allocation. Thus, under the fuel tax, the interstate trucking company pays only for the use it makes of the roads in the levying state. Further, the inadequacies inherent in the fuel tax with regard to allocation of burden are not the sort which work to the disadvantage of the interstate trucker, particularly since within any weight class fuel consumed is a fair index of the use made of the roads. See FACTUAL DISCUSSION 96.

53. While interstate truckers vehemently attack most taxes which affect them, their least energies are expended upon the ordinary motor fuel tax, except where the disjunction between fuel used and fuel purchased creates multiple taxation. HILLMAN AND ROWELL, *op. cit. supra* note 1, at 32-34; PURCELL, *op. cit. supra* note 1, at 10; COUNCIL OF STATE GOVERNMENTS REPORT 106.

54. Before 1940, states began limiting the amount of gasoline which could be carried into a state free of tax. While truckers accepted the ordinary fuel tax, this new levy on the excess over the established minimum caused much consternation in the industry. When an Arkansas statute of this nature was declared unconstitutional by the U. S. Supreme Court, states altered their tax to apply only to that portion of gasoline in the tanks which could reasonably be consumed within the state. This is the form in which the tax exists today. PURCELL, *op. cit. supra* note 1, at 39-41.

a role in minimizing the problems and curing certain defects.⁵⁵ The court, however, cannot ensure permanence or adequate scope for reciprocity agreements nor can it prescribe uniform apportionment formulae; it merely can negative actions taken by the states, justifying its position upon either a due process or a commerce clause basis.⁵⁶ It cannot by judicial fiat bring about uniformly durable state roads. Some more positive action toward solution of the many problems plaguing all interested parties seems essential.

The Federal Government

Any affirmative action which the Federal Government may contemplate will be limited ultimately by certain preconceived ideas of federalism and federal intermeddling in state affairs. Constitution-wise, the Federal Government may fairly well dominate highway regulation and taxation in its national aspects without great fear of Supreme Court hindrance. The commerce clause justifies entry, although the Fifth Amendment may require compensation for any federal action resulting in condemnation of state-owned highways.⁵⁷ But apart from the constitutional aspects, the practical features of federal intervention must be thoroughly examined.

Congress has made the National Government an intervenor in regulation of interstate trucking without treading on state toes. The Interstate Commerce Commission, while preempting the area of rate-fixing and controlling other phases extensively, has influence over the regulatory aspect only to the extent of prescribing certain minimum safety requirements and imposing a "convenience and necessity" requisite upon the initiation of new interstate common and contract carrier enterprises.⁵⁸ It has applied no active pressure toward destroying the trade barriers erected by state-to-state regulation differentials. Uniform size limitations among the states obviously would remove these obstacles. However, for the Federal Government to impose uniformity upon the states in the form of mandatory high maximums is patently unfair to those states whose roads are not constructed to accommodate heavier vehicles. To select

55. For an excellent discussion of the role of the judiciary in highway tax development until 1933, see Kauper, *supra* note 2; for a more recent work on the Supreme Court's efforts in the area, see Note, 100 U. OF PA. L. REV. 71, 72-79 (1951).

56. Actually, the Court has ignored the multiple taxation problem in this area. See Barrett, *supra* note 43, at 787-788.

57. Kauper, *supra* note 2, at 1, 18 n.74.

58. For general information on the scope and coverage of the INTERSTATE COMMERCE ACT, including functions of the Commission, see DEARING AND OWEN, NATIONAL TRANSPORTATION POLICY (1949). The Interstate Commerce Commission, in 1936, prescribed safety requirements applicable to interstate property carriers, which, by 1950, had been adopted in whole or in part by forty-three states. PURCELL, *op. cit. supra* note 1, at 84.

low maximums is inequitable to the trucker, being an impediment to efficient operation.

The Federal Government, through grants-in-aid, has the means to prompt, even to coerce, uniformity by conditioning its grants upon the receiving state's conformity in road construction to specifications determined by a federal agency.⁵⁹ Although conditions are imposed upon aid⁶⁰ in addition to requiring the state to match the federal grant dollar for dollar,⁶¹ if these requirements were directed toward the attainment of roads of standard characteristics, adoption of uniform regulation could be speeded. The agency which allocates federal funds to states would be the body to establish and administer the standards.⁶² Final selection of precise specifications must be based on considerable study and practical application of research conclusions such as those stemming from extensive road tests over a period of years. In the interim, reasonable estimates of the necessary criteria can be predicated upon studies and surveys already completed.⁶³ By this plan, federal intervention may promote uniformity without actual encroachment upon the states' power to regulate.

A stronger foundation for federal action has been laid in the regulatory than in the taxation area. If the regulatory action is taken through a grant-in-aid scheme, the agency which presently administers it can be invested with the complementary function of establishing the necessary standards. Should another plan be adopted, this same agency may continue to be the administering body. However, while the Federal Government

59. In 1948 the Federal Government contributed to the states \$397,000,000, or 12.6 percent of all highway revenues. In 1949, the disbursement reached nearly five hundred million dollars, 13.8 percent of revenues. In 1949, then, the remainder of state highway revenues came from user and property taxes, general revenues, and miscellaneous sources. *FACTUAL DISCUSSION* 58-59. Since the federal contribution is earmarked for primary, secondary, and feeder roads and since a sizeable portion of the state share went into local roads and city streets, the federal grant is clearly a much needed source of funds to the states. *LOCKLIN, op. cit. supra* note 12, at 668. With the continuation of this fund as the lure, or, perhaps, its withdrawal as a threat, states should be easily convinced of the wisdom of adhering to federally determined standards.

60. The present role of the Federal Government is that of supervisor, manager, and inspector; state plans and specifications are subject to federal approval. The responsibility of the supervising agency includes insuring ". . . that all steps are taken in conformity with federal law and in a manner that will best accomplish the established objective." *DEARING AND OWEN, NATIONAL TRANSPORTATION POLICY* 108 (1949).

61. *Id.* at 111.

62. *Id.* at 108.

63. Existing data collected by various state and independent, as well as federal, agencies would furnish information sufficient to allow estimates of standards necessary to the attainment of uniformity. Many road tests have been conducted, and a wealth of statistics has been catalogued. See, *e.g.*, *FACTUAL DISCUSSION*, which analyzes various experiments and their results: the Bates tests at 28-33; the Westergaard analysis at 33-34; the new tests undertaken by eleven Eastern states, the District of Columbia, and the Bureau of Public Roads at 39. See also the discussion of prospects of current and future research at 111-112.

has its finger in the highway tax pie in the form of excise taxes, it has not truly invaded the area of user taxation.⁶⁴ Therefore, new machinery would be essential to the facilitation of federal intervention in the taxation phase of the state highway problem.

Of course, the highest degree of federal entry consistent with some state retention of control over highway taxation would be absolute domination of interstate truck taxation.⁶⁵ If the Federal Government were to tax interstate trucking to the exclusion of the states, or merely to declare interstate commerce immune from state taxation, the ultimate result might be technical condemnation of state property, which constitutionally would signify a demand for compensatory federal action.⁶⁶ Indeed, unless the Federal Government, itself, undertakes highway construction, some method of compensating states for their loss of revenue would be necessary. At present, the federal aid program is financed from the general revenue fund; highway users are not expected to carry the burden.⁶⁷ Unless a federal user tax is imposed, it is likely that a much greater portion of highway expense will be borne by the general public than is the case at present.⁶⁸ While it may be argued that, since the highways are of

64. Federal excise taxes on motor vehicles, gasoline, and lubricants amounted to \$1,304,000,000 in 1949, while the federal aid appropriation from general revenue for that year was \$450,000,000. Federal excise revenue is not earmarked for highway purposes; however, there is a tendency to associate these taxes with federal aid. Thus, even if one considers the federal aid appropriation to be derived directly from excise revenue, thus likening that excise tax to a user tax, see note 20 *supra*, an \$850,000,000 surplus remains, which is used for general purposes. FACTUAL DISCUSSION 71.

65. The Federal Government conceivably could usurp the power to tax local carriers as well as dominating interstate truck taxation; the taxing power would be exclusive in the Federal Government. However, not one exponent of federal intervention hints at actions so extreme. Indeed, the patent impracticalities of federal control of local commerce, not to mention the serious constitutional question raised, make such a scheme virtually impossible.

66. See note 57 *supra* and accompanying text.

67. See generally FACTUAL DISCUSSION 71. Compare, however, notes 20, 59, 64 *supra* and note 68 *infra*.

68. If federal excise tax revenues were earmarked for the aid program, they would easily furnish enough funds for the present authorized expenditure of \$450,000,000; *e.g.*, in 1949, excise returns amounted to \$1,304,000,000. See note 64 *supra*. In that year, federal expenditures for highway purposes totaled \$481,000,000, and total expenditures from all sources for roads and streets were \$3,149,000,000. While no data are available as to what share of those expenditures was attributable to costs occasioned by interstate carriers, clearly at least an amount equal to the federal expenditure came from state collections from interstate carriers since the National Government's contribution was applied only to the interstate federal aid highway system and was conditioned on the states' matching the contribution dollar for dollar. If the Federal Government immunized interstate truckers from state taxation and applied part of the surplus \$850,000,000 of excise returns over expenditures to the highways, it would have to compensate for the diversion of excise funds theretofore used for general purposes in some way. This indicates either a reduction in the federal budget or an increase in revenues from other sources. Conceivably, the choice would be the latter alternative, thus shifting at least part of the highway burden to technical nonusers, the general public. Actually state con-

such great economic value to the nation, the general public is the proper source of funds for road construction and maintenance, the traditional user nature of highway taxation militates against acceptance of this contention.⁶⁹ Unless maximum federal intervention would include a plan to discard all presently accepted theories, it may be presumed reasonably that a user tax would be selected as the foundation of the federal highway tax program.

One recommended plan of federal entry, H.R. 1652,⁷⁰ suggested replacement of state taxes imposed upon interstate trucking with a single annual tax based upon weight of vehicles⁷¹ and collected by the Interstate Commerce Commission. It provided for registration of every interstate freight carrier with the Commission, a special interstate license plate,⁷² and authorized each state to impose a registration tax upon domiciliary interstate carriers.⁷³

The single weight tax seems to meet adequately all objections to the present lack of proper apportionment between the states. The tax, being centrally administered, treats the nation as a unit rather than forty-eight entities, each with its own tax program; the apportionment problem, in respect to the imposition of taxes, fades into nonexistence with expunction of state lines.⁷⁴ But while the functions of collection and distribution are accomplished in a single operation in any state administered tax, necessarily under any plan involving the imposition of a federal tax those

tributions to the federal aid highway system are more than equal to the federal contribution. Thus, an even higher amount than the \$481,000,000 indicated above would ultimately be drawn from the public. All figures used above are taken from *FACTUAL DISCUSSION* 58-59, 71.

69. Although a reallocation of specific responsibilities may be necessary, no one reasonably suggests shifting the brunt of the highway burden away from the users. See note 15 *supra*. To the contrary, the indication is that carriers do not meet their responsibility now and that their contribution should be higher. State user taxes continue to rise. *PURCELL, op. cit. supra* note 1, at 89, table 20. Scientific tests indicate that the trucker does not meet his obligation. *FACTUAL DISCUSSION* 68-69 and note 25 *supra*. Railroad interest groups still insist the trucking industry is subsidized. *MACKIE, op. cit. supra* note 25; *PARMELEE, op. cit. supra* note 25.

70. H.R. 1652, 82d Cong., 1st Sess. (1951) (hereinafter cited as H.R. 1652). For an analysis of H.R. 1652 substantially different from that which follows, see Note, 100 *U. OF PA. L. REV.* 71 (1951).

71. H.R. 1652 §1.

72. *Id.* §8.

73. *Id.* §7. In effect the bill requires reciprocity for these taxes.

74. As any other weight tax, this one allows simple administration and effective enforcement since the tax can be collected at the time of registration. See note 16 *supra*.

The advantages accruing from utilization of a weight tax are counteracted to no small degree by its shortcomings. Other theories provide a more reflexive yardstick for cost determination. See notes 24 and 27 *supra*. Factors such as speed of truck travel, effect of the elements, deterioration with age, and many others excluded from consideration in the weight tax definitely contribute to highway depreciation.

functions are divided.⁷⁵ The scheme for disbursement of funds collected from interstate truckers adopted by H.R. 1652 is predicated solely upon the improved road mileage of each state.⁷⁶ Thus, placing the power to tax in the Federal Government enables the levying body to adopt a theory for distribution different from the cost principle presently applied; H.R. 1652 apparently embraces a "needs" basis for revenue disbursement.⁷⁷ Again, the conflict between equity to parties and administrability arises. While the improved road mileage factor is easily administered, it is a highly inaccurate basis for fund allocation. Highly industrialized states, whose roads are heavily traveled, may receive too little compensation, while bridge states very possibly may be overcompensated in terms of actual needs.⁷⁸

Precise measurement of needs is not the most serious problem faced by plans such as H.R. 1652. It appears virtually impossible to divorce the question of apportionment of burden between interstate and local commerce from distribution of funds among the states. H.R. 1652 would legislatively adopt a flat weight-tax rate; the revenue from it presumably, when distributed to the states, would be sufficient to discharge the responsibility of the interstate carrier, *i.e.*, compensate the states for costs attributable to interstate trucking.⁷⁹ The rigidity of the rate could very

75. Thus, under a federal plan, collections would be made on a nationwide basis without particular regard for state lines. Distribution, on the other hand, necessarily must be conducted on an individual state basis. The only escape from this schism would be total federal control of any highways used by interstate trucks, which would be virtually all inclusive. Compare note 65 *supra*.

76. H.R. 1652 §8. One half of total collections would be allocated to the U. S. Treasury, with the remainder to be divided among the states according to each state's relative number of improved road miles.

77. Distribution on the basis of need has real value. Instead of merely turning the money back to the states to compensate for costs occasioned by interstate trucking, it would take into account state plans for improvement. Thus, the Federal Government would be in a better position to encourage progressive state actions. Compare Zettel, *supra* note 15, at 211 *et seq.*

78. The drafters of H.R. 1652 apparently placed greater emphasis upon obtaining a simple, workable plan than upon devising an accurate tax measure; both the collection and the distribution schemes selected carry out that intention. Vehicle weight is only approximately proportional to cost, and improved road mileage vaguely mirrors state needs.

Federal aid funds for highways have, until recently, been distributed among states on a basis of area, population and mileage. See DEARING AND OWEN, NATIONAL TRANSPORTATION POLICY 111 (1949). Future appropriations seem destined for yet more complex treatment, with national defense considerations playing a heavy role in the final outcome. See the discussion in 100 CONG. REC. 2677-2707, 4389-4399, 4410-4413, 4487-4503, 4504-4511 (1954) and see Pub. L. No. 350, 83rd Cong., 2nd Sess. (May 6, 1954).

79. It is not theoretically necessary that the Federal Government adopt costs as the measure of the tax responsibility of interstate trucks, but, given the traditional use of the cost principle in highway taxation, this seems likely. Compare note 15 *supra*.

well prove the Achilles' heel of this proposal since "costs attributable to interstate commerce" is a variable largely dependent upon the nation's fluctuating economic condition. Undulating costs may demand frequent rate changes; yet the legislative procedure may be too cumbersome to allow for timely change.⁸⁰ To determine cost increases or decreases due to interstate trucking, a minimal prerequisite would seem to be an administrative agency authorized to conduct continual study in the area, fix or amend rate schedules, and recommend legislative changes.

Although creation of an agency seems essential to the successful operation of plans like H.R. 1652, its existence may result in greater federal intervention than the drafters of the bill intended. If the agency were able to assess interstate costs directly, a distinct line could be drawn between interstate and local costs beyond which it need not go. However, accurate calculation of interstate costs might well necessitate prohibitively expensive machinery for the agency, including weighing stations on every highway at state lines, countless employees, both as administrators and as inspectors, and an overwhelming task of data compilation and computation. Since no theory of cost measurement has been perfected or even uniformly accepted,⁸¹ the agency may operate in sheer chaos.

The practical way out of this difficulty seems to demand extension of federal intervention into otherwise exclusive state affairs. The agency, or even the legislature functioning without administrative assistance, could base its determination of costs attributable to interstate commerce upon total highway expenses to each state less costs attributable to local vehicles as measured by revenue from those sources plus amounts collected from local property owners for highway purposes.⁸² Presumably, the deficiency of collections from property owners coupled with those from local commerce in relation to total costs would approximate costs due to interstate trucking. However, absolute reliance should not be placed upon this easily calculated figure. The agency must have authority to deter-

80 The proposed rate of the weight tax is 20 cents per hundredweight for irregular route carriers, 80 cents for regular route carriers. During an inflationary period, revenues from the tax would be insufficient; in depression, interstate truckers would be over-contributing. The bill provides no mechanism for rate alteration other than Congressional action. H.R. 1652 §11.

81. See notes 27 and 28 *supra*.

82. Rather than the Federal Government having to conduct apparently prohibitive continual study, the responsibility for cost calculation would be shifted to the states. The states, of course, are in an advantageous position for determining local costs. Their burden, actually, would be merely anticipating, as they do now, the amount to be collected from local sources. Naturally, this method is less accurate than one whereby the Federal Government would scientifically calculate costs due to interstate trucking since presumably the states would rely on records from previous years, among other things. Once again, however, practicality intervenes to demand this particular course of action.

mine whether state revenues from local sources actually reflect the full share of costs due to local commerce. While the states are constitutionally prohibited from themselves taxing interstate commerce discriminatorily, such action would be difficult to detect when the taxing function is thus divided between state and federal governments.⁸³ Yet, the state is in the same position to discriminate as if it were actually to levy the interstate tax. Since the federal tax would be based upon local cost calculations, a state could abet local commerce by undertaxing it in proportion to expenditures caused by it, thereby inflating costs due to interstate commerce; interstate trucking would be proportionately overtaxed.

Thus, the agency must be able to investigate local tax programs to assure equitable federal taxation. While the Supreme Court can only protect against gross discrimination,⁸⁴ an agency comprised of highway experts may be able to detect prejudicial actions of the states at their inception. In case of a discrepancy, the agency's negative sanction would lie in the fact that, in its recommendations to Congress or in its own actions, state-determined local costs would be disregarded and estimated actual costs would be computed. Since revenue from the tax would later be distributed to the states, a discriminator would be forced to increase revenue from local sources or its return from all sources would be less than total costs.

H.R. 1652, of course, is but one possible variant of exclusive federal taxation of interstate trucking.⁸⁵ Objections to the mechanics of this bill

83. Although discriminatory state taxation of interstate trucking is a violation of the Commerce Clause, the Supreme Court has found justification for any state taxation of interstate trucking in the "compensation" theory, which is based upon the notion that a state may require reimbursement for the facilities it offers. Since its inception in 1915, that theory has been expanded to include virtually any state tax as long as total highway tax revenues approximate compensation. Because the Supreme Court allows such great leeway, only gross instances of discrimination would be declared invalid. See Note, 100 U. OF PA. L. REV. 71, 72-78 (1951).

Furthermore, the Court's generous attitude toward state taxation offers them handy, judicially-approved methods of concealing discrimination: *E.g.*, a state may apply different taxes to interstate and local trucks [*Interstate Busses v. Blodgett*, 276 U.S. 245 (1928)]; states may exempt certain local users from taxes which affect both local and interstate vehicles [*Continental Baking Co. v. Woodring*, 286 U.S. 352 (1932)]. When states tax domestic, and the Federal Government taxes interstate, trucking, the difficulty of comparing the two to discover discrimination enhances the states' ability to use concealment tactics.

84. See note 83 *supra*.

85. Proposals for federal intervention are numerous. For example, a plan suggested by the President of the Western Highway Institute proposes greater entry than does H.R. 1652; it embodies a single fuel tax replacing all highway user taxes to be distributed pro rata to the states in accord with the amount consumed within each state. Note, 5 STAN. L. REV. 307, 315 n.50 (1953), citing SPRINGER, *THE INTERSTATE TRUCK TAXATION PROBLEM: A POSSIBLE SOLUTION* (1949) (on file with Hopkins Transportation Library, Stanford University). Also recommended is a scheme requiring interstate carriers to pay all state ton-mile taxes to a federal collecting agency, which would then distribute to

might be met with diligent effort. Even with those defects eliminated, though, practical considerations negate the possibility of state acceptance of the extreme quantum of federal intrusion advocated. An indication of state hostility toward such a scheme lies in the disappearance of the bill into Congressional committee, perhaps never to reappear.⁸⁶ The perfect tax plan must run the legislative gamut, and a system as extreme as complete federal domination is likely to face sudden death.

Seemingly, the smaller the degree of federal intervention, the more success any plan will have upon presentation to Congress. Any one of many variations of a scheme of partial federal entry may be successful in application and more acceptable to Congress.⁸⁷ One such plan recommends abolition of third structure taxes and substitution of a federal levy exclusively upon interstate carriers for application to the national system of highways.⁸⁸ The proposal is premised upon the fact that the federal government, in granting financial aid to the states in conjunction with the national transportation policy, relies greatly upon funds received from the general public; this program would refocus the burden, interstate trucking forming the focal point.⁸⁹ States supposedly would then be in a position to reallocate the burdens among interstate and intrastate vehicles by continued application of the registration fee and the motor fuel tax.⁹⁰ At the same time, interstate truckers would be relieved of the burden of unapportioned carrier taxes and would be freed of many administrative expenses since they would then have to pay only a single tax replacing all third structure taxes.

This proposal assumes the ability and desire on the part of the states to adjust the tax burden between interstate and local commerce. By depriving the states of the third structure tax, apparently the assumption is made that the states would prevent registration tax multiplicity by

the states their respective shares. Burtis, *The Farmers Concern in Highway Trade Barriers*, TAX BARRIERS TO TRADE 23, 37 (Tax Institute Symposium, U. of Pa. 1951). A proposal is also made for a federal registration fee for interstate carriers. *Ibid.*

86. Other indicia include the fact that the Council of State Governments has long urged the Federal Government to withdraw from the one aspect of taxation in which it has intervened, the federal excise tax on fuel. COUNCIL OF STATE GOVERNMENTS REPORT 115.

87. See note 85 *supra*.

88. Note, 100 U. OF PA. L. REV. 71, 91-92 (1951).

89. The greatest outward effect of the scheme would be the shifting of the responsibility for the federal highway contribution from the general public to interstate carriers. The present federal aid authorization is not derived from funds earmarked for that purpose but comes from a general account containing commingled revenues from many sources, none of which are highway user taxes. Presumably, the general public bears the burden for the federal contribution, which matches state contributions dollar for dollar. Under the suggested program, the federal levy, in every sense a user tax, would result in a reduction of those other taxes.

90. Note, 100 U. OF PA. L. REV. 71, 92 (1951).

reciprocity since existing agreements generally only include those taxes.⁹¹ The fallacy in this suggestion lies in the fact that reciprocity has attained much of its success, which is by no means complete, because the states have been able to levy special taxes. Sparsely populated states, those which lack industry in quantity sufficient to attract domiciliary trucking companies may be placed at a disadvantage in highway fund-raising. The special tax is the primary instrument of their balancing technique; they imposed the third structure taxes to compensate for economic deficiencies due to lack of domiciliary truckers.⁹²

Presumably, such states would be reimbursed, under the proposed plan, by the Federal Government with funds extracted solely from interstate trucking. The responsibility for deciding the necessary amount to be derived from and, therefore, the tax rates to be levied upon interstate truckers is placed squarely on the Federal Government. This implies that the central government need delve much deeper into state practices than the plan envisions.⁹³ Unless compensation from interstate sources satisfies each state, reciprocity agreements, tenuous at best, will be subject to stresses and strains similar to those placed upon them now. No justification exists for expectation of changes in their impermanent nature.

Certainly both proposed programs heretofore considered have many valid features. Exclusion of the states and domination by the Federal Government could solve the interstate problem; a single tax is obviously less burdensome than a complex series of state taxes. Yet, the exigencies of the situation seem to demand, if federal intervention there must be, some minimal degree of entry. Recognition of that fact should dictate the limitations on any plan. Theories of exclusive federal jurisdiction should be discarded and energy should be devoted to formulating a program modifying state highway tax practices without preemption of the field by Congress. It should enter the area without actually seizing the power to levy, collect, or distribute taxes beyond the limits of the present federal aid system. Rather, under a plan of minimal intervention, the National Government should act in a supervisory-advisory capacity with the accompanying investigatory duties and authority. Such a task demands creation of a federal agency comprised of highway technicians, construction engineers, representatives of the various modes of transportation, and, to assure state acceptance as well as to secure a membership familiar with state problems, representatives of the states.⁹⁴

91. See note 41 *supra*.

92. Note, 100 U. OF PA. L. REV. 71, 83 (1951).

93. See pp. 596-597 *supra*.

94. See note 95 *infra*.

Ideally, agency intervention would be confined to rectification of the multiple burdens problem. The agency alternately might apportion⁹⁵ or confine jurisdiction to tax to state boundaries.⁹⁶ The latter, in essence, is a federally-imposed reciprocity agreement; however, the inherent inequities make apportionment far more appealing.⁹⁷ Unless the agency prescribes mandatory apportionment factors for uniform application, each state will be prone to select the factor which operates to its advantage.

95. The states would be allowed to retain their present tax base or to select any new ones they desire. Practically speaking, states are likely to confine their selections to one of the three bases presently in use: weight, ton-mile, and gross receipts. For each tax base the agency would prescribe the factor which, when computed into the tax formula, would limit state taxing jurisdiction to state boundaries. If, for example, the agency selected mileage as the proper apportionment factor for a weight tax base, states applying a weight tax need calculate weight per miles traveled within the state, in essence converting the tax to a ton-mile tax.

At this point the agency's functions and advantages become clearer. Its members would exercise mature, expert judgment, based upon continuing research, in the selection of the formula and its actual operation. The agency is also in a position to provide review of interstate conflicts, such as overlapping jurisdiction. In allowing the states to continue to select tax bases, methods of administration, and tax rates, this plan may present the type of federal-state cooperation which will satisfy the states.

96. The air transportation industry is presently facing problems very similar to those existing in the trucking field, including that of nonapportioned state taxes. Apparently there, as in trucking, multiple taxation has not been self-correcting and the courts have been unsuccessful. Existing conditions have prompted study by the Civil Aeronautics Board. This research produced two possible solutions: one, exclusive federal jurisdiction, and two, modifying state tax practices. For practical, including political, reasons the Board selected the second method as better. It found two approaches to successful modification of existing practices: the first, exclusive tax situs, meaning no air carrier could be taxed by more than one state; the second, adoption of a method for apportioning state-favored tax bases. The Board's justification for preferring the second method revolved around the practicality of maintaining federal interference at a minimum. *MULTIPLE TAXATION OF AIR COMMERCE*, H.R. Doc. No. 141, 79th Cong., 1st Sess. 3-4 (1945). The same rationale for selection of this method evidently exists in the area of interstate truck taxation.

97. Conceivably a distinction may be made as to which of the two methods is better for certain types of carriers. Apportionment would function best when applied to a regular route carrier whose operations are relatively predictable; *i.e.*, collection of data for particular vehicles as required by the apportionment formula would be simpler. On the other hand, irregular route carriers may receive unfair advantage through their unscheduled operations. For example, if the apportionment factor chosen were a mileage factor, evasion in the form of under-reporting mileage traveled would be a simple matter. For those irregular route truckers who intend to comply with the requirements, extensive bookkeeping is a necessity. In a system which allows varying apportionment factors for different states, the complexity of recording is compounded. For these truckers, then, reciprocity, compulsory if necessary, may be the best solution. See, generally, Note, 5 *STAN. L. REV.* 306 (1953).

It is argued, though, that irregular route carriers quickly gravitate into regular routes; therefore, the distinction is unjustified. Note, 100 *U. OF PA. L. REV.* 71, 86 (1951). Obviously, this is not true of every irregular route operator; but for those who do follow this pattern and thus violate their I.C.C.-granted authority, a penal sanction exists to keep them from becoming true regular route carriers. 49 *STAT.* 543 (1935), 49 *U.S.C.* §§301, 312(a). Thus, the differentiation seems valid.

Without such directive prescription, then, multiple burdens appear in new garb.⁹⁸

If the principle upon which apportionment shall be based is costs occasioned, this scheme becomes indistinguishable from the general problem of allocation of burden among highway users. In effect, the agency would be determining the tax base applicable to interstate trucks.⁹⁹ That is, a tax base which will adequately reflect costs occasioned by all truck use simultaneously will apportion the interstate burden. On the other hand, a more general benefit theory of apportionment may well be adopted; *e.g.*, the interstate trucker should be taxed upon the benefits derived from business done in the state-wide community.¹⁰⁰ In that case, apportionment factors can be selected which will be generally applicable to any tax base selected by a particular state; to illustrate, an interstate trucker may pay a weight tax based upon the relationship that his trips into the state bear to total trips undertaken by him.

Apportionment on the basis of costs occasioned converts the registration tax into a rather complex third structure tax since ease of administration is sacrificed for apportionment. A broader benefits principle would be simpler to apply, although even here revenue collection would be postponed until the close of the tax period.¹⁰¹ Similar considerations apply to third structure taxes. As measures of cost, all are open to improvements which would, in turn, generally tend to compound existing com-

98. If the agency recommends alternative apportionment factors, or merely requires more exact apportionment than exists, Arizona would probably favor the mileage factor over, for example, a "terminal stops" factor; apparently more trucks pass through Arizona than do business there. New Jersey, with few road miles but many industries would want to apply the terminal stops factor. With states applying the same tax base but different apportionment factors, once again they may be asserting concurrent tax jurisdiction. *Cf.* *Wallace v. Hines*, 253 U.S. 66 (1920) (use of a mileage factor by a bridge state in apportioning property tax on a railroad).

99. If, for example, the agency prescribes a factor for the weight tax which measures costs occasioned, such as mileage, thereby forcing use of a ton-mile tax, it will have done double duty. Since the ton-mile tax to some extent both allocates the burden and apportions between states, the federal agency will be prescribing the tax base for the states to adopt. Given the inadequacies of the ton-mile tax, it seems more than likely that the agency would prescribe a yet more complex base.

100. Compare note 44 *supra*.

101. "Trips in," "terminal stops," and similar apportionment factors clearly do not measure as precisely benefits as does a ton-mile tax. On the other hand, the simplicity of keeping records of number of trips made may far outweigh the accuracy advantage in consideration of the most suitable apportionment factor. The Civil Aeronautics Board, in its study of air commerce found three distinct advantages in selection of a basically simple factor: One, of course, is the cost saving to the taxpayer and the government resulting from easy bookkeeping; two, use of a complicated factor encourages evasion; and three, easy interpretation removes one risk of self-assessment, preventing taxpayers from resolving doubts in favor of themselves by removing the doubt. *MULTIPLE TAXATION OF AIR COMMERCE*, H.R. Doc. No. 141, 79th Cong., 1st Sess. 51 (1945).

plexities. Again, apportionment would be less complicated if the agency adopts a general benefits theory.¹⁰²

Administrative peculiarities of the fuel tax virtually preclude application of apportionment measures. Until the amount of fuel purchased within a state can be made to equal the amount actually consumed there, this tax will be an imperfect measure of costs occasioned.¹⁰³ Tampering with the motor fuel tax, for example, by levying on fuel in tanks as trucks enter a state, has resulted in obvious multiple burdens.¹⁰⁴ Existing methods of collecting the fuel tax forbid application of apportionment fractions. If the Federal Government proscribes taxation of fuel in tanks, evasion of high-rate fuel taxes is literally encouraged. If it does not, multiple burdens result. Without federal preemption of the fuel tax field, these defects seem inherent in a system in which needs and, therefore, tax rates vary from state to state.¹⁰⁵

Regardless of which apportionment principle is favored for use, states remain free to set tax rates for any tax base. In addition, practicality would seem to dictate allowing each state to choose its own tax base for burden allocation purposes. However, if apportionment of first and third structure taxes is based upon a costs occasioned principle, a new problem arises. Although the federal agency would prescribe the base upon which interstate truckers could be taxed, there is no particular reason to expect that the states would be applying the same tax base to domestic concerns. State application of a tax base to interstate truckers different from that adopted for local companies may result in discrimination as potent, but not as apparent, as that due to differences in rates.¹⁰⁶ Wisdom, then, suggests a system which allows conversion of the apportionment process into a factor which can be neatly separated from the tax base,

102 See note 101 *supra*. To apply a general benefits type of apportionment fraction to a ton-mile tax, the base by which the fraction is multiplied would have to be total ton-miles in all states, rather than in the taxing state, as at present.

103. See p. 590 *supra*.

104. See note 54 *supra*.

105 On the other hand, it may be argued that the numerous advantages accruing from fuel tax application indicate that abolition of all taxes other than the fuel tax would solve the highway taxation quandary. The fuel tax is easily administered and allocates burden and apportions at the same time. However, this tax has limitations which seem to contradict that contention. See notes 25 and 53 *supra*. At present it is the largest highway revenue source. Political pressures may prevent fuel tax rates from being increased greatly, especially since the heaviest impact of the levy falls upon the local user. The tax rate, as it stands, does not provide sufficient revenues to support the state share of the highway system. But perhaps if the Federal Government were to withdraw its excise tax, as suggested by the Governors Conference, COUNCIL OF STATE GOVERNMENTS REPORT 115, state revenues would increase sufficiently to allow the fuel tax to stand alone.

106. Compare the discrimination problem under the type of plan proposed in H.R. 1652, pp. 596-597 *supra*.

thereby facilitating comparison of the tax bases applied to interstate and local truckers. Assuming an agency function of guarding against this overt discrimination, the difficulty of comparing the relative burdens of local and interstate trucking calls for agency prescription of an interstate "benefits" apportionment factor.

This plan, while not infringing on existing freedom to select the tax base favored for allocation of burden, also makes state attempts at discrimination more easily detectable. Of course, the agency should be given broad powers to investigate state practices in order to discover delicate shades of discrimination. At the same time, adoption of such a system simplifies its task of divining the most accurate apportionment measure. The agency, then, could inaugurate studies which ultimately might also unearth precise yet administrable methods of allocating the highway burden between classes of users.

COERCION: A DEFENSE TO MISCONDUCT WHILE A PRISONER OF WAR

Recent innovations in psychological coercion and use of false confessions in the current war of propaganda have emphasized the latent exiguity of traditional military law regarding coerced prisoners of war.¹ The charge has been voiced that both military and international laws concerning coercive defection of such prisoners are obsolete because of these developments.² This contention is too superficial. The problem of how the Armed Forces should handle these prisoners upon their return from captivity is complex and requires a complete reappraisal of the jurisprudence on the subject.

In the past, military authorities have given too little consideration to the problems of the relative degrees of harm to the national security caused by various disloyal acts, the different kinds and severity of coercion applied, and the over-all effect of the acts on military morale.³ Thus, much more is called for than an attempt to reconcile or modernize the traditional approach.

1. The term coercion, throughout this paper, is used in the sense of pressure of any type applied by one person upon another to force a desired action. This includes a gamut of acts from bad treatment such as meager amounts of food to brutal physical and mental torture.

2. Louisville Courier-Journal, Feb. 21, 1954, p. 2, col. 1.

3. See the discussion at p. 611 *infra*.