The Development of a Congressional Program Dealing with State Taxation of Interstate Commerce

Emanuel Celler
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I. BACKGROUND

PROMINENT on the list of great legacies which modern America received from the original framers of the Constitution is the principle of a national common market. It is this principle—the principle of the Commerce Clause—that has bound our states together in the economic union which is so essential to their political union. At the same time, this principle has also played a major role in the phenomenal development of our American economy. Yet, essential as the common market principle has been for both our political and economic development, the very nature of our federal system has precluded us from attaining a completely open market and necessitated that some proper balance be struck between the need for the free movement of goods and persons across state lines and the needs of the states for revenue.

From the enactment of the Constitution until 1959 the entire responsibility for reconciling conflicts between the tax policies of the states and the national interest in the free flow of commerce was shouldered by the courts. Congress itself enacted no statutes to give the courts guidance. As a result, a vast body of decisional law provided the only standards for determining whether any particular state or local levy was violative of the national principle of free trade among the states. However, most of the cases which arose were so diversified and of such peculiarly local significance that they did not generate strong political interest on a national level.

While Congress remained silent, significant trends developed which resulted in a balkanization of the economy. As each state reached farther and farther beyond its own borders to tax more and more companies, the burdens on the courts became unmanageable, and it became clear that the judicial branch of the government was inadequate to balance state revenue requirements with the national need for an open market. Indeed, the Supreme Court itself came to recognize its own inadequacy in this area. Thus, in recent years several members of the Court with such diverse philosophies as Justices Jackson, Rutledge, Black,*

* United States Representative from Tenth District of New York; member of the New York Bar.
2. International Harvester Co. v. Department of Treasury, 322 U.S. 340, 360 (1944)
Frankfurter, Douglas and Clark have all subscribed to this view and have either directly or implicitly called upon Congress to act.

Essentially, the inadequacy of the judicial process to accommodate both the competing demands of the states for revenues and the national need for a free flow of commerce is an inherent one. It arises from the fact that the Court can deal only with individual cases and is substantially handicapped by its inability to explore fully the national impact of a broad conglomeration of levies imposed on interstate companies by all fifty states and literally thousands of local governments. The late Justice Frankfurter has described these built-in limitations of the Court in the following terms:

At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.

The problem calls for solution by devising a congressional policy. 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.

Faced with its own inherent limitations, the Court generally maintained a permissive attitude toward state levies on interstate commerce—often declining in the absence of federal legislation to invalidate state revenue measures. Encouraged by the Court's permissive posture, the state tax administrators asserted broader and broader jurisdictional claims over interstate commerce, so that by 1959 it was clear that Con-
gress would have to act if the rapidly growing trend toward a balkanized domestic economy were to be reversed. In that year, in two companion cases, Northwestern States Portland Cement Co. v. Minnesota, and Williams v. Stockham Valves & Fittings, Inc., the Supreme Court decided that in the absence of federal legislation a company could be required to pay a state income tax, even though it was engaged exclusively in interstate commerce in the taxing state. Prior to this decision the view had been widely held by the business community that a company could not be taxed by a state unless it engaged at least to some extent in intrastate commerce within the taxing state.

The reaction of the business community to the Northwestern decision was extremely sharp. Small and moderate-size businesses in particular became gravely concerned with the prospect of having to comply with diverse, complex and overlapping income tax laws which would be beyond their capacity to handle. Not only was the business community fearful of future liabilities, but it was also confronted with the specter of assessment for countless numbers of back years as well. Having failed to file tax returns in the past in the belief that no liability had existed, generally they could not rely on statutes of limitations to bar assessments. In the Northwestern case, for example, the taxpayer was held liable for back taxes covering a period of some sixteen years. Under all of these circumstances, the business community regarded it as imperative for Congress to act.

The reaction by Congress to the Northwestern decision was swift. Within weeks after the decision, hearings were held by the Senate Select Committee on Small Business. Meanwhile, both the House Judiciary Committee and the Senate Finance Committee reported out bills designed to provide “stopgap” relief while Congress could develop a more comprehensive program based on more detailed information. The outgrowth of the bills was Public Law 86-272, which became effective in September of 1959.

Public Law 86-272 had a two-fold significance. First, the statute precluded a state or subdivision from imposing an income tax in situations in which the company’s only activities in the state were limited to the solicitations of orders by salesmen or the making of sales through independent contractors. Second, both the House and the Senate viewed

12. Id.
the statute as a temporary measure designed to prevent a further expansion of the jurisdictional reach of the states, pending the completion of a thorough study of state income taxes—which was considered necessary to achieve a permanent solution.17

Although Public Law 86-272 was limited in scope so as to apply only to income taxes, it soon became clear to the Congress that other forms of taxes were likewise having a profound impact on interstate commerce. Several months after the enactment of Public Law 86-272, the Supreme Court held in *Scripto, Inc. v. Carson*18 that an out-of-state seller could be required to collect a use tax on shipments to in-state purchasers even though the seller maintained no facilities in the taxing state and its sales were made entirely through independent contractors. This decision raised apprehensions in the business communities similar to those which had been raised by the *Northwestern* decision concerning income taxes. Indeed, the ramifications of *Scripto* are so broad that even those who tend to support the views of the state tax collectors regard it as a “stunning extra-territorial extension of a State's reach.”19

Following *Scripto*, bills were introduced in both the House and Senate which would have extended the jurisdictional protection of Public Law 86-272 into the sales and use tax area and would also have broadened the Congressional study so as to include sales and use taxes. Deeply concerned with the broad impact of *Scripto*, but reluctant to restrict state taxing powers without a thorough study, the 87th Congress enacted legislation which was limited to broadening the scope of the study called for by Public Law 86-272. However, out of an awareness of the interrelated effects of a variety of taxes, Congress expanded the study to include not only sales and use taxes but “all matters pertaining to the taxation of interstate commerce...”20

II. The Congressional Study and the Defects It Disclosed in the Present System

Pursuant to Public Law 86-272, as amended, a comprehensive study was initiated early in 1961 by a Special Subcommittee of the House Judiciary Committee under the chairmanship of Representative Edwin E. Willis of Louisiana. Since Congress had expressed its intention to act only on the basis of clearly documented facts, the primary objective of the study, as stated by Representative Willis, was “to develop a body of

factual information, hitherto unavailable, as to the number and characteristics of interstate companies, the pattern of their activities across State lines, the cost of complying with State and local tax laws, the degree to which they were able to comply, and the effect on businesses and State revenues of various possible remedial proposals.221

The study conducted by the Special Subcommittee on State Taxation of Interstate Commerce was one of the most exhaustive ever undertaken within the Congress, and occupies a total of four volumes published over a four and one half year period.22 It has by now become the definitive work in its field and has provided a wealth of reliable data of value not only to the Congress but also to state legislators, lawyers, accountants and students of local and state fiscal problems.

Since the study was extremely comprehensive—covering major aspects of the tax structures of all fifty states and several hundred local governments—one cannot summarize it briefly without losing sight of the extraordinary complexity of the current levies on interstate commerce. Yet it is useful for purposes of this analysis to point out that the study revealed at least four major defects in the present system.

First, the study revealed that the system is characterized by widespread non-compliance and non-enforcement—with most companies simply not filing any form of tax return in any state in which they do not actually maintain a place of business.23 For example, in the income tax area it was found that in 97.5 per cent of the cases in which liability existed in the absence of a place of business, no return was in fact filed.24 In the sales tax area there was non-compliance in 93.5 per cent of the cases under similar circumstances.25 At the same time, those companies which do in fact file tax returns were found not to be complying accurately with state and local rules. As a result, it is clear that the system creates gross inequities among similarly situated taxpayers and leaves the tax administrator free to exercise an extremely broad amount of discretion to determine just which taxpayers will be subject to rigorous enforcement. In addition, it is also clear that the business community does not have the capacity to comply without incurring grossly excessive compliance costs.

The second defect documented by the congressional study is the tendency of the present system to result in overtaxation in some cases and

undertaxation in other cases. In the income tax area, for example, it is possible for some companies to be taxable on more than 100 per cent of their net earnings, while other similarly situated companies pay a tax on substantially less than 100 per cent.

A third defect of the current system results from the existence of some provisions in state laws which give to locally based companies benefits which are not made available to competitors who are based outside of the taxing state. In the sales and use tax area, for example, some states discriminate against consumers who trade in automobiles that are purchased outside of the taxing state. Still other states tax products which are produced outside of the state, while granting exemptions for identical products manufactured within the state.

The fourth major defect of the present system is the attitude which it has generated among taxpayers, especially small and moderate-size companies. Faced with rules that are inherently unworkable and cannot possibly be enforced by the state tax administrators on a systematic basis, taxpayers generally have developed a widespread resistance to the assumption of responsibility. Rather than file returns under circumstances in which the cost of preparing the return often exceeds the tax, it is understandable that the small company especially will simply disregard state and local requirements. Thus the system itself not only breeds a widespread disrespect for state and local tax laws, it also tends to foster disrespect for laws in general.

III. THE PROPOSED INTERSTATE TAXATION ACT

Based on the study conducted by the Subcommittee, as well as on three months of extensive hearings held subsequent to the completion of the study, the House Judiciary Committee reported out a proposed Interstate Taxation Act in the form of H.R. 1649 on September 7, 1966. Since the 89th Congress adjourned shortly thereafter, consideration by the House was not possible, and the proposal was reintroduced in the 90th Congress in the form of H.R. 2158. On March 7, 1967, the House Judiciary Committee again reported the measure favorably, together with several amendments which reflected a number of suggestions for improvements made largely by State tax administrators. In July of 1967, H.R.

30. Id. at 820.
H.R. 2158 was reported by the Committee on Rules. Although it was not scheduled for debate by the House of Representatives in the first session of the 90th Congress, its sponsors are hopeful that it will be considered during the second session.

The core of H.R. 2158 is found in Title 1 of the bill, which establishes uniform jurisdictional standards for each of the four types of taxes which were included in the congressional study: corporate income taxes, capital stock taxes, sales and use taxes, and gross receipts taxes. Under these standards a company would not be subject to the jurisdiction of any state in which it does not maintain a "business location," which is defined to include: the owning or leasing of real estate, the maintenance of a localized employee, or the regular maintenance of a stock of tangible personal property for sale in the ordinary course of business.

To the basic jurisdictional standard there are two significant exceptions. One exception occurs in the sales and use tax area in the form of a provision which makes an out-of-state seller liable for the collection of a tax if he regularly makes household deliveries in the state. The other exception to the basic "business location" standard occurs in the income and capital stock tax areas, and involves the exclusion from the jurisdictional rule of those corporations which have an annual net income in excess of one million dollars.

Title 2 of H.R. 2158 provides a supplement to the jurisdictional standard in the form of a limit on the percentage of income or capital which can be taxed in those cases in which a company does have a business location in more than one state. Under Title 2, the maximum percentage of income or capital which is taxable is determined by a two-factor formula based on property and wages.

Title 3 of the bill addresses itself to some specific problems in the sales and use tax area. It provides for, inter alia, the location of sales for tax purposes, the granting of credits for prior taxes, exemptions for the household goods of persons who establish new residences, the exclusion of interstate freight charges from the measure of the tax, and the relief from collection requirements in the case of sales to persons who are already registered under the sales tax program of the jurisdiction imposing the tax.

Title 4 provides for continued congressional scrutiny of the problems left unresolved by the bill. It affords the states an additional four years to make progress in resolving such problems before congressional committees are called to make specific proposals.

Title 5 contains definitional provisions. In addition, it prohibits states and localities from giving favored tax treatment to local companies or local products under sales and use taxes or gross receipts taxes. It also prohibits the states from charging a taxpayer with the cost of conducting
an audit—a practice which is fairly common on the part of states such as Florida, which sends auditors throughout the entire United States and assesses the taxpayer with the travel and living expenses of the roving auditor.\textsuperscript{34}

\section*{IV. The Jurisdictional Balance Struck by H.R. 2158}

Since the jurisdictional provisions in Title 1 provide the basic framework around which the entire proposal is structured, the balance struck by those provisions is of paramount significance to an understanding of the manner in which the bill would reconcile the taxing powers of the states with the national need for a common market.

In this regard it is especially important to keep in mind that the present jurisdictional assertions of the states cannot be complied with by small and moderate-size companies and in fact are beyond the enforcement capabilities of the states themselves. To understand the reason for this, one need scarcely look beyond the data collected by the Subcommittee with respect both to the types of companies engaged in interstate commerce and the numbers of state and local governments which assert jurisdiction over interstate commerce.

At the time the Subcommittee conducted its study, it ascertained that there were, at the very minimum, some 120,000 manufacturing and mercantile companies engaged in interstate commerce in the United States. Today, the number is obviously considerably larger. About half of these companies have fewer than twenty employees, a substantial number have fewer than ten employees, and a significant minority have fewer than five. Yet these companies typically sell their products in many states, and even among those companies which are so small that their annual gross proceeds are less than two hundred thousand dollars, a considerable number sell their products in a truly nationwide market.\textsuperscript{36}

By 1965, the number of jurisdictions taxing interstate commerce was already staggering. There were in effect at the state level 38 sets of corporate income tax laws, 38 sales and use tax laws, 37 capital stock laws and 8 gross receipts tax laws of general applicability. In addition, to compound further the chaos and confusion, business taxes are rapidly proliferating on a local level—with sales taxes already imposed by over 2,300 localities, gross receipts taxes by over 1,000 and corporate income taxes by more than 100 local governments.\textsuperscript{36}

In formulating jurisdictional standards, one alternative which was considered and rejected by the Judiciary Committee was a plan to give jurisdiction for sales and use tax purposes to each state into which an

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\item[34] Report, vol. 3, at 698-99.
\item[36] Report, vol. 4, at 1121.
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interstate company shipped its products. However, such a broad jurisdictional reach necessitated a substantial degree of centralized administration. In short, if each state and each locality were to impose its own tax on a nationwide scale, it was clear that the system could only be made to work under a uniform nationwide collection program. As a result, the proponents of the plan recommended that a cooperative system be established under which the states and their subdivisions, as well as the Treasury Department of the Federal Government, would cooperate to provide a single audit for those companies which market their goods in more than one state.37

Were the raising of state revenues the only consideration in the formulation of jurisdictional standards, then the effective enforcement of a broad jurisdictional reach that could be obtained through central administration would obviously be desirable. However, during the course of the lengthy hearings that were held prior to the formulation of H.R. 2158, state officials made it clear that one of their primary considerations was the preservation of the maximum possible amount of state and local autonomy.38 As a result, the sponsors of H.R. 2158 concentrated their efforts on the formulation of jurisdictional rules which would not require central administration but which would have the least possible effect on state revenues and at the same time protect the small and moderate-size companies from being exposed to insurmountable compliance burdens.39

In fashioning jurisdictional standards, the results of the Subcommittee's earlier study provided workable criteria. The Subcommittee had found that, for all practical purposes, compliance and enforcement were both limited to circumstances in which the interstate company actually maintained some form of permanent establishment within the taxing state.40 The Subcommittee's findings also made it clear that no state would stand to gain or lose a significant percentage of its total revenues if Congress were simply to lay down legal rules which were consistent with the present actual practice.41 Thus, having rejected the possibility of centralized administration and having found that the states do not have the capacity to tax systematically out-of-state companies which do not have some form of permanent establishment within their borders, the sponsors of H.R. 2158 then sought a practical and workable jurisdictional rule embodying a permanent establishment concept.

Having evaluated a fairly broad series of "permanent establishment" rules, the Special Subcommittee proposed the "business location" definition which is embodied in H.R. 2158. Originally, the term "business location" was defined so as to include either the ownership or leasing of real property, or the maintenance of a local employee who does more than merely solicit orders. Subsequent to the introduction of H.R. 2158, this definition was subject to considerable criticism by state tax administrators who argued that the resulting jurisdictional rule would be too narrow as a result of its failure to give the states jurisdiction over companies which regularly maintain stocks of goods in the state, but which have no other jurisdictional contacts. In response to this criticism, H.R. 2158 was later amended by the Judiciary Committee so as to include the regular maintenance of a stock of goods as a basis for jurisdiction.\(^4\)

Several additional features of the jurisdictional standard in Title 1 were also incorporated as a means of further reconciling the views of the state tax administrators with the need for a free flow of commerce. In this regard, perhaps one of the most controversial features of H.R. 2158 is the exclusion from jurisdictional protection in the income and capital stock tax area of corporations which earn more than one million dollars annually. The basis for such an exclusion was suggested by one of the foremost state tax administrators in the United States, Mr. Fred Cox of the Georgia Department of Revenue. Based on a careful evaluation of both federal and state income tax returns, Mr. Cox concluded that, as a practical matter, there would be no significant loss of revenue so long as the states were left free to impose their current jurisdictional rules and their own types of apportionment formulas on the larger corporations. At the same time, the adoption by Congress of jurisdictional rules and a consistent two-factor formula for the smaller companies would substanti-ally eliminate the compliance problems of the smaller companies and contribute to increased efficiency of state tax administration.\(^4\)

Since Mr. Cox’s proposal was consistent with the data and findings of the Subcommittee, it offered the possibility of a highly workable compromise that would be acceptable to the state tax administrators as well as to the small business community. In addition, Mr. Cox’s proposal was also consistent with a widely held view on the part of the state tax administrators that the states themselves ought to be given four more years to resolve the major problems through state legislative action, rather than to be required to conform immediately to federally imposed standards.\(^4\)

Thus, by limiting the scope of the income tax and capital stock tax pro-

\(^4\) Id. vol. 1, at 82.
visions to the smaller corporations, H.R. 2158 was able to afford the states such an opportunity in those areas where significant amounts of revenue were involved.

Still another feature of the jurisdictional standard in Title 1 which is consistent with the views of the state tax administrators is the provision in the sales and use tax area which gives the states jurisdiction over out-of-state sellers who regularly make household deliveries in the state, regardless of whether the seller has a business location in the state. During the course of the various hearings held on interstate taxation problems, state tax administrators generally emphasized the need to protect local retailers from the tax-free competition of out-of-state sellers. In its investigation the Subcommittee had found that this was a matter of considerable significance to retailers who are located close to the borders of a state.45 Although the United States Supreme Court has generally maintained a permissive attitude toward state taxes, one of the few cases in which the Court struck down a state tax on interstate commerce involved an out-of-state company which regularly delivered goods from Delaware to household consumers in Maryland.46 As a result of this case, border retailers are currently exposed to a significant amount of tax-free competition.

In its evaluation of this problem the Subcommittee observed that if a seller in this type of a case were required to collect the tax, he would generally not be subject to a multiplicity of laws since the radius of his delivery routes, is, of necessity, limited. As a result, the Subcommittee recommended that the Supreme Court's decision be reversed and the jurisdictional reach of the states be expanded in this area.47

In its entirety, Title 1 of H.R. 2158 may thus be viewed as embodying a series of compromises. First, it permits the states to continue to assert taxing jurisdiction on a level that is consistent with the level of actual compliance and enforcement under the present system, while protecting the many small companies engaged in interstate commerce from having to cope with a plethora of taxes imposed by states and localities which are now asserting jurisdiction even though the companies do not maintain an actual place of business within their borders. Second, it obviates the need for centralized administration and for a direct involvement of the federal government in state and local tax matters and thereby strengthens the autonomy of state and local governments, while assuring that the national market will remain accessible to the small business community. Third, in the income and capital stock tax area, it provides immediate relief for those companies which have the most serious compliance prob-

lems, while affording the states an opportunity to work out their own solutions to the interstate tax problems of those companies which are a major source of state and local revenues. Fourth, in the sales and use tax area, since the jurisdictional rule coincides with effective limits of the current systems, it permits the states to retain jurisdiction over all but a very few of their presently registered seller-collectors, while extending the jurisdictional reach of the states in the border retailer situation where tax-free competition is currently the most troublesome.

V. SOME POLITICAL RAMIFICATIONS OF THE JURISDICTIONAL BALANCE

It is testimony to the objectivity of H.R. 2158 that it has not raised political issues of a partisan nature on either a national or a regional level. In short, neither a Republican nor a Democratic policy position has emerged. At the same time, neither support nor opposition for the bill is more concentrated in one area of the country than another—or concentrated in accordance with either the size or degree of industrialization of particular states. Instead, H.R. 2158 has received broad general support from the business community as well as from segments of labor, with the major opposition coming from state officials.

The groups which strongly support the establishment by Congress of jurisdictional standards include such diverse organizations as the National Association of Wholesalers, National Association of Manufacturers, the United States Chamber of Commerce, the International Ladies Garment Workers Union, and a large number of associations representing specialized industries, such as the American Association of Nurserymen, the Magazine Publishers Association, the National Food Brokers Association, the Advertising Federation of America, etc. On the other hand, the organizations which oppose the measure include the National Association of Tax Administrators, the Council of State Governments and the National Association of Attorneys General.

The very nature of the types of groups which support and oppose H.R. 2158 makes it clear that the major political issue raised by the measure is whether the imposition by Congress of jurisdictional limitations on state taxing powers is inimical to the political interest of state and local governments. Expressed in other terms, the issue before the Congress is whether the political power which would be denied to the states and their subdivisions by H.R. 2158 is such that it ought properly to be exercised by state and local governments. As a result, careful consideration ought to be given by the Congress to two fundamental aspects of the type of power in dispute.

First, the question arises as to the actual capacity of state and local governments to exercise this power in an equitable manner. Obviously,
jurisdictional claims which cannot be equitably and systematically enforced by the states and their subdivisions and which cannot be complied with by the great majority of taxpayers, ought not to be asserted. In this regard, the evidence accumulated by the Congress indicates that the states simply do not have—and without federal assistance are unlikely to acquire—sufficient administrative capacity to eliminate the widespread non-enforcement and non-compliance that currently exists with respect to out-of-state companies which do not maintain business locations within their borders.48 Thus, in effect, the power denied to a state or local tax collector by H.R. 2158 is not the power to impose an effective tax program which is capable of raising significant amounts of revenue, but is, instead, simply the broad administrative power to select out of a wide range of non-resident businesses only a limited number as targets for enforcement. To deny the tax collector such power—the power to administer an unwieldy and unworkable system—can scarcely be considered to have a deleterious effect on state and local governments.

Second, even if it were assumed that the states and their subdivisions could acquire the administrative capacity to enforce their present jurisdictional claims equitably and systematically and that the many small companies in interstate commerce could afford to acquire the record-keeping facilities necessary to comply, an even more fundamental political question arises: would it be to the long-range benefit of the states and of the federal government if each state imposed its own tax on a nationwide scale, effectively reaching all of the companies which market goods in the state but do not have a business location there? Admittedly, such a system would have strong political appeal if viewed solely in local terms. As one distinguished writer has observed:

Interstate commerce is a rich tax base. It has, moreover, special political fascination. A state or local tax levied upon it falls largely upon people in other states. Here is a legislator’s dream: a lush source of tax revenue, the burden of which falls largely on those who cannot vote him out of office. It is the old problem of taxation without representation.49

It is indeed this appeal of the present system which accounts to a large extent for the opposition to H.R. 2158 on the part of a number of state and local officials. Obviously, any federal proposal to limit the power of the local tax collector vis-à-vis out-of-state companies would tend to be rejected summarily by governors, state legislators and state tax administrators, who are continuously plagued with the arduous task of extracting revenues from their constituents. Yet the policy of seeking continually

to expand each state's jurisdictional reach beyond its own limits of effective enforcement has broad ramifications, not only because of its effect on the national economy but also because it undermines the political vitality of the states themselves. The more each state is successful in shifting its tax burden onto persons who are without political representation in the state government, the more those persons will exert political pressures on the federal government to play a primary role in state and local affairs. Thus, strong as the political appeal of programs to tax out-of-state citizens may be, the results of such programs lead to greater and greater political responsibility for the federal government.

Finally, there is still another aspect of state programs designed to shift tax burdens onto out-of-state companies which is too often ignored by state officials. The development of such a program on the part of one state and its subdivisions obviously acts as a stimulus to other states and subdivisions to develop similar programs. For example, California currently asserts jurisdiction over companies all over the United States, which do not have business locations in California. As part of its program, it currently maintains field offices in other states, including a staff of some 80 full-time auditors in New York City and a similar staff in Chicago. A number of other states have likewise begun to operate out-of-state offices of their own. Under the circumstances, there is certainly implicit in California's policy an open invitation to all of the other states and their subdivisions to assert jurisdiction over California companies which do not have business locations outside of California.

At first blush, one might expect that some sort of "golden rule" of state taxation would emerge from this situation so that each state would voluntarily limit its own jurisdictional assertions as a means of assuring its own local companies continued access to the national market. Yet the very nature of our federal system relieves state officials of political responsibility in this area. On the one hand, if a local businessman feels aggrieved by having to comply with the tax laws of a state in which he has no business location, he rarely calls his grievance to the attention of public officials in his "home state." Instead, he regards his predicament as raising a federal issue and is inclined, therefore, to make his grievance known to his representative in Congress. On the other hand, if the local businessman does call his grievance to the attention of the officials of his "home state," these officials will, in fact, be powerless to act.60 Thus, if there is to be a "golden rule" for the taxation of interstate commerce, it is unlikely that such a rule will be promulgated by any political body other than the Congress.

60 See, e.g., Statement of Willard W. Livingston, Chief Counsel, Alabama Dep't of Revenue, Hearings Before the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, 89th Cong., 2d Sess., ser. 14, 1301-03 (1966).
VI. SOME OBSERVATIONS ON THE MULTISTATE TAX COMPACT WHICH HAS BEEN SUGGESTED AS AN ALTERNATIVE TO H.R. 2158

As part of their official program of opposition to H.R. 2158, both the National Association of Tax Administrators and the Council of State Governments have taken the position that Congress ought to discontinue further consideration of federal legislation in this area and ought instead to authorize the negotiation of an interstate tax compact. Thirteen states\textsuperscript{51} have already enacted such a compact and several bills\textsuperscript{52} have been introduced into Congress which would give congressional approval.

The compact provides \textit{inter alia} for: the creation of a multistate tax commission composed of tax officials from each party state, the arbitration of multistate disputes, a three-factor formula for apportioning income which could be elected at the option of the taxpayer, and a system of credits in the sales and use tax area. Although a detailed discussion of similarities and differences between the compact and H.R. 2158 is beyond the scope of this analysis, there are two major features of the compact which are highly significant in the light of the foregoing discussion.

First, the compact does not address itself to the jurisdictional problem. Since it establishes no jurisdictional standards it leaves even the smallest interstate companies vulnerable to the claims not only of many states but of thousands of localities as well. Thus, it would not reaffirm the principle of a common market—as would H.R. 2158—but would instead encourage the states to persist in their efforts to shift tax burdens onto out-of-state businesses.

Second, by granting broad administrative powers to a multistate tax commission, the compact would tend to lessen the direct control of each individual state legislature over its own state's tax policies. At the same time, since the powers which would be granted to the Commission, as well as to individual tax administrators, are largely discretionary, it is unlikely that the compact would bring about an improvement in the attitudes of taxpayers towards the present system. In short, it is largely because the present system is lacking in precise standards and is so heavily dependent on the exercise of administrative discretion that taxpayers have developed a widespread resistance. If businessmen are to be called on to pay taxes in jurisdictions in which they have little or no political representation, a decrease rather than an increase in discretionary administrative powers would appear to be necessary.

\textsuperscript{51} Alabama, Arkansas, Florida, Idaho, Illinois, Kansas, Missouri, Nebraska, Nevada, New Mexico, Oregon, Texas, and Washington. In addition, the Wyoming Legislature has authorized the Governor to negotiate a compact subject to the subsequent approval of both the Legislature and the United States Congress.

\textsuperscript{52} H.R. 9476, H.R. 13682, 90th Cong., 1st Sess. (1967).
VII. SUMMARY AND CONCLUSIONS

During the eight years that have passed since the Supreme Court's decision in the *Northwestern* case it has become abundantly apparent that the present system for taxing interstate commerce works badly both for business and for the states. The study conducted by the Special Subcommittee makes it clear that as the states reach farther and farther to impose smaller and smaller liabilities on more and more out-of-state companies, tax administrators are called on more and more to enforce the unenforceable and businessmen to comply with the impossible. Since the system has grown unworkable, it is essential that a national policy be formulated which will preserve the taxing autonomy of our states and at the same time reaffirm the basic principles of our American common market.

H.R. 2158, which is now pending before the 90th Congress, would limit the jurisdictional reach of the states to the present levels of effective enforcement and compliance, and is so doing would provide a system which is not dependent for its efficacy on centralized administration. Although the measure has widespread support from the private sector of our economy, opposition to the measure on the part of state tax officials is formidable, and the states generally are reluctant to accept any statutory limitations on their jurisdictional reach over out-of-state businesses. As a result, the major political issue raised by H.R. 2158 is whether the establishment of jurisdictional limitations would in fact be inimical to the interests of state and local governments.

Whether the common market principles embodied in H.R. 2158 will eventually prevail depends ultimately, of course, on the collective judgment of the Congress. The facts have been found, the issues framed, and the alternatives in terms of national policy made clear. Reduced to its essence, the question for the Congress now to determine is whether the principles of free trade among the states ought to be compromised so as to permit each state to continue to make broad jurisdictional claims on a nation-wide scale.

If the program contained in H.R. 2158 is approved by the Congress, then the present trend toward a balkanized domestic economy will be reversed and the small business community assured continued access to the national market. If, on the other hand, H.R. 2158 is rejected, the states will be encouraged to increase their efforts to extract revenues from non-resident businesses. As a result the need to provide relief for small companies plagued by a plethora of compliance problems will continue to grow and correspondingly increase the need for centrally administered programs capable of systematic enforcement. In either event, it is clear that the vexing problem of state taxation of interstate commerce has broad national ramifications and that ultimately a national program must of necessity emerge to remedy the present chaotic and unworkable system.