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## State Taxation of Interstate Commerce: The Current Status

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SEC has not expressly set forth the degree of disclosure required. A 1945 opinion issued by the director of the SEC Division of Trading and Exchanges indicates that only a *full disclosure* of a potential conflict of interest will suffice.<sup>58</sup> The SEC, pursuant to section 206(4), has issued a "statement of policy" for "specifying certain types of representations, charts, implications and omissions which are considered materially misleading in the selling literature of investment companies."<sup>59</sup> This statement of policy indicates that only a *full disclosure of any potential conflicts* will be sufficient to satisfy the statutory mandates. Full disclosure in light of *Capital Gains* would apparently include the date the security in question was acquired and possibly the size of any position held or to be taken in a recommended stock, and would especially include any intent to change that position in the near future. Such disclosure may, however, amount to actual prohibition of such practices because client reaction to this disclosure may be too painful a burden for the investment adviser to bear.

*Carl W. McKinzie*

## State Taxation of Interstate Commerce: The Current Status

### I. THE JUDICIAL QUAGMIRE

The increasing demand for additional state revenue is responsible for a marked growth in both the type and amount of state taxes.<sup>1</sup> This growth has included the imposition of income taxes on inter-

<sup>58</sup> 11 Fed. Reg. 10997 (1945), 3 CCH Fed. Sec. L. Rep. ¶ 56374 (opinion of Director of Trading and Exchange Division, relating to section 206 of the Investment Advisers Act of 1940, section 77q(a) of the Securities Act of 1933, and sections 78j(b) and 78o(c)(1) of the Securities Exchange Act of 1934).

"It follows that an investment adviser may not effect a transaction as principal with a client unless he obtains the client's consent to the transaction after *fully* disclosing any adverse interest he may have, together with any other information in his possession which the client should possess in order to determine whether he should enter into the transaction." 11 Fed. Reg. at 10997, 3 CCH Fed. Sec. L. Rep. at ¶ 56375. (Emphasis added.)

<sup>59</sup> 17 C.F.R. § 275.206(4)-1 (1961), 3 CCH Fed. Sec. L. Rep. ¶ 56382 (Advertisements by Investment Advisers).

<sup>1</sup> Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 Va. L. Rev. 1051 (1960).

Because of the new and expanding conceptions as to what a government should do for its people, the problem of an effective coordination of taxes has been greatly accentuated in recent years. While demands for additional governmental services continue to pyramid, inflation has spiralled governmental costs. State tax collections have not kept pace with state expenditures which

state business.<sup>2</sup> During the past century state taxation of income derived solely from interstate commerce has been a source of judicial conflict and confusion.<sup>3</sup> Congress provided no legislative standards to govern or limit this type of taxation,<sup>4</sup> and the myriad of judicial opinions<sup>5</sup> has only served to create further confusion in this area.<sup>6</sup>

The judicial state of affairs concerning taxation of interstate commerce was aptly described in *Miller Bros. Co. v. Maryland* as follows: "Our decisions are not always clear . . . consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law."<sup>7</sup> In fact, the United States Supreme Court has "handed down some three hundred full-dress opinions"<sup>8</sup> on this particular problem only to create what has been judicially described as a "quagmire."<sup>9</sup> The "quagmire" is not completely devoid of defenders, however. Mr. Justice Whittaker expresses himself as follows: "The Court refers to our past opinions . . . as creating a 'quagmire.' . . . I respectfully submit that this Court's past opinions, rightly understood and aligned in their proper categories, are remarkably consistent in a field so varied and complex."<sup>10</sup> Despite Mr. Justice Whittaker's protestations of consistency, it is generally accepted that no workable rules for the imposition of such taxes can be derived from the judicial maze that has evolved.<sup>11</sup>

have soared over four hundred per cent in less than fifteen years. In truth, in the overall picture, state governments currently appear to be operating "in the red." *Id.* at 1052.

<sup>2</sup> In 1911 Wisconsin became the first state to adopt a corporation net income tax. By 1960 thirty-six states and the District of Columbia had followed suit. Of this number fourteen states were either collecting, or under their laws had the ability to collect, income taxes from out-of-state businesses engaged solely in soliciting orders within the taxing state. As sample statutes see: Ga. Code Ann. §§ 92-3102, 92-3112 (1961); and Minn. Stat. Ann. § 290.03 (1962). The fourteen states are: Arizona, California, Colorado, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Oregon, South Carolina, Tennessee, Utah, and Virginia.

<sup>3</sup> See Dowling, *Introduction—State Taxation of Multistate Business*, 18 Ohio St. L.J. 3 (1957); Hellerstein & Hennefeld, *State Taxation in a National Economy*, 54 Harv. L. Rev. 949 (1941); Kust, *State Taxation of Income From Interstate Commerce: New Dimensions of an Old Problem*, 14 Sw. L.J. 1 (1960).

<sup>4</sup> There was a lack of any congressional regulation in this area until 1959 although the courts were literally flooded with cases on the subject. See the history of the problem as set out in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

<sup>5</sup> See, e.g., *Freeman v. Hewit*, 329 U.S. 249 (1946); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1925); *Leloup v. Port of Mobile*, 127 U.S. 640 (1888).

<sup>6</sup> For conflicting views see *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952); *Nippert v. Richmond*, 327 U.S. 416 (1946); *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920).

<sup>7</sup> 347 U.S. 340, 344 (1954).

<sup>8</sup> *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 485 (1959) (dissenting opinion).

<sup>11</sup> Mr. Justice Frankfurter states this best in his dissent to the *Northwestern* case. 358 U.S. 450, 476 (1959).

## II. THE NORTHWESTERN DECISION

*Northwestern States Portland Cement Co. v. Minnesota*<sup>12</sup> and its companion case, *William v. Stockham Valves & Fittings, Inc.*<sup>13</sup> seemed finally to establish sufficient guide lines for the imposition of state taxes.<sup>14</sup> In *Northwestern* the dispute involved a Minnesota tax which specifically covered corporations engaged exclusively in interstate commerce. The taxpayer corporation maintained an office in Minnesota staffed by three persons. It solicited orders which were subject to acceptance at the central plant in Iowa. In the *Williams* case the taxpayer, a Delaware corporation with its principal office in Alabama, maintained an office in Georgia which employed two people. Again, the orders were subject to acceptance by the main office outside of Georgia. The Supreme Court stated: "[N]et income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory [vis-a-vis local businesses] and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same."<sup>15</sup> This decision held that "neither the commerce clause nor the due process clause of the federal constitution denies to a state the power to levy an apportioned, nondiscriminatory excise tax on the net income of a foreign corporation, even though the income is derived exclusively from interstate commerce."<sup>16</sup> This case apparently left the states free to impose a net income tax on foreign companies having a sufficient nexus with the taxing state, if these taxes were nondiscriminatory and fairly apportioned.

## III. PUBLIC LAW 86-272

Six and one half months after the *Northwestern* case was decided,

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<sup>12</sup> 358 U.S. 450 (1959).

<sup>13</sup> 358 U.S. 450 (1959).

<sup>14</sup> There were predictions mistakenly made that the *Northwestern* decision was a final solution to the problem. Note, 12 Vand. L. Rev. 904. "[I]t seems unlikely that Congress will impose limitations on state taxing power in the near future." *Id.* at 920. The Wall Street Journal, Feb. 26, 1959, p. 2, reported that the general reaction in Washington to the decision indicated that Congress would not interfere with the right of states to tax corporate income. Congressman Celler, Chairman of the House Judiciary Committee, said that it would be difficult at this time to get a drive going in Congress to change the ruling.

<sup>15</sup> 358 U.S. 450, 452 (1959).

<sup>16</sup> Hartman, *supra* note 1, at 1051. Mr. Justice Frankfurter, dissenting in *Northwestern*, referred to the inadequacy of the court to deal with the problem and suggested congressional action. "Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the states and the needed limits on such state taxing power." 358 U.S. 450, 476 (1959). See also *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 188 (1940).

The states were quick to realize the possibility of increased revenue due to the *Northwestern* decision and several either passed new tax statutes or amended the old. See S.C. Code Ann. § 65-222.1 (Supp. 1959); Va. Code Ann. § 58-128 (1960).

Congress, in response to the protests of the business community, passed legislation severely restricting the effect of that decision.<sup>17</sup> The Senate Finance Committee report on this matter cites the *Northwestern* decision as the specific reason for such legislation.<sup>18</sup> The Committee's primary objection to this type of taxation was not any discrimination or inherent unfairness in the taxes but rather their "complexity."<sup>19</sup> A leading authority predicted this problem: "The major difficulty in state taxation of property and net income of far-flung transportation and industrial enterprises is that of allocating to each state its fair share of the national total. No factor and no combination of factors can guarantee accurate allotments."<sup>20</sup> The business community expressed dissatisfaction with the high cost of complying with the widely dissimilar standards and rates among the states. The burden of making the proper determination of the tax due each of the states appears to be the main reason for the prompt passage of this legislation.<sup>21</sup>

As a result of these hearings and reports, the committee found that enactment of a federal statute setting minimum standards for the imposition of state net income taxes on income derived solely from interstate commerce was essential to prevent an undue burden on the free flow of interstate commerce. Public Law 86-272 was the result.<sup>22</sup>

<sup>17</sup> *Northwestern* was decided February 24, 1959 and Public Law 86-272 was approved September 14, 1959. Hellerstein, *An Academician's View of State Taxation of Interstate Commerce*, 16 Tax L. Rev. 159 (1960). "The celerity of the Congressional response to the pressures of business interests to restrict state taxation is even more striking in the light of one hundred years of indifference and inaction by Congress while constant litigation flooded the courts over the controversies arising in the area of state taxation of interstate commerce." *Id.* at 160. Mr. Hellerstein also called the law "the hasty response by Congress to the vociferous pressure of business men." *Id.* at 159.

<sup>18</sup> S. Rep. No. 658, 86th Cong. 1st Sess. 2 (1959): "These bills and the joint resolution deal with the problem arising by reason of a recent decision of the U.S. Supreme Court in *Northwestern States Portland Cement Co. v. Minnesota* and *Williams v. Stockham Valves & Fittings, Inc.*"

<sup>19</sup> S. Rep. No. 658, *supra* note 18, at 4.

<sup>20</sup> Powell, *Vagaries and Varieties in Constitutional Interpretation* 202 (1956). For an earlier statement along similar lines, see Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States*, 32 Harv. L. Rev. 634, 639 (1919).

<sup>21</sup> S. Rep. No. 658, *supra* note 18 at 3: The "burden of compliance . . . in ascertaining . . . 'taxable income' . . . and the portion of the company's total taxable income that is properly apportioned to the taxing state," appears to be the prime reason for the necessity of prompt action in this area.

<sup>22</sup> 73 Stat. 555 (1959), 15 U.S.C. § 381 (Supp. IV, 1963). See also: *Hearings Before Senate Committee on Small Business on State Taxation of Interstate Commerce*, 86th Cong. 1st Sess. (1959); *Hearings Before the Senate Committee On Finance On State Taxation Of Interstate Commerce*, 86th Cong., 1st Sess. (1959); S. Rep. No. 658, 86th Cong., 1st Sess. (1959). For a very complete and clear review of the legislative history of Public Law 86-272 see Mickey & Mickum, *Congressional Regulation of State Taxation of Interstate Commerce*, 38 N.C.L. Rev. 119, 124-29 (1959).

The pertinent sections of Public Law 86-272 provide as follows:

§ 101 Imposition of Net Income Tax—Minimum Standards

(a) No state, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on

This act prohibits the taxation of income from interstate commerce if the only business activity in the state is the solicitation of orders for the purchase of tangible personal property. To avoid taxation by the state these orders must be sent out of the state for approval, and if approved, be filled by shipment from a point outside the state. The effect of this statute is greater than might be first expected because of the widespread use of traveling salesmen or missionary men.

The situation was complicated further when shortly after the passage of Public Law 86-272, the Supreme Court decided *Scripto, Inc. v. Carson*.<sup>23</sup> In *Scripto*, the Court held that an out-of-state business could be required to collect and pay over a use tax<sup>24</sup> on sales made within the taxing state although the business maintained no facilities in the state. Public Law 86-272 offered absolutely no protection against a use tax as opposed to an income tax. Thus, by the relatively simple process of changing income taxes into use taxes, the states could avoid the effect of the statute altogether. However, by forcing a change in the form of the state tax, the statute accomplished its avowed purpose, *i.e.*, to eliminate the complexity of the various state income taxes.<sup>25</sup>

#### IV. THE REPORT

Public Law 86-272 was not intended as a final solution to the problem.<sup>26</sup> "Both Houses [of Congress] viewed this provision as a temporary measure designed to hold the line pending the completion of the thorough study which was considered necessary to achieve a

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income derived within such state by any person from interstate commerce if the only business activities within such state by or on behalf of such person during such taxable year are either, or both, of the following:

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

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

<sup>23</sup> 262 U.S. 207 (1960).

<sup>24</sup> Use taxes are usually levied upon the use, storage or consumption of tangible personal property purchased outside the taxing state but subsequently employed therein. These taxes are similar in many respects to sales taxes. See Annot., 129 A.L.R. 217 (1940).

<sup>25</sup> A use tax would be much less complex than the present maze of income taxes in that, like its brother the sales tax, it is based on the purchase price of the article. This eliminates the grave computation problem that arises under an income tax because there is no need for a method of apportioning costs among the states. The sales price itself serves as the amount to be taxed.

<sup>26</sup> Staff of Subcomm. on State Taxation of Interstate Commerce, House Comm. on the Judiciary, *State Taxation of Interstate Commerce*, H.R. Rep. No. 1480, 88th Cong., 2d Sess., 438 (1964): "Public Law 86-272 was enacted as stopgap legislation to forestall what was viewed as a possible expansion of the taxing jurisdiction of the states."

permanent solution."<sup>27</sup> Such a study was authorized by the act itself.<sup>28</sup>

On June 15, 1964, the House of Representatives' Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary completed the study authorized by Public Law 86-272.<sup>29</sup> The study encompasses two volumes, and the detailed analysis of its complex statistical data goes far beyond the scope of this Note. However, the report does seem to reach several very clear conclusions:

1. the present system of state taxation of interstate commerce is characterized by diversity and complexity and results in substantial inequities;
2. there is widespread noncompliance with the present state and local tax provisions in this area;
3. the cost of compliance is at least partially responsible for this noncompliance;
4. the judicial process is inadequate to deal with this problem and arrive at a final solution; and
5. Public Law 86-272 has achieved some degree of success as a "stopgap" measure, but Congress must seek a more comprehensive and permanent solution.

The report refers to the existing state regulations and statutes as "the product of a nonobjective artist,"<sup>30</sup> and then continues: "[S]implification in the multistate tax system, through reduction of its multiplicity, variety, and mutability, is a necessary preliminary to achieving a reasonable level of compliance with tolerable cost levels."<sup>31</sup> The report concludes: "Certainly, the problems presented are not easy problems, but they are important problems. They are important to the states, and they are important to the vitality of the American common market. Congress has a responsibility to both, and it is time for it to seek a solution."<sup>32</sup>

#### V. THE RECENT CASES

In spite of the urging of the House Report, it is impossible to predict the action that Congress will take or the time it will require to act. Hence, Public Law 86-272 is of continuing current importance. The first cases testing and construing it have now been de-

<sup>27</sup> *Id.* at 8.

<sup>28</sup> Title II of the act authorized the study to be made by the Committee on the Judiciary of the House of Representatives and the Committee on Finance of the Senate, for the purpose of recommending legislation to provide uniform standards.

<sup>29</sup> H.R. Rep. 1480, *supra* note 26.

<sup>30</sup> *Id.* at 594.

<sup>31</sup> *Id.* at 384.

<sup>32</sup> *Id.* at 599.

cided. The Louisiana Supreme Court ruled on its constitutionality in *International Shoe Co. v. Cocreham*.<sup>33</sup> International Shoe brought an action against the Louisiana Collector of Revenue to recover state income taxes that were paid under protest. International Shoe maintained that Public Law 86-272 prohibited the state from taxing income obtained by sending salesmen into the state to solicit orders to be shipped in interstate commerce. The Collector of Revenue asserted that "Congress did not have the power to adopt Public Law 86-272"<sup>34</sup> and maintained "that it [Congress] was without authority to prohibit the states from levying taxes for their support under the guise of regulating interstate commerce."<sup>35</sup> Nineteen states filed briefs *amici curiae* supporting the Louisiana Collector, and several trade associations filed briefs supporting International Shoe. The state supreme court held the law constitutional, concluding that "the statute in question is a proper exercise of the plenary power of Congress over commerce and that the State law must yield insofar as it is sought to be applied to the activities"<sup>36</sup> there involved.

A second case, decided by the Supreme Court of Missouri, *CIBA Pharmaceuticals, Inc. v. State Tax Comm'r*<sup>37</sup> has also considered Public Law 86-272. There the taxpayer had home offices in New Jersey and employed resident salesmen in Missouri. All orders were sent to New Jersey for approval, and when approved the goods were shipped in interstate commerce. The State Tax Commission maintained that Public Law 86-272 was unconstitutional, but the court agreed with *International Shoe Co. v. Cocreham* referring to it as a "well considered opinion."<sup>38</sup> A problem of interpretation arose because the Tax Commission asserted that even if Public Law 86-272 is constitutional the drug manufacturer's activities do not come within the minimum standards prescribed. The Commissioner stated: "No court cases or legal authorities have been found by this writer which can be of any substantial aid in deciding what Public Law 86-272 actually means and whether respondent's activities in Missouri come within the statutory minimum or not."<sup>39</sup> The court had no difficulty, however, in finding that CIBA's activities were within the standards prescribed by the statute.

These decisions by no means settle the dispute over Public Law

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<sup>33</sup> 164 So. 2d 314 (La. 1964), cert. denied sub. nom. Mouton v. International Shoe Co., 379 U.S. 902 (1964).

<sup>34</sup> *Id.* at 317.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Id.* at 322.

<sup>37</sup> 382 S.W.2d 645 (Mo. 1964).

<sup>38</sup> *Id.* at 657.

<sup>39</sup> *Id.* at 652.



86-272. A recent Oregon tax court decision, *Smith, Kline, and French Laboratories v. State Tax Comm'n*<sup>40</sup> reached exactly the opposite result. That court relied on a direct-indirect distinction in holding the act unconstitutional, asserting that a tax on *income* derived from interstate commerce as in *Northwestern* is valid.<sup>41</sup> On the other hand, the court maintained that a tax on the *privilege* of doing interstate business, as in *Spector Motor Serv., Inc. v. O'Connor*,<sup>42</sup> is invalid. *International Shoe* expressly disregards such reasoning as being unimportant.

## VI. CONCLUSION

Congress, in considering further legislation, should keep the problem they are attempting to solve clearly in mind. The two primary aspects of the problem seem to be the multiplicity of systems among the states and the high cost of compliance caused by the difficulty of a different method of calculation for each state. It has never been contended that these state taxes are a problem because of their amount. The real problem is not how much the states tax, but rather the fact that they each have their own method of taxing. Therein lies the real failing of Public Law 86-272. This statute has the effect of exempting certain activities from state taxation, but this does not alleviate the burden on those businesses not exempt. The admitted cause of the problem—multiplicity of systems—remains entirely unaffected.

The ultimate solution appears obvious. All states should use the same method of calculation. The means to this end are not so obvious, however. Congress cannot pass uniform tax statutes for each of the states.<sup>43</sup> It is submitted, however, that this solution can be achieved

<sup>40</sup> 32 U.S.L. Week 2616 (Ore. Tax Ct. 1964). The decision states: "[T]his court is not persuaded by the contrary result reached by the Louisiana Supreme Court in *International Shoe Co. v. Cocreham*." *Ibid.*

<sup>41</sup> An old line of decisions based the validity of state taxes on interstate commerce on a distinction between direct and indirect taxes. Indirect taxes, such as a tax on net income, were held valid while direct taxes, such as a tax on gross income, were held invalid. See *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); *U.S. Glue Co. v. Town of Oak Creek*, 247 U.S. 321 (1918). This direct-indirect test should be distinguished from the distinction between direct and indirect burdens on interstate commerce as illustrated by *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Hammer v. Dagenhart*, 247 U.S. 251 (1918). The direct-indirect burden on commerce test was later overruled by *Wickard v. Filburn*, 317 U.S. 111 (1942), and *United States v. Darby*, 312 U.S. 100 (1941).

<sup>42</sup> 340 U.S. 602 (1951). In *Spector* the court held a franchise tax on the privilege of doing interstate business to be direct and hence invalid. See also note 41 *supra*.

<sup>43</sup> The fact that interstate commerce is at the heart of the problem makes broad powers available to Congress, but even these broad commerce powers appear insufficient to force state legislators to pass specific tax statutes. Admittedly there is a theoretical problem of the extent of federal power over commerce involved here and the outcome is not entirely settled. The method suggested in the text would avoid this thorny problem. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

by a slightly more circuitous route. The proposed legislation should take the form, not of an exempting statute, but rather of a declaration that Congress has found all methods of taxing interstate commerce are an undue burden on that commerce except for one method set out in the act.

It is not necessary, in fact not even desirable, that Congress set a suggested or required maximum on the percentage of the tax. As illustrated by *Scripto*,<sup>44</sup> exempting an activity from net income taxes may only invite the states to impose a sales or use tax. But it is important to remember that a sales or use tax does not present the complexity inherent in income taxes.<sup>45</sup> The tax is a fixed percentage of a sales price that is immediately known. Although the rate may vary from state to state, the method remains the same and calculation is easily made. By analogy, the rate an individual state chooses to set as an income tax rate should be immaterial so long as there is a single method of computation applicable to all states.

The most difficult problem lies in apportioning a large multistate business's net income among the several states where sales are made.<sup>46</sup> The difficulties raised in attributing a particular expense or deduction to one state rather than another make it apparent that calculating an exact net income for each state may well be impossible. However, each individual business would certainly have the per cent of total gross income attributable to each state available in the form of total sales figures. This percentage of gross income could then be applied to the total net income figure of the concern as entered on the concern's federal income tax return. This would provide a net figure for the state in question which would then be taxed at that state's rate.

Certainly there are many practical difficulties involved in this method. The variance of overhead in relation to income depending to some degree on the state where business is done would work some injustice.<sup>47</sup> But when taken in view of a total economy, consisting of

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<sup>44</sup> *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). See text accompanying note 23 *supra*.

<sup>45</sup> See note 25 *supra*.

<sup>46</sup> Mr. Justice Clark in *Northwestern States Portland Cement v. Minnesota*, 358 U.S. 450 (1959), speaking of double taxation in relation to the apportionment problem has the following to say: "Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domiciliary states." *Id.* at 462. See also *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952).

<sup>47</sup> This injustice could arise in the instance of an industry which had relatively large costs in one state and comparatively low costs in another state, but which derived approximately equal incomes from both states. In such a situation the business would pay the same tax in each state although the operations in the state with low costs proved profitable and operations in the state with high costs resulted in a loss. A striking example of this would be the operations of General Motors in Michigan.

At present, there is a definite discrimination in favor of manufacturing states. The